Anbay Legal Monthly Newsletter

Insolvency Update

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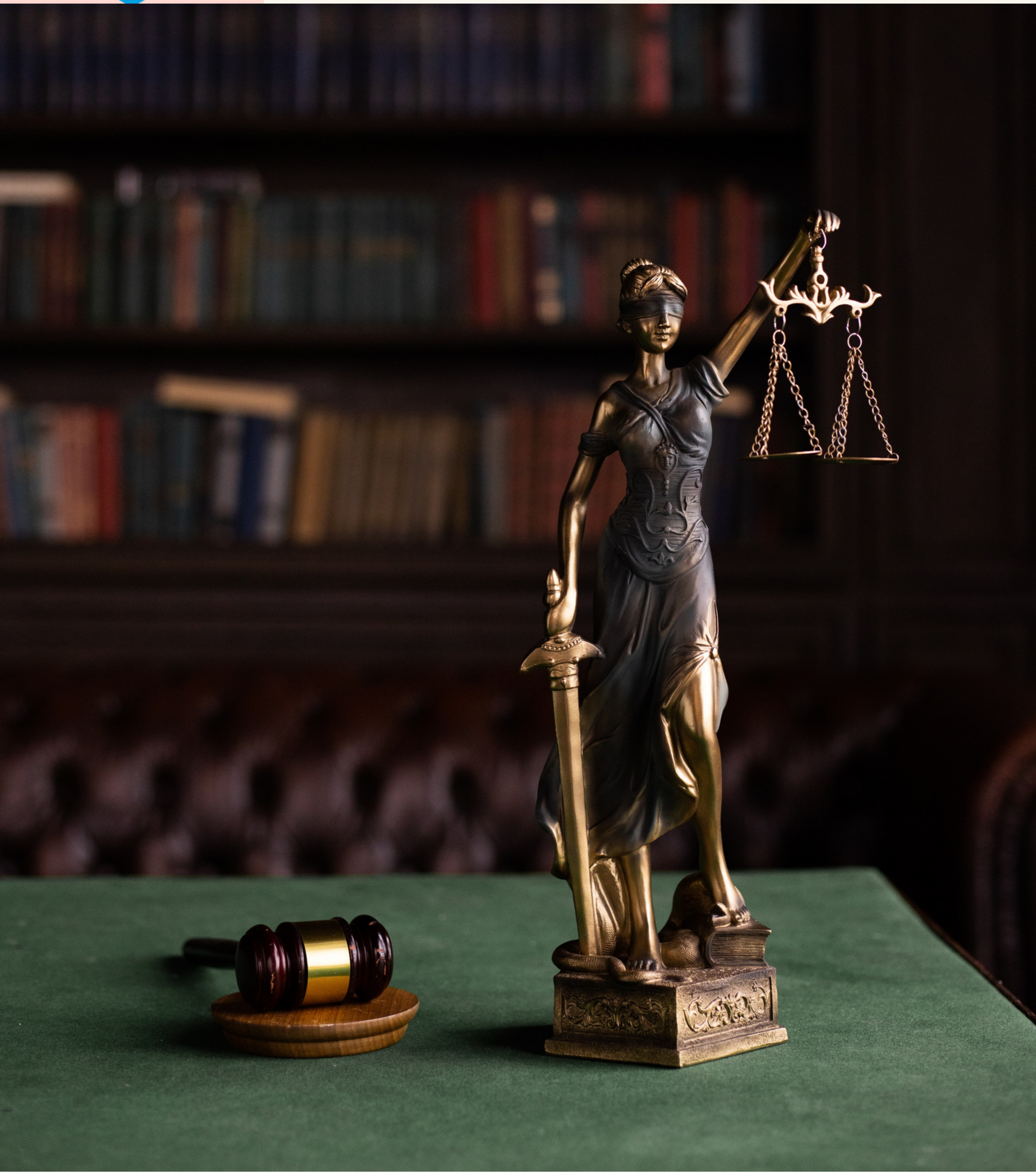

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INFORMATION UTILITIES) AMENDMENT REGULATIONS, 2022

BERING NUMBER OF NOTIFICATION - IBBI/2022-23/GN/REG085

The Insolvency and Bankruptcy Board of India (IBBI) wide a notification dated 14.06.2022 introduced second round of amendments to the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017.

The main purpose of this amendment is better availability of information to both the creditors and the debtors.

