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Insolvency Update

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JAIPUR TRADE EXPOCENTRE PRIVATE LIMITED V. M/S METRO JET AIRWAYS TRAINING PRIVATE LIMITED

COMPANY APPEAL (AT) (INSOLVENCY) NO. 423 OF 2021

FACTS:

- Jaipur Trade Expocentre Private Limited (Jaipur Trade) entered into a license agreement dated 15.04.2017 with Metro Jet Airways Training Private Limited (Metro Jet Airways) for a license of a building admeasuring 31,000 Sq. Ft. The term of the license was for a period of five years and the license was INR 4,00,000/- per month plus govt. taxes.

- Initially, Metro Jet Airways made payment to the Jaipur Trade but the cheque dated 07.05.2018 & 08.10.2018 for INR 20,00,000/- each were dishonored. Accordingly, Jaipur Trade sent a demand notice under Section 8 of the code and thereafter filed petition under Section 9 of the Code against Metro Jet Airways before NCLT Jaipur.

- NCLT dismissed the Section 9 petition on the ground that the claim arising out of the license to use the immovable property does not fall in the category of goods & services and therefore, the Section 9 Application is not maintainable.

APPELLANT'S CONTENTION:

- It was contended on behalf of Jaipur Trade that the premises were rented out to the Metro Jet Airways for running of an educational institution and the provision made by the license agreement is a provision for service as mentioned under Section 5(21) of the Code and thus qualifies as an operational debt under the Code.

- Jaipur Trade further relied on the case of ***Anup Sushil Dubey v. National Agriculture Cooperative Marketing Federation of India ltd. and Anr.***[1] and ***Sarla Tantia v. Ramaani Hotels & Resorts Pvt. Ltd. and Anr***[2] wherein NCLAT held that lease rentals qualify as operational debt.

CONTENTIONS OF METRO JET AIRWAYS:

- It was contended on behalf of Metro Jet Airways that the license agreement does not come within the definition of operational debt and therefore, outstanding rent/license fee cannot be termed as operational debt under Section 5(21) of the Code.

[1] (2020) SCC OnLine NCLAT 674.

[2] (2019) SCC OnLine NCLAT 725.

- Metro Jet Airways further relied upon the case ***M. Ravindranath Reddy v. G. Kishan & Ors.***[3] and ***Promila Taneja vs. Surendri Designe Pt. Ltd.***[4] wherein NCLAT held that lease rental does not amount to operational debt.

DECISION/ANALYSIS BY NCLAT:

- NCLAT noted that the definition of operational debt as mentioned under Section 5(21) of the Code provides that the operational debt means a claim arising out of provision of goods and services but the term "services" is not defined anywhere under the IBC.

  The Bench referred to Clause 4(b) of the license agreement which provides that the licensee shall pay all govt. taxed including GST and observed that the payment of GST is only provided for goods and service and the license agreement itself provided for payment of GST which clearly indicates that the license is taxed for services.

- It was also observed that if the agreement was not for services, then there was no requirement of payment of GST. NCLAT also held that the term operation is derived from "operate" and "operating cost" is an expense incurred in the conduct of the principal activities of the enterprise and similarly operational debt is also a debt which is incurred in the conduct of the principal activities of the enterprise.

- NCLAT further held that the judgement of three judge bench of NCLAT in the case of ***M. Ravindranath Reddy*** does not lay down the correct law as it has referred to provisions of **Section 14(1)** which has nothing to do with the extent and expense of "operational debt" under the Code. NCLAT observed that "Essential goods and services are entirely different concept and the protection under **Section 14(2)** as provided for is an entirely different context. Thus, the observations made that there has to be nexus to the direct input or output produced or supplied by the Corporate Debtor, is a much wider observation not supported by scheme of the Code."

- The bench further held that judgement of NCLAT in the case of ***Promila Taneja*** held that the definition of "service" as mentioned under Consumer Protection Act, 2019 and the Goods and Services Act, 2017 cannot be referred for the purpose of interpretation of term "Operational Debt" as these acts are not mentioned under **Section 3(37)** of the Code. However, the Bench held that in the present case, the license agreement itself provides for payment of GST and thus definition of term "service" under GST Act can be referred. Furthermore, the Bench held that since judgement of Promila Taneja

[3] Company Appeal (AT) (Ins.) No.331 of 2019.

