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CORPORATE LAWS

Case Law Update

Companies Act – (1)

Zee Entertainment Enterprises Ltd. (Plaintiff/ Petitioner/Zee) versus Invesco Developing Markets Fund (Defendant/Invesco), Bombay high court order dated October 26th, 2021.

Facts of the case

- Zee is a public limited and listed Company. It is a well-known media enterprise. **Invesco holds about 17.88% of Zee's equity**. Zee's promoter and promoter group hold or control about 3.99% of its equity shareholding.
- Invesco issued the **Requisition Notice on 11th September 2021** signed by requisite shareholders (>10%) and delivered to Zee's registered office.
- The notice had **9 items, the first 3** being for **removal of the company's Managing Director (Mr. Goenka) and 2 other directors** and the **remaining 6** were related to the **appointment of 6 new IDs subject to approval** from the Ministry of Information & Broadcasting **(MIB)**
- Zee held its **AGM on 14th September 2021**, **2 directors** sought to be removed as per requisitionists notice **resigned for personal reasons** unconnected with requisition notice.
- With the resignation of 2 directors, Zee's board had Mr. Goenka as the Managing Director and CEO, and 6 other existing IDs.
- **Zee's Articles** of Association provide for a **12 director** Board. This meant that unless the resolution removing Mr. Goenka was carried, the resolutions for all six of the names proposed by Invesco could not be carried: The Board strength would have gone to 13 directors.
- As per Sec. 100 of Companies Act, 2013(CA, 2013) **Zee's board** would have had 21 days i.e**., upto 3rd October 2021 to requisitioned EGM**.
- On **29th September 2021**, **Invesco filed a Company Petition** before the NCLT under Sec. 98(1) and 100 of CA, 2013. The matter before the NCLT is pending following an order of the NCLAT. Petition filed to **order to call and hold an EGM of Zee on or before 28th October, 2021.**
- Zee's Independent Directors met on 30th September 2021 and its Board met on 1st October 2021. Mr. Goenka recused himself from the Board meeting and did not vote on any resolution regarding the Requisition Notice.

- The **Board considered legal opinions received** and **concluded** that the **Requisition Notice was invalid**. It expressed its inability to convene the EGM, and felt that **not calling the requisitioned EGM was in the best interests of Zee and its shareholders**. The Board decided that Zee should approach this court on the question of the validity of the Requisition Notice.
- On 1st October, 2021, Zee emailed Invesco conveying the Board's decision, providing reasons and its justification.
- Zee brought suit on 1st October 2021 having the following **prayers**:
  - — a declaration that a Requisition Notice dated 11th September 2021 is illegal, ultra vires, invalid, bad in law and incapable of implementation
  - — Zee seeks a declaration that its refusal to act on the Requisition Notice is in accordance with the law, valid and justified
  - — it seeks an injunction against Invesco from acting in furtherance of the Requisition Notice in question

Question of Law

- Can the Court — not the Board — be asked to assess the validity of the resolutions proposed at the requisitioned EGM?
- Even before the EGM is called and held, can the Court be asked to hold that one or more of the proposed resolutions are invalid, illegal, or likely to be ineffective?
- If the Court does believe that the proposed resolutions are invalid, illegal or, if passed, likely to be ineffective, should the Court refuse to step in, and, instead, allow the EGM to go ahead — sometimes at quite considerable costs, direct and indirect — even if, should the proposed resolutions be passed, the result is a foregone conclusion of 'ineffectiveness'?