The Information Utility Regulations were first issued on 31.03.2017 in the Gazette of India and were subsequently amended wide notification dated 13.04.2021, bearing No. IBBI/2021-22/GN/REG072. This present amendment is the second made to these regulations.

THE PROMINENT CHANGES BOUGHT ABOUT BY THIS LATEST AMENDMENT ARE AS FOLLOWS:

- Before filing an application to initiate Corporate Insolvency Resolution Proceedings (CIRP) under Section 7 or 9 of the Insolvency and Bankruptcy Code, the creditor needs to file an information of default with the information utility. The said information shall then be processed in accordance with Regulation 21 of the IBBI regulations.

- Regulation 21 mandates expeditious undertaking of the process of authentication and verification of information of default as soon as it is received by the information utility. This involves the entire process of confirmation of default from the debtor through communication.
  The purpose of the amendment is to record the default to analyse the authenticity of the default claimed therein so that the provisions of IBC aren't misused.

- After the recent amendment, both the creditors and corporate debtors have to submit their claims to the resolution professional as opposed to pre amendment cases where only creditors were bound to submit their claims.

- Further, if the concerned laws are applicable to the Operational Creditors, they will have to furnish the extracts of the E-way bill, Form GSTR-1 and Form GSTR-3B along with their application under Section 9 of the IBC.

- The creditors of the corporate debtor shall also be required to aid the information utility in order to help the Resolution Professional in preparation of the Information Memorandum. For this purpose, the creditors will have to share information including the Corporate Debtor's assets, liabilities, latest financial statements and other financial information with the resolution professional.

- Further, the Financial and Operational Creditors will also be required to provide their PAN number and email ID while filing application under Section 7 or 9 of IBC both of which pertain to **initiation of corporate insolvency resolution process (CIRP) by financial and operational creditors** respectively.

UCO BANK v GIT TEXTILES MANUFACTURING LIMITED

CASE NO.: C.P (IB) No. 600/KB/2019

FACTS:

- The matter was dealt with by the Kolkata Bench of the NCLT.
- The financial creditor had sanctioned a total credit facility of Rs. 20,41,00,000/- in favour of the Corporate Debtor wide initial sanction letter dated in 2008 and further sanction letters as credit facilities were renewed on further dates.
- Total amount claimed to be in default was Rs. 54,33,52,844.37/-. The corporate debtor failed to repay the default and their account was declared NPA on 30.09.2012. The said date was also taken as the date of default.
- In pursuance of the same, the financial creditor sought initiation of Corporate Insolvency Resolution Process (CIRP) with respect to GIT Textiles Manufacturing Limited (Corporate Debtor) under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

FINANCIAL CREDITOR'S CONTENTION:

- Total amount claimed to be in default was Rs. 54,33,52,844.37/- with the interest imposed by the creditors in lieu of total credit facility in favour of the Corporate Debtor wide initial sanction letter dated in 2008 and further sanction letters as credit facilities were renewed on further dates.
- The corporate debtor failed to repay the default and their account was declared NPA on 30.09.2012. The said date was also taken as the date of default and on 04.04.2019, the Financial Creditor had filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) seeking initiation of CIRP proceedings against the debtor.

CORPORATE DEBTOR'S CONTENTION:

- The corporate debtor contended that the financial creditor was guilty of forum shopping as he had filed proceedings before Debt recover tribunal for the same cause.
- The present petition was non-maintainable because the limitation period for the default had already lapsed as of 30.09.2015 while the present petition was filed in 2019.

ISSUES AT HAND:

- Whether the creditor be liable of forum shopping in so much as it filled a subsequent application in the Debt Recover tribunal under Recovery of Debts Due to Banks and Financial Institutions (RDDBFI Act) along with NCLT under The Insolvency and Bankruptcy Code?
- Whether the petition be barred by limitation period after the default was made due in September of 2012?
- Whether a dispute over the default amount be enough to hinder CIRP proceedings under Section 7 of IBC?

DECISION OF THE TRIBUNAL:

- Deciding on the first issue, the tribunal held that, taking action under one legislation cannot curtail the Financial Creditor's right under the Insolvency and Bankruptcy Code 2016 when the other legislation has an entirely different objective as opposed to IBC.