[4] Company Appeal (AT) (Ins.) No.459 of 2020.

relied upon the case of M Ravindranath Reddy which is already held as bad law and therefore, consequently, Promila Taneja also does not lay down the correct law.

- NCLAT allowed the appeal and concluded that the claim of Licensor for payment of license fee for use of Demised Premises for business purposes is an 'operational debt' within the meaning of Section 5(21) of the Code.

OUR OUTLOOK:

- The Supreme Court has not yet decided Promila Taneja case, but the NCLAT has made a favorable decision for entities leasing commercial spaces. It has provided them with better security and leverage in the event of a default by their lessees and a footing to have its claims addressed as part of the lessee's corporate insolvency resolution process.

- According to **Section 3(33) of the Code**, the Agreement between the parties could be considered a 'transaction' and any payment claim by Jaipur Trade Expocentre arising from this Agreement would be covered by **Section 3(6)**. Accordingly, any obligation or liability arising out of a claim is considered a debt of the Corporate Debtor by **Section 3(11).**

AVANTHA HOLDINGS LIMITED & ANR. V. MR. ABHILASH LAL & ORS.

COMPANY APPEAL (AT) (INSOLVENCY) NO. 304 OF 2022

FACTS:

- FLSmidth Private Limited had filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") before the NCLT Kolkata ("Adjudicating Authority"), seeking initiation of CIRP against Jhabua Power Limited ("Corporate Debtor"). The Adjudicating Authority vide an order dated 27.03.2019 had initiated CIRP against the Corporate Debtor and Mr. Abhilash Lal ("Respondent No. 1") was appointed as Resolution Professional.

- Avantha Holdings Limited ("Appellant") is the Promoter and Shareholder of Avanta Power and Infrastructure Limited, which in turn hold 17.9% shares of Corporate Debtor. On 03.06.2019, the Appellant had submitted a One Time Settlement ("OTS") proposal to the Resolution Professional, which was considered by CoC and was not found commercially viable. Thereafter, the Resolution Professional invited Expression of Interest ("EOI") from prospective Resolution Applicants for submission of Resolution Plan on 19.08.2019.

- On 22.10.2019 NTPC Ltd. ("Respondent No.3") had submitted an affidavit certifying its eligibility under Section 29A of IBC and had informed Resolution Professional on 06.12.2019 that Ratnagiri Gas and Power Private Ltd. ("RGPPL") and Konkan LNG Private Limited ("KLL"), which were joint ventures of NTPC, have been declared Non-Performing Asset ("NPA"). The Canara Bank classified RGPPL as NPA on 21.05.2018, with effect from, 01.04.2009. Similarly, Canara Bank has classified KLL as NPA with effect from 01.04.2009. NTPC submitted its Resolution Plan on 30.12.2019 and revised the same on subsequent three occasions and had stated on affidavit that No Dues Certificates in respect of KLL has been received and with regard to RGPPL, there was no overdue amount.

- On 21.12.2020, the Appellant made a proposal to the Committee of Creditors ("CoC") under Section 12A of the IBC for settlement of debt owed by the Corporate Debtor. In a meeting dated 05.03.2021 the CoC rejected the Appellant's proposal as not being economically viable. On 16.04.2021, the NTPC submitted its revised Resolution Plan and an affidavit under Section 29A, claiming that the dues towards the lenders of KLL and RGPPL have been satisfied and lenders have provided no due certificates as on 30.03.2020 and January 2021 respectively.