Petitioners Arguments

- Zee's Ld. Counsel opens his case with the submission that the **proposed resolutions in the Requisition Notice** are directly **contrary to the Companies Act's provisions** regarding directorships.
- There is **no concept of direct appointment of ID by shareholders**. They are to be drawn from a databank, the NRC must recommend their appointment, the Board must be satisfied of their integrity and expertise, and their appointments are then subject to approval by the general body.
- Also **marked difference between** a shareholder of a public listed company **demanding that the company should do whatever is necessary to appoint IDs** and **demanding that this or that particular individual should be foisted** on the company as an allegedly ID.
- The entire set of proposals **to place six persons hand-picked and chosen by the requisitionists** to the board is **not one that the law contemplates,** even if every single one of those six is supremely qualified.
- Section 203 requires a company to have a Managing Director (MD) or a Chief Executive Officer (CEO) or manager or, in their absence, a whole-time director (WTD). The requisition demands **the removal** of (Mr. Goenka) **MD and CEO without proposing a replacement**. This

puts Zee into a statutory black hole, for it would then be totally in violation of Section 203

- MIB Guidelines requires a company under those guidelines to seek prior permission from MIB before effecting any change to the CEO or Board of Directors. **There is no situation in which 'prior permission' equates to 'subject to approval'.**
- There will be non-compliances with SEBI (LODR) Regulations as well as Takeover Regulations of SEBI.
- Taken together Ld. Counsel points out that **proposed resolutions are all misbegotten — illicit in conception, illegal in form and iniquitous in the result.**

Defendant's Arguments

- **shareholders have an unfettered right to propose any resolution they choose at an EGM**, the **only requirement** being having the **necessary numbers** and complying with the procedure of Section 100.
- if the proposed **resolutions are indeed found to be** — in his words — '**unworkable', they will be 'still-born', and no effect will be given to them.**
- that the **outcome of the EGM is by no means a foregone conclusion**, and the suit is, therefore, premature.

Held

- **I am inclined to agree with the arguments of Ld. Counsel of Plaintiff on all counts**. I do not see how Mr. **Goenka can be removed** at all, leaving a managerial void only to be possibly later filled. His removal causes an immediate vacancy and non-compliance. **How this is to be done without prior permission of the MIB is also unclear.**
- I see **no method of circumventing the NRC** or directly proposing named persons as 'independent directors'.
- The **first proceeds on the footing that shareholders have some superior right to propose resolutions to the general body, ones that stand on a higher pedestal than resolutions proposed to the general body by the Board itself**. I find nothing to support a proposition that is so overbroad.
- The **second submission** distinguishes between the procedure for requisitioning an EGM and the subject of that EGM, i.e., the proposed resolutions. Taken to its logical extreme, this means that a **group of qualified shareholders can propose any sort of resolution, regardless of its legality, and force this to be considered by the general body at an EGM.**
- After applying **Null Hypothesis testing**[1] he court stated that if the **resolutions proposed** are not such as can even be **countenanced in law**, then **how does the question of putting them to vote at an EGM even arise?**
- If the **inevitable consequence** is going to be something **effete — incapable of effective action — why compel the meeting at all?** Or, more accurately, why not interdict something that is shown well in advance to end in an utterly useless and sterile result?

1. A proposition — like any hypothesis in philosophy — has to be tested for falsification or failure.

- After reading **Sec. 100**, the court stated that there is equally **nothing in this Section** that says **that a resolution proposed** by either the Board or a set of requisitionists **cannot ever be called into question before the meeting is held.**

- It seems to me that **if the EGM called** pursuant to the requisitions could **only be for the purposes of passing ineffective resolutions**, then, as a matter of commercial common sense, the **directors need not call such an EGM**. Such a proposition is supported by an observation of ***Fry LJ in Isle of Wight Rly Co vs. Tahourdin (1883) 25 Ch D 320 at 334*** where he said: '**If the object of a requisition to call a meeting were such, that in no manner and by no machinery could it be legally carried into effect, the directors would be justified in refusing to act upon it.'**

- In view of this discussion, there will be an **injunction** in terms of prayer clause (a) of the Interim Application, restraining Defendants Nos. 1 and 2 (including their employees, agents and anyone acting by, through or under them) from **taking any action or step in furtherance of the Requisition Notice dated 11th September 2021**, including calling and holding an EGM under Section 100(4) of the Companies Act, 2013.