- In the present matter, application under DRT was made with respect to Recovery of Debts Due to Banks and Financial Institutions as opposed to IBC which was for initiating a CIRP proceeding. Both of them being entirely different matters, cannot curtail each other.
- Further, with respect to the second issue, relying on a recent decision by the SC in ***Laxmi Pat Surana V. Union Bank of India & Anr*** [1], it was also held that. while petitions seeking default have a limitation period, such limitation period refreshes itself each year when a corporate debtor acknowledges the existence of such default in its financial statements. In the present matter, the debtor in its yearly financial statements (2012 – 2019) clearly accepted such default, thus, renewing the limitation period.
- On the issue over the dispute amount, the tribunal relying on two decisions namely ***Innoventive Industries Ltd. v. ICICI Bank and Khan Bahadur Shapoor Freedom Mazda v. Durga prasad*** [2] reported in the Hon'ble Supreme Court[3] held that – as long as the financial creditor provides enough evidence to satisfy that a default has occurred, it is of no matter that what amount of the debt is disputed as long as a debt is 'due'. It also stressed upon the acceptance of a jural relationship either explicitly or implicitly by both the parties in an unambiguous manner.

N.C. GOEL & MAYA GOEL v PIYUSH INFRASTRUCTURE INDIA PRIVATE LIMITED

CASE NO.: CP (IB) No.453/ALD/2019

FACTS:

- The matter was dealt with by the Allahabad Bench of NCLT.
- The creditors filled an application under Section 7 of the Insolvency and Bankruptcy Code, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking Corporate Insolvency Resolution Proceedings (CIRP) against Piyush Infrastructure India Pvt. Ltd (corporate debtor) with respect to default of repayment of an amount of Rs. 12,00,000.

FINANCIAL CREDITOR'S CONTENTION:

- In the present matter, the creditors contended that they provided credit to the corporate debtor between the time period of 2011-2016 amounting to Rs. 12,00,000/-, with interest payable at @18% per annum.
- Till the date of 04.06.2016, the debtor had paid a total interest of Rs. 18000 to both the creditors and along with that had issued Post-dated cheques for repayment of principal amount, starting from 15.01.2018 to December 2018. However, ever since the first cheque being dishonoured on 23.01.2018, no future payments were received.

CORPORATE DEBTOR'S CONTENTION:

- The corporate debtor contended to have never paid the interest to the creditors in 2016 and since the loan transactions pertained to the period of 2012 to 2014, the limitation period had lapsed and, the petition was barred by limitation.

[1] Laxmi Pat Surana V. Union Bank of India & Anr, March 21, 2021,
[2] Laxmi Pat Surana V. Union Bank of India & Anr, March 21, 2021,
[3] Innoventive Industries Ltd. v. ICICI Bank, (2018)1 SCC 407, Khan Bahadur Shapoor Freedom Mazda v. Durga prasad, (1962) 1 SCR 140.

- Further, it was also contended by the debtor that, under Section 5(8) of the IBC, since no interest was payable on the transaction, the said transaction could not be considered as a financial debt.
- The debtor also submitted that the post-dated cheques were never offered for payment at the first place and that the creditors had approached the tribunal with dubious intent.

REOINDER/REPLY BY FINANCIAL CREDITORS

- It has been claimed that the creditors have already preferred a complaint under section 138 of Negotiable Instruments Act, 1881, which is pending for adjudication before the appropriate legal forum. As regards the aspect of limitation, it is claimed that the cheques were given from January 2018 till December 2018 which were dishonoured. Therefore, from the date of dishonour of these cheques, the application filed under section 7 was maintainable.

ISSUES AT HAND:

- Whether the present petition is barred by the law of limitation?
- Whether the issuance of post-dated cheques be taken as an acceptance of debt on part of the corporate debtor?

DECISION OF THE TRIBUNAL:

- Deciding on the first issue, the tribunal held that, in the absence of documents to substantiate the date of default for the repayment of credit, the limitation period cannot be decided. The present case did not present the tenure of the loan, the date of demand of the repayment except for the two letters by the debtor demanding payment of interest.
- With respect to the second issue, the tribunal held that, copies of the post-dated cheques issued by the Corporate Debtor for repayment of principal amount cannot be taken to be unqualified admission of debt because the presumptions drawn under section 118 and section 139 of the Negotiable Instruments Act, 1881, are rebuttable presumptions in themselves.
- The case in matter here, on the face of it seemed to be more concerned with recovery of money as opposed to CIRP proceedings which was the main purpose of the act, the court highlighted disregard for IBC laws in this case and dismissed the petition directing them to pursue remedies under other laws.