- On 06.06.2021, the Appellant had filed an application bearing I.A. No.537 of 2021 before the Adjudicating Authority seeking declaration that NTPC as not compliant with Section 29A of the IBC and further praying to set-aside the CoC decision's rejecting the proposal under Section 12A. Thereafter, NTPC yet again submitted a revised Resolution Plan dated 14.06.2021, which was approved by the CoC with 100% votes. Subsequently, I.A. No.586 of 2021 was filed by the Resolution Professional before the Adjudicating Authority for approval of the Resolution Plan. The Adjudicating Authority vide an order dated 08.03.2021 rejected the I.A. No.537 of 2021 filed by the Appellant and held that the NTPC is not disqualified under Section 29A of the IBC. The Appellant filed an appeal before the NCLAT challenging the Order dated 08.03.2021; seeking disqualification of NTPC under Section 29A of IBC; and praying to set-aside decision of the CoC rejecting the proposal of the Appellant under Section 12A of IBC.

APPELLANT'S CONTENTION:

- The Appellant argued that IBC does not contemplate submission of more than one Resolution Plan and NTPC had submitted four plans. The Appellant argued that the Canara Bank had classified RGPPL as NPA on 21.05.2018, with effect from, 01.04.2009 and had classified KLL as NPA with effect from 01.04.2009. Even if, the claim that RGPPL and KLL entered into OTS with lenders and no due certificates were issued, the payment having not been made by NTPC, the proviso to Section 29A(c) is not attracted. The payment of all overdue amounts has to be made by person, who is to submit the Resolution Plan and thus the ineligibility of NTPC cannot be said to have been removed by no due certificates granted by lenders in March 2020 and January 2021. Further, the CoC rejected the OTS

proposal of the Appellant under Section 12A with non-application of mind and over no reasonable basis of rejection.

CONTENTIONS OF THE NTPC:

- NTPC submitted that the Canara Bank has classified RGPPL and KLL as NPA on 21.05.2018 and by that time period of one year from the date of commencement of CIRP has not elapsed. CIRP having commenced on 27.03.2019, disqualification under Section 29A(c) was not attracted. The NTPC was not ineligible to submit its Resolution Plan on 30.12.2019 and when it was not ineligible at the time of submission of first Resolution Plan, there is no occasion of attaching any eligibility during submission of subsequent revised Plans.

- It was further submitted that entire debt of KLL was settled through OTS in March 2020 and all lenders have issued no due certificates in March 2020 and as there was no old dues in loan account of RGPPL, no due certificates were issued by the lenders of RGPPL. On the date on 16.04.2021, when 3rd Plan was submitted, which ultimately was considered and approved in its revised form by the CoC, NTPC was fully compliant of Section 29A. By clearing all overdues by virtue of proviso to Section 29A(c), the NTPC had become eligible.

CONTENTIONS OF THE COC:

- The CoC submitted that the Appellant has proposed upfront payment of Rs. 200 crores in its OTS proposal, which was significantly lower than the NTPC Resolution Plan, which provided upfront payment of Rs. 905 crores. The CoC did not find the Settlement Plan submitted by the Appellant as commercially viable and the commercial decision taken by CoC needs no interference. The OTS proposal could only fructify after receiving 90% votes from CoC, which it failed to achieve.

DECISION OF THE NCLAT:

- The NCLAT Bench observed that Section 12A does not entitle Promoters of the Corporate Debtor to submit a Settlement Plan as is claimed by the Appellant. The pre-condition of accepting any withdrawal Application under Section 12A is on approval by CoC by 90% of its voting shares. CoC having never granted its approval, Section 12A route was never open for withdrawal of CIRP. The Bench opined that Section 12A proposal cannot be forced upon the lenders.

- The Bench held that the CoC had not committed any error in rejecting the Appellant's proposal under Section 12A and the Adjudicating Authority had correctly refused to interfere with CoC's decision. With regards to NTPC's eligibility to submit Resolution Plan, the Bench observed that Section 29A(c) is plain and clear that grace period of one year has been given and if after expiry of grace period,

Resolution Applicant is unable to pay the dues and the NPA continues, the Resolution Applicant becomes ineligible.