SEBI

Name of the Case: SAT order in the matter of *M/s Vertex Spinning Mill Ltd and ors vs. Securities and Exchange Board of India* dt: October 5, 2021

Facts of the case

1. Securities and Exchange Board of India- ('SEBI') issued a Show Cause Notice dated August 08, 2016 (hereinafter referred to as "**SCN**"). The SCN alleged that Vertex Spinning Limited (hereinafter referred to as "**VSL**"/"**the Company**") ('Noticee no. 1'), Promoters and the then Executive Director and CEO Mr. Sachin Sharma (Noticee no. 2) and Mr. Suresh Sharma (Noticee no. 3), respectively had made misleading corporate announcements without proper basis only to lure investors.

2. On investigation SEBI observed that from March 29, 2006, to March 28, 2007, ("**Investigation Period**") the Company made certain major corporate announcements with respect to its project in Dhule District, Maharashtra at Nardhana Industrial Textile Park. Pursuant to this SEBI vide summons dated December 09, 2010, asked the Company *inter alia* to give details of the implementation status of all the corporate announcements made during the investigation period, with necessary supporting evidence.

3. On investigation, SEBI found that Corporate Announcement dated February 1, 2007, informed the stock exchange that on December 1, 2006, and January 2, 2007, it has received letters of advanced possession for 400 acres of land from MIDC, Dhule. SEBI further sought implementation status for this corporate announcement from VSL. VSL vide its letter dated December 07, 2012 stated that only half the construction has been done. SEBI noted that at the time of investigation, it was already six years since announcements were made by VSL. Even in respect of its claim merely half of the construction has been completed, no evidence (like the report of Architect/structural engineer) to substantiate that actually half the construction work has been completed.

Further, no reason was given for such an unusual time being taken for even construction of the building, while the announcement gave the picture that VSL is seriously pursuing this project.

4. Further in this regard SEBI received an email from Mr. Daljeeth Singh Matharu, ex-GM (Operation & Maintenance) of VSL dated March 28, 2012. He vides his email informed SEBI that, "All his statements with respect's to his new set up at Dhulia (Mah.) are hoax's, in the name of development a floor has been constructed in last 5 to 6 years it's just a barren land which he has got on nominal charges and wants to sell it at an exorbitant price, in the name of development there – it's a big ZERO."

5. SEBI further went through the annual reports of VSL to see if anything is mentioned about the implementation of its project at Dhule. SEBI found that in the annual reports of the Company for the year 2006-07 and 2007-08 nothing was mentioned about its implementation. Further SEBI noted that Annual Report for the year 2009-10, stated that- *"The proposed Dhule project was expected to commence by the financial year 2010-2011"*. SEBI also found that no reason was given for such an unusual time being taken for even construction of the building, while the announcement gave the picture that VSL is seriously pursuing this project.

6. Therefore, SEBI stated that the Company and its Promoters who were also the then CEO and Executive Director, Mr. Suresh Sharma and Mr. Sachin Sharma, has made these misleading corporate announcements without proper basis only to lure the general investors to fall into the trap laid by Promoter directors of VSL. The said corporate announcements have also affected the price and volume of the scrip of the Company.

7. SEBI vide its order dt: -January 29, 2021 debarred Noticee no.1, Noticee no. 2 and Noticee no.3 for a period of six months.

Charges levied: Section 12A (a), 12A(b), 12A(c) of SEBI Act, 1992, Regulations 3(a), 3(b), 3(c), 3(d), 4(1), 4(2)(f), 4(2)(k) and 4(2)(r) of PFUP Regulations by the Company and its Promoters who were also the then CEO and Executive Director, Mr. Suresh Sharma and Mr. Sachin Sharma respectively.