GATEWAY OFFSHORE PRIVATE LIMITED AND ANR v RUNWAL REALTORS PRIVATE LIMITED

CASE NO.: CP (IB) 954/MB/C-I/2019

FACTS:

- The matter was dealt with by the Mumbai Bench of NCLT.
- The creditors had jointly provided financial credit to the corporate debtor amounting to Rs.4,43,00,000/- and the debtor had defaulted in the repayment of the same. In pursuance of the same, the creditors filed an application under Section 7 of the Insolvency and Bankruptcy Code,

2016 (IBC) before the NCLT's Mumbai Bench seeking remedy for initiating CIRP proceedings against the debtor.

FINANCIAL CREDITOR'S CONTENTION:

- It was contended that, the Corporate Debtor was liable to repay the loan amount of Rs.4,43,00,000/- along with interest at the rate of 9% p.a. on or before June 2018.
- Multiple letters of reminder were served to the debtor for repayment of the dues but despite the same, the debtor had failed to make the due payment.

CORPORATE DEBTOR'S CONTENTION:

- After serving a legal notice regarding this repayment, the debtor challenged the application on the issue of maintainability of legal notice by submitting that the transaction between the parties did not classify as financial debt and pertained to payment for a joint venture between the parties. This contention was challenged by the creditors saying that they weren't into the business of real estate so such a joint venture wasn't possible in the first place.
- The debtor also relied on SC's decision in ***Swiss Ribbons vs Union of India***[4] and contended that the creditors could not substantiate their claim as their existed no loan agreement or official communication regarding the same and thus, the existence of a debt cannot be proved.
- It was also contended that the creditors cannot operate as NBFC's (Non-Banking financial companies) as the same require numerous regulations and companies to be followed for establishment.

ISSUES AT HAND:

- Whether the absence of a written agreement is enough to nullify the claim of a loan agreement existing between the parties?

DECISION OF THE TRIBUNAL:

- The court relied on a decision by the SC in ***Narendra Kumar Agarwal and Ors. v Monotrone Leasing Private Limited and Ors***[5] and held that while presence of a written contract is not a pre-requisite to the existence of a financial debt, the Adjudicating Authority must be content that the Corporate Debtor is not being hauled into Corporate Insolvency Resolution Process mala fide for any purpose other than the resolution of the Insolvency.
- In the present matter, the creditors had failed to provide any evidence in the form of a loan agreement, promissory note, contract etc to substantiate the claim of a financial debt that was not re-paid for. The transactions in the companies' books weren't substantiated by any evidence to ascertain their purpose either.
- Based on the aforementioned the tribunal rejected the application and regarded that IBC processes must not act as a back gate to other purposes opposed to what they are meant for.

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[4] Swiss Ribbons vs Union of India [Writ Petition (Civil) No. 99 of 2018]

[5] Narendra Kumar Agarwal and Ors. v Monotrone Leasing Private Limited and Ors. (Company Appeal (AT) (Insolvency) No. 549 of 2020 (NCLAT; Order dated 19.01.2021)

EMPLOYEES PROVIDENT FUND ORGANIZATION v MR. SUBODH KUMAR AGARWAL & ORS.

COMPANY APPEAL (AT) (INSOLVENCY) NO. 116 of 2022

FACTS:

- The Present appeal has been filed against the order of NCLT dated 14 December, 2021 wherein an application filed by the Resolution Professional for approval of the Resolution Plan in respect of 'M/s Ambient Computronics Private Limited, the Corporate Debtor was allowed.
- On 10.12.2020, the Corporate Insolvency Resolution Process (CIRP) was subsequently started against Ambient. In a letter dated October 12, 2021, EPFO informed Ambient's Resolution Professional of INR 6.16 LAKHS pending investigation.
- The Resolution Plan filed by the Director of Ambient was authorised by NCLT, Kolkata, on December 14, 2021 because Ambient was registered under the MSME Act. Then, in accordance with Section 7A of the 1952 Act, EPFO issued a final order dated 21.01.2022, imposing a liability of INR 12.17 Lakhs onto Ambient.

EPFO CONTENTIONS:

- On behalf of EPFO, it was argued that because both the Resolution Professional and the Successful Resolution Applicant were aware of the proceedings that were ongoing before EPFO, they should have included provisions in the Resolution Plan for the payment of provident fund obligations. Furthermore, it was argued that since the Resolution Plan did not call for the payment of provident funds, the money should be set aside.

