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CORPORATE LAWS

Case Law Update

1. Companies Act

Akhil R Kothakota and Anr. (Appellant) vs. M/s. Tierra Farm Assets Company Pvt. Limited (Respondent/ Respondent Company) (NCLAT) order dated 9th November, 2020

Facts of the case

- The Respondent Company issued certain secured Non-Convertible Debentures ("NCD") in March, 2017 and Debenture Trust deed was executed for the same. The Respondent company failed to pay interest subsequent to January, 2018.
- The appellant was diligently following up with the company and various other entities involved in the issue of the debentures.
- The Appellant had been consistent in their demand for redemption of the debentures as stipulated under the terms of the debenture trust deed but neither debenture-holder representative not debenture trustee responded to the same.
- Therefore Appellant had filed a petition under Section 71(10) of Companies Act, 2013 in NCLT, Bengaluru Bench seeking to direct company to make repayment of the Debenture(s) along with interest due thereon in accordance with terms and conditions of the Debenture.
- While deciding the petition u/s 71(10), the tribunal had to consider financial status of the Respondent Company, the interest of all stakeholders etc. before ordering to repay the outstanding exclusively in respect of Appellant. NCLT observed that it was not the case that the Respondent Company has resorted to misappropriation/fraud in order to deny the claim of the Appellants. The financial status of the Respondent Company disclosed that the Company was suffering substantial losses leading to severe financial distress.
- Therefore, NCLT had not given any specific direction of repayment and had only disposed of the petition with the direction to the Respondent Company to explore all possibilities of settlement without giving any timeline for repayment.
- Aggrieved by the order of NCLT, Appellant filed an appeal to NCLAT.

Arguments on the part of Appellant

- Section 71(10) of the Companies Act 2013 specifically empowers the Tribunal to 'direct, by Order, the Company to redeem the debentures forthwith on payable of principal and interest due thereon' when a Company has failed to pay interest on debentures when it is due.
- NCLT did not specifically address to 'the prayer for repayment' but rather gave a direction to explore all possibilities of settlements of claims of Appellant and granted six months' time, which is ultra vires to Section 71(8) and Section 71(10) of the Companies Act, 2013.
- Learned Counsel relied on the Judgment of the Hon'ble Supreme Court in ***Dhampur Sugar Mills Ltd. vs. State of U.P. & Ors. 2007/8 SCC 338*** in which it is observed that the *"power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case"* binds the Tribunal to give effect to the right of the Appellants under Section 71(10) read with Section 71(8).
- Learned Counsel relied on the Judgment of the Hon'ble Apex Court in ***Manohar Lal (D) by Lrs. vs. Ugrasen (D) by Lrs. & Ors. 2011/SCC 557*** in which it was held *'the Court cannot grant a relief which has not been specifically prayed for by the Parties'.*
- Further, he submitted that the NCLT order was dated 17.12.2019 and 6 months-time granted by the Tribunal had already lapsed, and till date the Respondent Company did not take up any pro-active steps to initiate or explore any kind of possibility of settlement.

Arguments on part of Respondent

- Despite service of notice, there was no representation from the Respondent Company.

Held

- Issue for Consideration was Whether the provisions under Section 71(10) of the Companies Act 2013 was adhered to by NCLT while disposing of the Petition?
- After reading provisions of Sec. 71 of Companies Act, 2013, NCLAT observed that Section 71(11) speaks of "penalty for default". Section 71(12) provides 'a contract with a Company to take up and pay for any debentures of the Company may be enforced by a decree of 'Specific performance.'
- NCLAT, further, observed that the relief for "Specific Performance" is allowed as a 'rule' when there is no other relief which would meet the circumstances of the given cases.
- In reply filed by the Respondent Company before the NCLT:
  - The Respondent Company clearly admitted a default in payment of interest on NCD and they were proposed to settle the dues and matter was under due process.
  - Although the Respondent Company had averred that there is an Arbitration proposal pending between the Parties, but the material on record did not evidence any such initiation of 'Arbitration proceedings.
- Although the Tribunal had taken into consideration "financial status and interest of all stakeholders", the Respondent Compan' did not make any

effort to settle the matter nor was there any representation on their behalf before this Tribunal, despite service of notice.

- Section 71(10) provides that the Tribunal may hear the Parties concerned and direct, by Order, the Company to redeem the debentures forthwith on payment of principal and interest due thereon.
- NCLAT found force in the contention of the Learned Counsel appearing for the Appellant that Section 71(10) did not empower the Tribunal to ascertain the financial condition of the default Party or grant any other relief than the relief provided for under the said Section.
- Keeping in view the facts and circumstances of the case, the Appeal was disposed of with a specific direction to the Respondent Company to repay the amounts 'due and payable' to the Appellants within a period of two months from the date of order.

2. IBC

State Bank of India (Appellant) vs. Athena Energy Ventures Private Limited (Respondent) in the order dated 24 November, 2020 passed by at National Company Law Appellate Tribunal, (NCLAT) New Delhi