Arguments made by Noticee no. 1, Noticee no.2 and Noticee no. 3 before SEBI which were reiterated before Hon'ble Securities Appellate Tribunal:

1. VSL and its Promoters who were also the then CEO and Executive Director Mr. Suresh Sharma (Noticee no. 3) and Mr. Sachin Sharma (Noticee no. 2) respectively had made misleading corporate announcements without proper basis only to lure investors:

a. VSL has submitted that when it mentioned the upcoming project in its corporate announcement dt: February 1 and 7, 2007 it made categorically clear that the project was in pipeline and was yet to commence production and hence, there is no question of any misinformation, as alleged.

b. VSL also submitted that it was categorically stated that electricity/ light connection and installation were completed as per the required capacity means that MIDC till that point of time had provided 10 WA connection for construction purposes from village feeder

and that MIDC vide letter dated November 06, 2006, itself records that permanent supply of 5 MW and 8 MW was the requirement of the VSL and MIDC was trying to arrange for the power supply of 5 MW and 8 MW.

c. Further VSL vide its letter dt: 01.02.2007 submitted that it had categorically stated that MIDC was bringing water from 35 KM away from the factory site and a permanent supply of water was not provided. The River from which that water was supplied dried up. It is further submitted that Corporate Announcement nowhere mentioned about permanent supply through the pipeline as there were none.

d. Further VSL submitted that it had duly informed the exchange vide their letter dated June 9, 2008 regarding difficulties faced by VSL in their Dhule project due to non-availability of water and HT power connection in the industrial area. The said letter categorically mentioned that the timeline given by the concerned official for making such availability. VSL submits that there is no error and incorrectness in the project announcement when it was announced that the light connection was provided by which the Noticee meant light connection for the purpose of lighting work or low-capacity supply.

Conclusions made by Hon'ble Whole Time Member, SEBI which are confirmed by Hon'ble Securities Appellate Tribunal:

1. VSL and its Promoters who were also the then CEO and Executive Director Mr. Suresh Sharma (Noticee no. 3) and Mr. Sachin Sharma (Noticee no. 2) respectively had made misleading corporate announcements without proper basis only to lure investors:

a. SEBI stated that submission of the VSL is incorrect since on February 01, 2007 VSL made the following corporate announcement: *"The construction of the Unit is already in progress and expected to complete by August 2007. All the necessary infrastructure like construction of roads is completed, Water tank is installed by the MIDC the water has been brought from 35 kms away from the factory site. Electricity/Light connections and installation is already completed as per the required capacity."*

b. Hon'ble Whole Time Member stated that note from the announcement quoted above, that VSL never qualified that the power supplies were only available for 10 WA connection for construction purpose and the necessary connection required for running the plant was yet to be received. Moreover, the announcement never mentioned that the water connection was yet to be received. In fact, it gives a picture that all facilities are available at the site. Therefore, I cannot accept the contention of VSL in this regard.

c. Hon'ble Whole Time Member further stated that the Annual Report of VSL for the year 2009-10, stated, "*The proposed Dhule project was expected to commence by financial year 2010-2011*", which shows that VSL was aware that the project would be starting

in the financial year 2010-11 and there was no basis of making the impugned corporate announcement since 2006-07.

d. Hon'ble Whole Time Member, SEBI stated that VSL had arrived at an understanding with MIDC related to opening a textile park in Nardhana, Dhule around March, 2006. Further Lease Agreement for the said plot (comprising of T1 which was 50 acres and T2 which was 350 acres) was entered into on August 08, 2008 and there was a temporary license agreement dated March 28, 2006, based on which VSL had taken temporary possession (for three years) of a portion of the plot (T1) at Nardhana, Dhule. This was to operate till the execution of the final Lease Agreement. Vide a letter dated December 09, 2006 (copy submitted by VSL), the company was seeking possession of the remaining 350 acres of the land (T2). From the said letter, it is clear that as on December 2006, VSL did not have possession of the whole 400 acres of land. Regarding the pollution clearance from Maharashtra Pollution Control Board, also there is no clarity.