RESOLUTION PROFSSIONAL:

- On behalf of the Resolution Professional, it was argued that since EPFO had not submitted a claim, the Resolution Plan did not require that it consider EPFO's claim. Furthermore, the Resolution Professional relying on Section 36(4)(a)(iii) submits that as per the provision assets in provident fund, pension and gratuity are not assets of the Corporate Debtor and there is no indication that said amount is to be paid by the Corporate Debtor.

RESPONDENT CONTENTIONS:

- Corporate Debtor contends that no claim has been filed by the Appellant, therefore, there was no occasions for inclusion of their claim in the Resolution Plan. He submits that Resolution Plan is in accordance with Section 30(2) of the Code which does not warrant any interference.

ISSUES AT HAND:

- Whether claims that are not part of the Resolution Plan stand extinguished?
- Whether the Corporate Debtor under section 36(4)(a)(iii) not obliged to make any payment towards the provident fund, the pension fund and the gratuity fund?

- Whether the Interim Resolution Professional is under obligation to place the claims before the committee of creditors?

DECISION OF THE TRIBUNAL:

- NCLAT observed that in the present case though no claim was submitted by EPFO, the Resolution professional and the Resolution applicant were well aware about the proceedings pending before the EPFO under Section 7A of 1952 Act.

- The submission that Section 36(4)(a)(iii) does not contemplate any payment Company Appeal (AT) (Insolvency), towards the above fund by the Corporate Debtor is completely devoid of merit. It is the statutory obligation of the Corporate Debtor to contribute to the dues of workmen and employees towards the provident fund, the pension fund and the gratuity fund.

- Although Regulation 36 Sub-Regulation (2)(l) provides for other information which the resolution professional deems relevant to the committee but the said information being under subjective satisfaction of Resolution Professional does not cast any obligation for bringing in the notice of the Committee any ongoing proceeding where statutory liabilities were likely to accrue on the Corporate Debtor.

- Lastly the court concluded that, the law as it stands today does not require any claim which is not filed to be included in the Resolution Plan.

- In the present case, the claim under Section 7A was not there at the time of currency of the Corporate Insolvency Resolution Process, hence, the court is of the view that it is not necessary to express any concluding opinion as to what steps to be taken by the Appellant for a claim which has been crystallized after close of CIRP process, however appellant is at liberty to take s appropriate remedy for recovery of the amount under Section 7 as may be advised.

IN THE MATTER OF WAVE MEGACITY CENTRE PRIVATE LIMITED

COMPANY PETITION NO. (IB)-197(PB)/2021

FACTS:

- Under Section 10 of the IBC, Wave megacity filed an application for the initiation of CIRP. However, a number of homeowners objected to Wave starting the insolvency procedure on the grounds that it was fraudulent and that Wave's petition was not intended to be resolved.
- In this matter, the present application has been filed under Section 65 Of IBC, 2016 that is if any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with a malicious intent for any other purpose, the Adjudicating authority may impose penalty on that person of one lakh which may extend up to one crore.
- The applicants are the allottees of M/s Wave megacity Private Limited.

APPELLANT'S CONTENTIONS:

It was contended on behalf of the applicant homebuyers before NCLT that,

- Corporate accepted huge number of monies over Rs. 1400 Crore from over 2300 subscribers and has stated no reason for non- delivery for over ten years.
- There are various judicial proceedings going on against corporate debtor filed by almost all of the subscribers before law enforcement authorities. The latest one being FIR No. 63 of 2021 and the in the Judgment pronounced in this case by the Delhi State Consumer Disputes Redressal Commission, New Delhi, the applicant has been awarded refund of his money with interest, compensation and costs.
- That Corporate Applicant prior to filing for insolvency, has made major changes in the management by replacing the three prior directors of the Corporate debtor being Sh. Manpreet Singh Chadha, Shri Charanjeet Singh and Sh. Rinkal, who were holding office since 2011,2020 and 2019 respectively to help them escape criminal prosecution which has been initiated against them by name and that would clearly reflect from the copy of the FIR registered with the EOW enclosed with the instant application u/s 65 of the code that one of the Directors, Sh. Manpreet Singh Chaddha, has been transposed as Financial Creditor in the present petition.
- The applicants in the instant application are making a statement on record that the CD accepted payment in cash while inducing them to accept a reduced price of the property on paper to cause serious losses to the state exchequer
- Wave has siphoned off huge amounts of money to its various other associates prior to the filing of the petition u/s 10
- The Corporate debtor has the intention of escaping the liability of satisfying the orders, decrees and awards against it by invoking the powers of this Tribunal on false, misconceived and mischievous grounds.