- The Bench observed that if contention of back dated NPA is accepted, the purpose of statutory prescription under Section 29A(c) can be defeated by the Financial Institutions by declaring NPA on particular date and making it effective from back date, so that no Resolution Applicant can take the benefit of statutory provision as provided under Section 29A(c). Therefore, the Bench considered the NPA date as 21.05.2018 and held that the period of one year had not elapsed till 27.03.2019, when CIRP commenced. Since on the date of commencement of CIRP, period of one year has not elapsed, the disqualification under Section 29A(c) shall not attach to the NTPC as a Resolution Applicant and the same is held to be eligible on 30.12.2019 and in entire process of the CIRP. Accordingly, the appeal was dismissed by the NCLAT Bench.

OUR OUTLOOK:

- A statutory requirement to wait one year from the date of classification is to ensure that if the Resolution Applicant does not get away from NPA within one year from the date of classification, it will be declared NPA. The Resolution Applicant can, however, be denied the benefit of the expression statutory requirement that "at least one year has passed since the date of such classification" if it does not actually receive the grace period, whether by a backdate, which is nine years ago.
- Thus, we believe that the Canara Bank's NPA classification date should be regarded as 21.05.2018, and not 01.04.2009, which is the backdate, with effect from which NPA is declared, as has been stated by the bank.

THE REGIONAL PROVIDENT FUND COMMISSIONER EMPLOYEES PROVIDENT FUND ORGANIZATION V. MR. VASUDEVAN RESOLUTION PROFESSIONAL & LIQUIDATOR OF M/S. TITANIUM TANTALUM PRODUCTS LIMITED

COMPANY APPEAL (AT) (CH) (INS) NO. 182 OF 2022 & IA NO. 415 OF 2022

FACTS:

- M/s. Titanium Tantalum Products Limited ("Corporate Debtor") had undergone Corporate Insolvency Resolution Process ("CIRP") and subsequently an order for liquidation was passed on 12.06.2018. The Liquidator ("Respondent") had issued a public announcement that the last date for submission of claims was 14.07.2018. The Regional Provident Fund Commissioner of the Employees Provident Fund Organization ("Appellant"), which is a Government functionary, submitted its claim

amounting to Rs. 3,09,88,511/- on 02.02.2021 i.e. after 936 days of delay. The Liquidator rejected the Appellant's delayed claim while stating that the liquidator had no power to condone the delay.

- The Appellant had filed an application before the NCLT Chennai Bench ("Adjudicating Authority") seeking condonation of delay of 936 days in claiming the dues under Employee's Provident Funds and Miscellaneous Provision Act, 1952. The Appellant further sought a direction to the Resolution Professional/Liquidator to make provision in the Information Memorandum and corresponding Resolution Plan, if any, for the payment of Claim of Rs. 3,09,88,511/- due to the Appellant.
- The Adjudicating Authority had dismissed the application vide an order dated 17.12.2021. Consequently, the Appellant filed an appeal before the NCLAT challenging the order dated 17.12.2021 passed by the NCLT.

CONTENTIONS OF THE APPELLANT:

- The Appellant submitted that it had intimated the Liquidator through various correspondences and demand notices regarding the outstanding dues. When State Bank of India had issued a Notification for E-auction of the Corporate Debtor's assets, the Appellant had issued an Order under Section 8F on the Employee's Provident Funds and Miscellaneous Provision Act ("EPF & MP, Act") on 24.12.2020 and after the E-auction, the Appellant had issued an order dated 05.01.2021 under Section 8F(iv) and 8F(3) (x) of the EPF & MP Act, 1952.
- It was argued that the Appellant being a Government Statutory Organization, catering the Workmen interests, the protection of the interests of Workmen of the Appellant would be in line with larger public interest and if the delay is not condoned, the Appellant would suffer an irreparable loss and hardship.