e. Hon'ble Whole Time Member also noted that from September 2006 onwards VSL was requesting MIDC for the supply of electricity and water to the plot, as is observed from various letters exchanged between MIDC and VSL. Therefore, at the time when the corporate announcements were made by VSL dt: February 1, 2007 and February 7, 2007, the Company only had possession of plot T1 and not T2 and did not have water and power supply at T1. I also note that during this time, in spite of no water or electricity at the proposed site of the textile plant, the Company kept on making forward looking corporate announcements related to the development of the plant at Nardhana, Dhule which gave the impression that work was progressing at the site whereas there was no actual development in the project and thus these corporate announcements were misleading. So, facts stand established that plot no. T1 and T 2 were not at a stage wherein the plant could be constructed. Hon'ble Whole Time Member stated that at the time of investigation, it was already six years since announcements were made by VSL and there was a time limit of five years for the development of the textile park provided by MIDC. This time limit was again reiterated by MIDC in its letter dated February 05, 2011 (a copy of the letter was submitted by VSL).

f. Hon'ble Whole Time Member noted that vide letter dated June 09, 2008, VSL has issued a clarification related to a corporate announcement dated January 30, 2007, to the BSE Ltd. wherein it had informed about the delay in the project due to non- availability of water and power. But Hon'ble Whole Time Member further stated that such misleading corporate announcements had the potential to influence the decision of the investors regarding their investment in the shares of VSL. Therefore, VSL and the then CEO Mr. Suresh Sharma and Mr.

Sachin Sharma, being Executive Director of VSL and therefore, being in charge of the affairs of the VSL and responsible for the same, made misleading corporate announcements, without proper basis.

Penalty: Debarment of Noticee no.1, Noticee no.2 and Noticee no.3 for six months from the market as was ordered by SEBI was confirmed by SAT.

IBC – Case No. 1

***M/s. Mohan Gems & Jewels Private Limited* (Appellant) *through its Liquidator* vs. *Mr. Vijay Verma (Respondent 1) and the Insolvency Board of India (Respondent 2)* in the order dated 24 August 2021 passed by the National Company Law Appellate Tribunal, (NCLAT), New Delhi**

Facts of the Case:

- An application was filed under the Insolvency and Bankruptcy Code, 2016 (Code/IBC) against the *Mohan Gems & Jewels Private Limited* - Corporate Debtor (CD) for initiation of Corporate Insolvency Resolution Process (CIRP) which was duly admitted by National Company Law Tribunal (NCLT) New Delhi. Having regards to no expression of interest being received the Resolution Professional (RP) at the instance of the Committee of Creditors obtained the liquidation order from the NCLT.

- An application was filed by the Liquidator seeking for closure of the Liquidation Process as per Regulation 45(3)(a) of IBBI Liquidation Process Regulations, 2016 (Liquidation Process Regulations), as the CD was being sold as a going concern in the e-Auction held on 20 November 2019 declaring Mr. Vijay Verma – Respondent 1 (R1) as the highest bidder at a bid price of ₹ 4,51,99,713/-While dismissing the application as misconceived, NCLT held that

  a. A Company being a juridical person with perpetual succession cannot be sold. It can only be dissolved;

  b. Selling of Company in liquidation is unknown to law and beyond the discretion given to IBBI under section 240 (2) (y) of the Code;

  c. Regulation 45(3) of Liquidation Process Regulations is repugnant to the mandate under section 54 of the Code; and

  d. Tribunals cannot test the vires of the parent legislation, as it is the creature of the said statute, but they are competent to test the vires of subordinate/delegated legislation.

- Aggrieved by the order of NCLT, the liquidator of the CD filed an appeal before NCLAT.

Arguments of the Appellant

- The Learned NCLT has failed to appreciate that the Liquidator is authorized to sell the CD or its business as a going concern pursuant to Liquidation Process Regulations.

- Further, highlighted that such a sale is consistent with the objective of the Code as affirmed by the Hon'ble Supreme Court in several Judgements and that the ***Liquidation should be the last resort as it results in loss of daily bread for the workmen.*** The Hon'ble Supreme Court in '***Arcelor Mittal India Private Limited' vs. 'Satish Kumar Gupta and Others***' relying on 32(e) of the Liquidation Process Regulations,

held that if *there is* ***a Resolution Applicant who can continue to run the 'Corporate Debtor' as a going concern, every effort must be made to try and see this possibility***.