RESPONDENT'S CONTENTIONS:

- The applicants failed to establish as to how the initiation of CIRP will benefit Wave as it's promoters would lose the control of the project as well as their investment after initiation of CIRP.
- The major portion of the project has been finished by Wave, who has also gotten a completion/occupancy certificate for the finished buildings.
- Corporate debtor also states that, it has issued refund to Mr. Ram Krishna Sharad, as per the orders of SC of India and he is no longer an allottee on date. Corporate Debtor also claimed to have processed refunds of amount over INR 185 Crore to over 500 allottees full refund.
- Over 50 allottees have been given partial refunds.
- FIR No. 63 dated 13.04.2021 filed with EOW was filed after filing of the petition under section 10 by Wave.

ISSUES AT HAND:

- Whether the application to initiate CIRP filed by the corporate debtor Under Section 10 of IBC,2016 was with a fraudulent or malicious intent?
- Whether the FIR No. 63 of 2021 registered against the CD was registered after the Section 10 Petition was filed?
- Whether the present petition filed under section 65 is not in relation to the application filed by Corporate Debtor Under Section 10?

DECISION OF THE TRIBUNAL:

- NCLT observed that the application u/s 10 of IBC has been filed with malicious and fraudulent intent which is penalized u/s 65 of IBC.
- On the issue of the FIR registered against the Corporate Debtor and its Directors, the court is satisfied from the evidence given in the rejoinder that Petitioners were pursuing the matter for registration of FIR since August 2020 much before the present application u/s 10 of IBC was filed
- The Court observed that the removal of the directors just before filing of application under Section 10 of IBC,2016 shows that the management wants to hide from answering the reasons of such default and wants to immune itself from the provisions of Section 17(1)(c) which states that the managers have to report to IRP all the documents and the record.
- Various litigations are pending against the corporate debtor before different fora and to escape that liability the corporate debtor is seeking the shelter of Resolution process. On initiation of CIRP, the moratorium under section 14(1) of IBC, 2016 comes into effect and by virtue of that all proceedings against the Corporate Debtors are put to rest. CIRP offers a calm and a breathing room to Corporate Debtor.
- Corporate Debtor accepted cash and issued plain paper receipts while inducing them to accept a reduced price of the property on paper, to cause serious loss to the state exchequer.
- The IBC proceedings are proceedings in rem and hence cannot be utilised to make illegal acts as legal. Central government is directed to make necessary investigation into the affairs of the corporate debtor.
- Hence the present petition under Section 65 is allowed and the Corporate Debtor is required to pay a fine of Rs. 1 crore into the Prime Minister's Relief Fund within 15 days after the judgement date.

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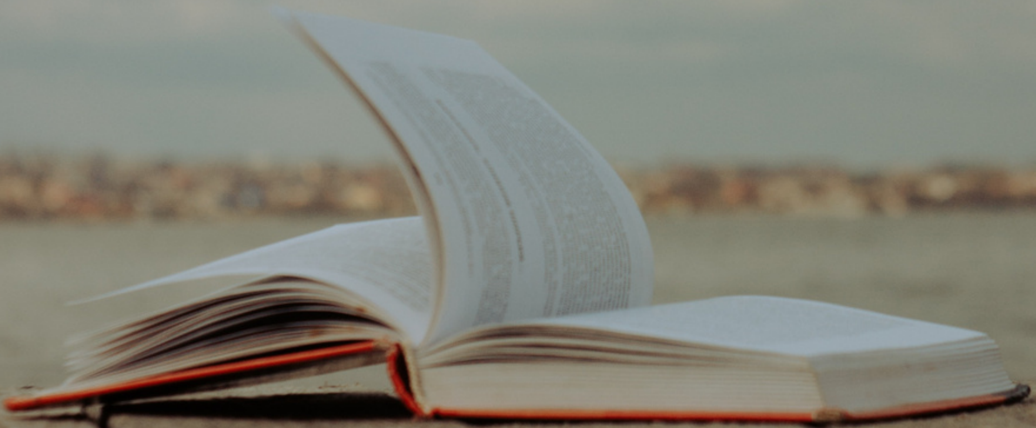

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