CONTENTIONS OF THE LIQUIDATOR:

- The Liquidator submitted that despite several communications and reminders, the Provident Fund department filed its claim on 03.02.2021. The Appellant was not meticulous in projecting its claims all through the Liquidation period and furnished its claims lately at the fag end of Liquidation period. Further, on perusal of the Appellant's claim the Liquidator noticed that the Provident Fund department had claimed PF dues for the period May 2015 to November 2018 except for the period November 2017 to May 2018 i.e., CIRP Period.
- On perusal of the TRRN Number and the Challan date, it was observed that all the challans were raised after September 2018, which is well after the Liquidation Commencement Date i.e. 12.06.2018. The Liquidator had neither uploaded the TRRN Challans nor given authorization to anyone including the employees to do the same. It was argued that collusion is suspected between the employees and the Provident Fund Department which fall within the provision of Section 66 of the IBC, dealing with

fraudulent trading or wrongful trading. The Appellant had filed the application with intent to defraud the Corporate Debtor and to make unlawful gain which is subject to be investigated by the Tribunal.

DECISION OF THE NCLAT:

- The NCLAT Bench observed that in cases where delay has occurred due to inaction, latches, bad faith or negligence of the litigant, a Tribunal or Court of Law would be reluctant to condone the delay.
- While observing that no sufficient cause can be made out for delay, the Bench held that "Just because the Appellant is a Statutory Organization, no `indulgence' or `latitude' can be shown, since the 'Law' applies to one and all in a level playing field. In reality, the Officials must act with as much as diligent as is expected from a 'Litigant', as per decision in *District Board, Sargodha V Shemas Din123 I C 83*."
- The Bench further opined that speed is the essence of IBC and time wasted or lost cannot be regained. The process of Liquidation is time bound, to be completed within one year in the teeth of IBC. Undoubtedly, the Code is an inbuilt and self-contained one and the object of the IBC 2016, is that, a time barred 'Debt' cannot be resurrected or given a fresh tenure of life, as opined by this 'Tribunal'. Thus, the bench declined to condone the delay and dismissed the appeal.

VIEWPOINT:

- Tribunals / Courts of Law are not empowered to find out a device for granting relief to someone who appears to have been hard done by. In essence, an application for the condonation of delay will undoubtedly create a 'jurisdictional bar' against consideration of tangible / substantive issues on merit. Unless the facts are pleaded and proven in a case, a Tribunal cannot determine the sufficiency of the cause.

STATE BANK OF INDIA V. SHRI GHANSHYAM SURAJBALI KURMI

CP(IB) 297/95/HBD/2021

FACTS:

- The State Bank of India ("Financial Creditor") had granted various credit facilities to Apex Drugs Limited ("Corporate Debtor") amounting to Rs. 208,21,65,555.24 Crores. The Corporate Debtor was the Principal Borrower and Shri. Ghanshyam Surajbali Kurmi ("Personal Guarantor") stood as personal guarantor in order to secure the repayment of the financial assistance so availed.
- The Corporate Debtor failed to adhere to sanction terms and neglected to operate loan accounts as per terms and conditions of the restructuring package sanction. As a result, the accounts of the Corporate Debtor were classified as Non-Performing Asset (NPA) on 30.06.2013. Consequently, the Corporate

Debtor was admitted into Corporate Insolvency Resolution Process ("CIRP") by the NCLT Hyderabad Bench ("Adjudicating Authority") vide an order dated 06.09.2018.

- The Financial Creditor had also issued a demand notice dated 16.08.2021 to the Personal Guarantor, demanding payment of the amount in default and had subsequently filed a petition under Section 95(1) of the IBC, seeking initiation of the Insolvency Resolution Process against the Personal Guarantor. The Adjudicating Authority vide an order dated 29.11.2021 had granted interim-moratorium and had appointed Shri Kanchinadham Ravi Kumar as Resolution Professional, directing him to file his report under Section 99 of the IBC. Accordingly, Resolution Professional filed his report stating that the amount of Debt as on 31.07.2021 was Rs. 208,21,65,555.24/- and the Personal Guarantor had confirmed that no payment had been made to the Financial Creditor and lack of resources to pay the amount. Hence, the Resolution Professional recommended the admission of the petition filed under Section 95 of the IBC.