- The Learned Counsel also relied on the ratio of the Hon'ble Apex Court in '***Swiss Ribbons Private Limited & Anr.' vs. 'Union of India & Ors.***' Regulations 32A and 45(3) were inserted in the Liquidation Process Regulations after the decision in '***Arcelor Mittal India Private Limited' (Supra)*** **and** ***'Swiss Ribbons Private Limited & Anr.' (Supra);*** that 32A of the Liquidation Process Regulations is in the nature of a drop-down provision of Regulation 32(e)&(f) to define the process for the sale of the 'Corporate Debtor' or its business as a going concern; that Regulation 45(3) is the sequel to Regulation 32(e)&(f*) to provide the process for closure of Liquidation Proceedings in the event the business of the 'Corporate Debtor' is sold as a going concern and that such an action would prevent the 'Corporate Debtor' from consequential dissolution.*
- Section 54 of the Code provides that when the assets of the Corporate Debtor have been completely liquidated, the liquidator is required to make an application for dissolution before the NCLT. There is no provision in the Code that prohibit the closure of the liquidation process in the event the Corporate Debtor is sold as a going concern pursuant to Regulation 32(e) following a closure report filed under Regulation 45(3)(a) of the Liquidation Process Regulations as done in this case and it would be a contradiction to hold that only dissolution is envisaged under the Code.
- A harmonious reading of Section 240[1] and Section 35(o)[2] of the Code makes it abundantly clear that IBBI has the jurisdiction to frame the Regulations with regard to functions of the liquidator including in respect of the sale of the Corporate Debtor as a going concern.
- The sale of Corporate Debtor was carried out by the liquidator in accordance with the Liquidation Process Regulations; that Regulation 39C[3] was inserted in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016, with effect from 25 July,2019, but, by then the Application under Section 33 of the Code seeking Liquidation of the 'Corporate Debtor' had already been filed before the NCLT and therefore passing of Resolution of CoC under Regulation 39C was not possible.
- The NCLT has erroneously rejected the application on the ground that Regulation 32A and 45(3) are inconsistent with the Code and framed without jurisdiction by IBBI.
- The NCLT order was stayed only to avoid the death of the Corporate Debtor.

Arguments of the Respondent 1

- Once the auction was successfully completed on 20 November 2019, the liquidator was immediately intimated to execute the sale document.
- The entire amount was deposited within the period from 18 December 2019 to 16 January 2020 into the Liquidator account of the Corporate Debtor and if the Corporate Debtor is put into dissolution, then there would be no purpose in purchasing the Company at such a high price for the same asset.

- The bidder suffered a huge loss by way of interest since the bid price was already submitted one year ago and hence sought for payment of interest at 12% per annum on account of the loss suffered.

Arguments of the Respondent 2

- Learned Counsel strenuously contended that sale 'as a going concern' at the Liquidation stage achieves the principal objects of the Code which are as follows
  - — maximization of value of assets
  - — promotion of entrepreneurship
  - — balancing the interest of stakeholders
- The sale of 'Corporate Debtor' as a going concern even at the Liquidation stage achieves all the aforesaid objects and the employees remain in employment keeping the goodwill intact. There is no inconsistency between the objective of the Code and the provisions of the Code and the NCLT has overstepped its jurisdiction in trying to segregate the two.
- Sections 281(3), Sections 280(2), Sections 290(1)(d) of the Companies Act, 2013,(the Act) make it clear that a Company can be sold as a going concern at the Liquidation stage. Also stated that the Hon'ble Supreme Court in ***'Arcelormittal India Private Limited' (Supra)*** and ***'Swiss Ribbons Private Limited & Anr.' (Supra)*** has observed that dissolution of the Company is to be carried out only as the last resort.
- Upon enactment of the IBC in the year 2016, under Section 255 read with the XI schedule of the Code, certain provisions of the Act were amended and made harmonious with provisions of the Code. Sub-Section (94A) was inserted in Section 2 to define the term 'winding up' as follows:-

  "(94a) "winding up" means winding up under this act or Liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable."