Facts of the Case

- State Bank of India (**"Appellant"**) filed the application against the Respondent – Athena Energy Ventures Private Limited – Corporate Debtor who was corporate guarantor for Athena Chattisgarh Power Ltd (the **"borrower"**) who had borrowed money from the Appellant.
- The application was filed under section 7 of the insolvency and Bankruptcy Code, 2016 (**"Code"** /**"IBC"**) for initiation of Corporate Insolvency Resolution Process (**"CIRP"**) against the borrower as it had committed default in repayment of the financial assistance.
- The borrower was promoted by the Respondent. The borrower availed financial assistance from the Appellant bank and other banks, in consortium and had executed necessary documents in favour of the Appellant and other consortium banks. When the need of the borrower increased, the Respondent came forward and executed corporate guarantee and documents in favour of the Appellant and other consortium of banks. The Respondent was under obligation to see that the amounts availed under the finance from the Appellant were repaid by the Borrower.
- The Appellant had sanctioned ₹ 30,69,68,00,000/- and had actually disbursed ₹ 27,69,19, 05,767/- to the borrower. The borrower committed default and Appellant filed an application under Section 7 of IBC **against the borrower** before the National Company Law Tribunal (**"NCLT"**) Hyderabad Bench. The same was admitted by Order dated 15th May, 2019.
- Appellant also filed an application u/s 7 of IBC to seek initiation of CIRP against the Respondent – Corporate Guarantor. The application was filed before the NCLT, Hyderabad in view of provisions of Section 60(2) of IBC although registered office of respondent was at New Delhi.
- The Respondent had opposed the Application filed claiming that the application was arising out of very same

transaction and duplicating the claim which was not permissible.

- Relying on ***Vishnu Kumar Agarwal vs. Piramal Enterprise Ltd.,*** wherein it was held that once the petition u/s 7 of IBC is filed against Principal Debtor/ Co- Guarantor and CIRP has been initiated, the Financial Creditor cannot file another Application on the very same set of claim. i.e. application for the same set of claim and default cannot be admitted against the Corporate Guarantor or Principal Borrower, the claim was dismissed by NCLT-Hyderabad Bench .
- Aggrieved by the order, the Appellant moved an appeal to NCLAT.

Arguments of the Appellant

- Judgment in the matter of *Vishnu Kumar Agarwal vs. Piramal Enterprise Ltd* was not relating to Principal Borrower and Guarantor but was relating to initiating two separate proceedings against two Guarantors and hence the Judgment did not apply. Further, it was also submitted that the Hon'ble Supreme Court in the Interim Order directed maintaining of status quo and in other matters, stayed the Judgment of this Tribunal.
- In the matter of ***Vishnu Kumar Agarwal vs. Piramal Enterprise Ltd***. the Tribunal did not notice sub-sections 2 and 3 of Section 60 of IBC. In sub-section 2, the earlier words were "bankruptcy of a personal guarantor of such corporate debtor". These words were later on substituted by the words "liquidation or bankruptcy of a corporate guarantor or personal guarantor as the case may be, of such Corporate Debtor". These words were substituted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.
- Appellant placed reliance over the Supreme Court Judgement ***State Bank of India vs. Ramakrishnan & Anr*** where it was held that the Creditor has remedy with regard to his debt against both the Principal Debtor as well as the surety. The said order was pronounced before the above stated amendment, section 60 (2) and (3) as they stood before amendment was enforced.
- If the provisions of Section 60(2) and (3) are kept in view, it can be said that IBC has no aversion to simultaneously proceeding against the Corporate Debtor and Corporate Guarantor. If two applications can be filed, for the same amount against Principal Borrower and Guarantor keeping in view the above provisions, the Applications can also be maintained.
- It is for such reason that Section 60(3) provides that if insolvency resolution process or liquidation or bankruptcy proceedings of a Corporate Guarantor or Personal Guarantor as the case may be of the Corporate Debtor is pending in any Court or Tribunal, it shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such Corporate Debtor.
- Pursuant to Section 128 of the Indian Contract Act, 1872, the liability of the principal borrower and the guarantor is co-extensive and the creditor is entitled to proceed against either or both and no sequence is required to be followed.
- Under Section 5(8)(a), (h) and (i) IBC, the principal borrower and guarantor are treated similarly. Section 60(2) IBC permits that simultaneous applications could be filed against the borrower as well as guarantor and that the same could also be maintained.

- Also, relied on the observations of the Insolvency Law Committee (ILC) Report of February 2020 and argued that proceedings can be maintained against the borrower as well as guarantor and creditor can file claims in both CIRP proceedings. The claims can be reduced and adjusted proportionately in the two CIRP proceedings depending on the liability under the Deeds of Guarantee.

Arguments of the Respondent

- The soul of the IBC is resolution of the Corporate Debtor and to keep the Corporate Debtor as going concern to maximize value.
- IBC proceedings are not adverse in nature and for same amount; there cannot be two CIRP proceedings, one against borrower and the other against the surety.
- The principle in Section 128 of Contract Act, 1872 is not applicable in insolvency proceedings against the Principal Debtor and surety or against more than one surety, for same set of claims as claims against surety have to be reduced to the extent of claims lodged against the Principal Debtor.
- The amount claimed against the borrower and the guarantor being the same, the application against corporate guarantor could not be maintained. (for same amount, there cannot be two CIRP proceedings, one against Borrower and the other against the surety.)

Held:

- The question in case of Piramal was whether CIRP can be initiated against two Corporate Guarantors simultaneously for same set of debt and default. The issue was not whether Application can be filed against the Principal Borrower as well as the Corporate Guarantor.
- If the amendment in provisions of Section 60(2) and (3), which were made effective from 6th June, 2018 are to be kept in view, it can be said that IBC has no aversion to simultaneously proceeding against the Corporate Debtor and Corporate Guarantor. If two Applications can be filed, for the same amount against Principal Borrower and Guarantor keeping in view the above provisions, the Applications can also be maintained.
- NCLAT placed reliance on the arguments of Appellant on ILC Report and referring to subsequent judgement of Edelweiss Asset Reconstruction Company Ltd. v. Sachet Infrastructure Ltd. and Ors passed by NCLAT - which permitted simultaneous initiation of CIRPs against Principal Borrower and its Corporate Guarantors.
- Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise. It would be a matter of adjustment when the Creditor receives debt due from the Borrower/ Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP. This can be conveniently done, more so when IRP/ RP in both the CIRP is same
- The appeal was accordingly allowed and the NCLT order was set aside.

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