CONTENTIONS OF THE PERSONAL GUARANTOR:

- The Personal Guarantor submitted that the Financial Creditor was part of the Committee of Creditors (CoC) and had voting share of 70.10%. The CoC had approved resolution plan of Successful Resolution Applicant with 100% voting, which was further approved by this Adjudicating Authority. The Clause F of the approved Resolution Plan states that, "Once the consideration as envisaged in the resolution plan is paid, all rights, security and interest including but not limited to mortgage, pledge, guarantee and hypothecation created shall stand satisfied in lieu of the said payment." Thus, the liability of the Personal Guarantor was discharged upon approval of Resolution Plan and any rights of Financial Creditor against the Personal Guarantor were forfeited after the latter gave its approval to the said resolution plan.

CONTENTIONS OF THE FINANCIAL CREDITOR:

- The Financial Creditor submitted that the Resolution Plan approved by Adjudicating Authority becomes a statutory scheme and is therefore, an act of operation of law. With approval of the Resolution Plan under the IBC, the Corporate Debtor is discharged by the operation of law and not at the instance of the creditor even if one or any of the creditors may or may not be in favor of the resolution plan.

- It was further argued any relief sought by the Resolution Applicant for the ex-management would eventually cast a doubt upon the independence of the Resolution Applicant vis-à-vis Suspended Management. The Clause-F of Resolution Plan clearly depicts the intention of Resolution Applicant of seeking reliefs and concessions as far as the Corporate Debtor only. Interpreting the said clause to

extinguish the Personal Guarantee of Personal Guarantor is not tune with objectives of the IBC and would create a scenario which would have adverse cascading effects.

- Further, the liability of Personal Guarantor is co-extensive with that of Principal Borrower and as per the Section 134 of the Indian Contract Act, 1872 a guarantor is discharged of its liability towards the creditor only if the creditor on its own instance discharges the Principal Debtor. The main ingredient of this section is discharge of the debtor through voluntary act of creditor and not due to operation of law.

DECISION OF THE ADJUDICATING AUTHORITY:

- The Adjudicating Authority affirmed the view that as per *Section 134 of the Indian Contract Act, 1872*, a guarantor is discharged of its liability towards the creditor only if the creditor on its own instance discharges the principal debtor through voluntary act of the creditor and not due to operation of law. The Bench also affirmed that the decision in *Lalit Kumar Jain vs Union of India*[5] was squarely applicable and held that a guarantor cannot enjoy a right of subrogation after conclusion of CIRP, when the payment is made by the guarantor with respect to the debt for which the guarantee is provided.

- It was observed that "therefore, we are also of the view that conclusion of Corporate Insolvency Resolution Plan does not bar Financial Creditor against Guarantor, and Financial Creditor can always approach this Adjudicating Authority as envisaged under the Code." Further, the relief under Clause-F is applicable to Corporate Debtor alone, which is in line with the aims and objectives of the IBC. If Clause F is interpreted as the extinguishment of the Guarantee of the personal guarantor, that would create a scenario which would have adverse effects. Clause F does not discharge the guarantors of the Corporate Debtor from any future liabilities.

- It was held that the Financial Creditor is also at liberty to initiate Interim Resolution Process against the Personal Guarantor as the resolution plan approved by Adjudicating Authority is not for recovery but revival. The Bench held that there was no merit in submissions made by Personal Guarantor and accordingly initiated Insolvency Resolution Process against Shri. Ghanshyam Surajbali Kurmi.

VIEWPOINT

- In accordance with Section 134 of the Contract Act, 1872, a guarantor is discharged of its liability towards the creditor only if the creditor discharges the principal debtor. Here, the debtor's discharge is based on the voluntary act of the creditor, not by operation of law.

[5] Transferred Case (Civil) No. 245/2020

- In addition, Clause-F only applies to Corporate Debtors, which is in line with the IBC's objectives. Clause F could be interpreted as extinguishing the personal guarantee of the guarantor, causing adverse consequences. The guarantors of the Corporate Debtor are not discharged from future obligations under Clause F.

- To conclude, we're also in the opinion that after the conclusion of the Corporate Insolvency Resolution Plan, Financial Creditors can still approach this Adjudicating Authority as envisaged by the Code against Guarantor.