- As noted above, under the provisions of the Act, it is permissible to sell the Company undergoing winding up as a going concern and since winding up is nothing but Liquidation under the IBC, it is also permissible to sell the 'Corporate Debtor' as a going concern at the Liquidation stage
- The Code is an economically beneficial legislation that aims to put the 'Corporate Debtor' back on its feet maximizing the value of assets of the 'Corporate Debtor' and promoting entrepreneurship. The long title to the legislation indicates the objective:-

  "An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and bankruptcy Board of India, and for matters connected therewith or incidental thereto."

Held

- The NCLAT assessed the Law laid down by the Hon'ble Supreme Court on 'Sale of 'Corporate Debtor' as a

going concern' and relied on the cases - '***M/s. Innoventive Industries Ltd.' vs. 'ICICI Bank and Anr.', Arcelormittal India Private Limited (Supra) Swiss Ribbons Private Limited & Anr.' (Supra)***

- NCLAT further stated that it is a well-settled proposition that the legality and propriety of any Regulation/Notification/ Rules/Act cannot be looked into by NCLT or NCLAT. The Tribunal can only ascertain whether the procedures provided for under the Code/the Act are being followed or not. The NCLT/NCLAT cannot go beyond this.
- After analysing the relevant provisions of the Code and Regulations made thereunder, and keeping in view the scope and spirit of the Code, read with Section 54 of the Code, Regulation 39C of CIRP Regulations, Regulations 32(e) & (f), 32A and 45(3) of the Liquidation Process Regulations as well as the law laid down by Supreme Court on sale of Corporate Debtor as a going concern, NCLAT held that **if a Resolution Applicant can continue to run the 'Corporate Debtor' as a going concern, every plausible effort must be made to ensure the same** and the Liquidation of the Company is to be seen only as a last resort and every attempt should be made to revive the Company and to continue it as a 'going concern'
- Accordingly, the appeal was allowed.

1 240 of the Code- Power to make Regulations

2 35(0) of the Code- Powers and Duties of liquidator-to perform such other functions as may be specified by the Board

3 39C of CIRP Regulations - Assessment of sale as a going concern.

(1) While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may recommend that the liquidator may first explore sale of the corporate debtor as a going concern under clause (e) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 or sale of the business of the corporate debtor as a going concern under clause (f) thereof, if an order for liquidation is passed under section 33.

(2) Where the committee recommends sale as a going concern, it shall identify and group the assets and liabilities, which according to its commercial considerations, ought to be sold as a going concern under clause (e) or clause (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

(3) The resolution professional shall submit the recommendation of the committee under sub-regulations (1) and (2) to the Adjudicating Authority while filing the approval or decision of the committee under section 30 or 33, as the case may be.".

IBC – Case No. 2

***M/s. BLS Polymers Limited* (Appellant) v/s. M/s RMS Power Solutions Private Limited (Respondent) order dated 27 July, 2021 passed by the National Company Law Tribunal, (NCLT), New Delhi**

Facts of the Case

- M/s. BLS Polymers Limited – Operational Creditor (OC) has made an application to the National Company Law Tribunal, New Delhi Bench (NCLT) against the M/s RMS Power Solutions Private Limited – Corporate Debtor (CD), u/s 9 of the Insolvency and Bankruptcy Code, 2016 (Code/IBC), wherein the debt had arisen prior to the notification dated 24 March 2020 - threshold notification date, which provided for an increase of the threshold limit from one lakh rupees to one crore for filing applications u/s 9 of the Code.
- The OC filed an application u/s 9 of the Code to initiate the Corporate Insolvency Resolution Process (CIRP) against the corporate debtor, for a total default amount of ₹ 35,74,942/- wherein the invoices were raised on 7 August, 2019 and 4 September, 2019, respectively.
- Due to the non-payment of dues by the corporate debtor, a demand notice was issued by the OC on 16 March 2020, which was delivered to the registered office address of the corporate debtor on 21 March 2020 (i.e., prior to the threshold notification date).

Arguments by the Appellant

- The OC contended that the invoices were payable after 15 days from the date of the invoices.
- The CD had issued two cheques towards the payment of its debt on 15 December, 2019 and 30 December, 2019, amounting to ₹ 16,04,800 and ₹ 16,23,880/- respectively but the said cheques were dishonoured.
- The CD had duly acknowledged and undertaken to pay their dues by mid-April 2020 in a letter dated 12 March 2020.
- The demand notice was also served to the CD on 21 March, 2020 ie., before the notification came into force.
- Accordingly, the cause of action for initiating the application u/s 9 of the Code had accrued on the date of the CD's "default", as defined under section 3(12) of the Code (i.e., prior to the threshold notification date).
- Further, contended that the threshold notification was not applicable to the matter in which the default had occurred as the demand notice was served to the CD prior to the threshold notification date.
- Also relied on the Supreme Court order in the matter of ***Sesh Nath Singh vs. Baidyabati Sheoraphuli Cooperative Bank Ltd 2021***
- Also, contended that the statute is presumed to have prospective effect unless it is held to be retrospective either expressly or by necessary implication. The notification nowhere mentions that the enhancement of the threshold amount will have a retrospective or retroactive effect as held in ***Madhusudan Tantia vs. Amit Choraria, Company Appeal Insolvency no. 557 of 2020***

Arguments by the Respondent

- Raised an objection that pursuant to the threshold notification issued by

the Ministry of Corporate Affairs, the threshold amount for CIRP had been increased from one lakh rupees to one crore rupees, and therefore the present application was liable to be dismissed.

Held

- NCLT while analysing threshold notification stated that there is no mention of the date of enforcement, and it is a well-settled legal principle that if the date of a law's enforcement is not mentioned in the notification, it has a prospective effect.
- While considering the issue of **the threshold notification's applicability, the NCLT observed that the threshold notification may not apply where:**
  - i. a demand notice u/s 8 of the Code has already been delivered prior to the threshold notification, but the application has then been filed after the threshold notification date;
  - ii. the default has occurred prior to issuance of threshold notification, but a demand notice for an application u/s 9 of the Code has not been sent;
  - iii. an application has already been filed but not admitted by the NCLT against a corporate debtor; and
  - iv. an application has been admitted for the initiation of the CIRP against a corporate debtor
- NCLT held that as far as the circumstances of points (iii) and (iv) are concerned, there was no dispute regarding the threshold notification's applicability because every notification has a prospective effect unless the notification specifically mentions that it will have a retrospective effect.
- In relation to the conditions envisaged in point (i), the NCLT was of the view that all of the three relevant sections (i.e., sections 7, 9 and 10 of the Code) are triggered only once a default occurs.
- It is only when section 9 of the Code has been triggered due to a default occurring that a demand notice u/s 8 of the Code must be sent to the corporate debtor and 10 days' time is given to the CD to bring to the notice of the OC the existence of dispute if any.
- It is to be noted that "default" occurring is a prerequisite to such proceedings. The NCLT opined that the application contexts outlined above can be filed if a default has occurred prior to the threshold notification date.
- In relation to the conditions envisaged at point (ii), the NCLT was of the view that in cases where the default has occurred prior to the date that the threshold notification is issued, and no demand notice was delivered prior to the date of notification in that case too, the notification will not be applicable, rather a minimum threshold in such cases, as per section 4 of the Code, is one lakh rupees.
- NCLT held that the threshold notification is applicable only in respect of defaults that occurred on or after the threshold notification date viz., 24 March, 2020 and not prior to that.

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