M/S.DISHNET WIRELESS LIMITED V. ASSISTANT COMMISSIONER OF INCOME TAX (OSD)

W.P.NOS.34668 OF 2018 ALONG WITH OTHER WRIT PETITIONS AT MADRAS HIGH COURT

FACTS:

- A notice under **Section 148 of the Income Tax Act, 1961** for reopening of the assessment was issued against the assessee/petitioner M/s. Dishnet Wireless Limited. Thereafter, a Corporate Insolvency Resolution Plan was submitted by the Insolvency Resolution Professional on behalf of the assessee before the NCLT, Mumbai. After the said Resolution Plan was submitted on behalf of the assessee, proceedings for reopening of the assessment were initiated by the Income Tax Department against the assessee.

- Against the reassessment proceedings, writ petitions were filed by the assessee before the Madras High Court. The Madras High Court allowed the Income Tax Department to proceed with the reassessment, however, the department was directed to keep the assessment in a sealed cover. After the passing of the said interim order, the NCLT, Mumbai approved the Resolution Plan of the assessee.

CONTENTIONS OF THE ASSESSEE:

- The assessee M/s. Dishnet Wireless Limited submitted before the Madras High Court that the Income Tax Department was not entitled to proceed further with the reassessment proceedings in view of the definition of 'claim' as defined in **Section 3(6) of the Insolvency and Bankruptcy Code, 2016**. The assessee contended that the Government is a "corporate debtor" and hence, it cannot proceed with the reassessment proceedings since the Corporation Insolvency Resolution Plan had been approved by the NCLT, Mumbai.

- The assessee averred that all the claims existing prior to the approval of the said Corporate Insolvency Resolution Plan were extinguished. Therefore, the assessee submitted that the Income Tax Department could not proceed further with the reassessment proceedings against the assessee.

CONTENTIONS OF THE INCOME TAX DEPARTMENT:

- The Income Tax Department contended that writ petitions were filed by the assessee after a Moratorium under **Section 14 of the Insolvency and Bankruptcy Code** came into force. The Income Tax Department averred that the said Moratorium did not preclude the Income Tax Department from re-opening the concluded assessment under **Section 148 of the Income Tax Act, 1961**.

- The Income Tax Department averred that only a notice under **Section 148 of the Income Tax Act** had been issued to the assessee before the Resolution Plan was submitted by it under the Insolvency and Bankruptcy Code, and that the assessee's objections against reopening of the assessment had been overruled by a speaking order. Thus, the Income Tax Department submitted that since the claim of the Income Tax Department had not been crystalized by way of an Assessment Order, therefore, the said claim cannot be said to be extinguished. The Income Tax Department submitted that there is no bar under the law that inhibits the income tax authorities' power to continue with the reassessment proceedings initiated under Section 148 of the Income Tax Act.

Decision of the Madras High Court:

- The Court noted that the Supreme Court in the case of ***Ghanashyam Mishra & Sons (P) Ltd. Vs. Edelweiss Asset Reconstruction Co. Ltd.***[6] had held that the 2019 Amendment to **Section 31 of the Insolvency and Bankruptcy Code, 2016** is clarificatory and declaratory in nature and hence, it will have a retrospective operation. Thus, the Supreme Court had held that all the dues, including the statutory dues owed to the Central Government, State Government or any local authority, if not a part of the Resolution Plan, shall stand extinguished. The Supreme Court had ruled that no proceeding could be continued in respect of such dues for the period prior to the date on which the adjudicating authority had approved the Resolution Plan under **Section 31 of the Insolvency and Bankruptcy Code**.

- The Court observed that upon admission of petitions for initiation of corporate insolvency resolution process under **Section 7 of the Insolvency and Bankruptcy Code**, various important duties and functions are entrusted on the Resolution Professional and the Committee of Creditors (CoC), who are required to deeply scrutinized the Resolution Plans. The Court added that after the CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the Resolution Plan conforms to the requirements provided under **Section 30(2) of the Insolvency and Bankruptcy Code**.

[6] (2021) 9 SCC 657

- The Court noted that the Resolution Plan submitted by the Insolvency Resolution Professional on behalf of the assessee had not contemplated any concession from the Income Tax Department, despite the fact that notices under **Section 148 of the Income Tax Act** had already been issued to the assessee before the submission of the said Resolution Plan. The Court observed that the Corporate Insolvency Resolution Plan approved under Section 31 of the Insolvency and Bankruptcy Code did not contemplate the assessee's tax dues under the Income Tax Act. Also, the Court noted that the reassessment proceedings under the Income Tax Act had not been crystallized at the stage of approval of the said Resolution Plan.

- The Court held that since the proceedings under the Insolvency and Bankruptcy Code were initiated prior to the initiation of the reassessment proceedings under the Income Tax Act, the assessee should have obtained appropriate concession in the said Corporate Insolvency Resolution Plan. The Court added that the claims of the Income Tax Department were not considered by the NCLT, Mumbai, while approving the Resolution Plan. Thus, the Court held that the power of the Income Tax Department to initiate reassessment proceedings under **Section 148 of Income Tax Act** and pass a fresh assessment order cannot be impinged by the said Corporate Insolvency Resolution Plan.

- The Court ruled that the provisions of Insolvency and Bankruptcy Code cannot be interpreted in a manner which is inconsistent with any other law in the time being in force. Thus, the Court held that the proceedings under the Insolvency and Bankruptcy Code, 2016 cannot dilute the rights of the Income Tax Department to reopen the assessment under **Section 148 of the Income Tax Act**. Therefore, the Court ruled that the Income Tax Department cannot be precluded from reopening the assessment under the Income Tax Act.

- The Court, thus dismissed the writ petitions. The Court directed the Income Tax Department to communicate to the assessee the Assessment Orders passed by the Income Tax Department pursuant to the interim orders issued by the High Court. The Court granted liberty to the assessee to file an appeal before the Commissioner of Income Tax (Appeals) against the said Assessment Orders, within thirty days from the date of communication of the Assessment Orders.

VIEWPOINT

- Despite the proceedings under the Insolvency and Bankruptcy Code, 2016, the Income Tax Department has the right to reopen the assessment under Section 148 of the Income Tax Act. In light of this decision, it can be said that the Income Tax Department has the right to reopen the assessment under the Income Tax Act.

TEJAS KHANDHAR V. BANK OF BARODA

Company Appeal (AT) (INSOLVENCY) No. 371 of 2020

FACTS:

- Bank of Baroda ("Financial Creditor/Respondent") had extended financial assistance to the Mr. Tejas Kandhar ("Corporate Debtor"/ "Appellant") to the tune of Rs.9,91,00,000/-. On 08.10.2013, a loan recall Notice under **Section 13(2) of the SARFAESI Act, 2002** was issued by the Financial Creditor to the Corporate Debtor, demanding payment of Rs. 6,11,42,097/-. In 2016, the Debt Recovery Tribunal ('DRT') had allowed the Financial Creditor to recover a sum of Rs.50,00,000/- and thereafter a sum of Rs.20,00,000/- towards interest. A One Time Settlement ('OTS') proposal dated 01.08.2016 was filed before the DRT, Pune by the Corporate Debtor which remained unaccepted. Subsequently, another OTS proposal dated 07.03.2018 was accepted by the Financial Creditor on 27.03.2018. However, the Corporate Debtor failed to fulfill its repayment obligations.

- The Financial Creditor filed a petition under **Section 7 of the Insolvency and Bankruptcy Act, 2016 ("IBC")**, seeking initiation of Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor. The Adjudicating Authority admitted the application and initiated CIRP against the Corporate Debtor vide an order dated 10.01.2020. The Corporate Debtor filed an appeal before the NCLAT, challenging the initiation of CIRP.

CONTENTIONS OF THE APPELLANT:

- The Corporate Debtor (Appellant) submitted that the 'date of default' was 01.07.2013 and the date of NPA was 22.09.2013, whereas the Financial Creditor had filed the petition on 11.07.2019. Three years period of limitation had expired on 22.09.2016, therefore, the petition was barred by limitation. Further, the Financial Creditor had not raised the plea of extension of Limitation or 'acknowledgement of debt' under **Section 18 of the Limitation Act, 1963** and therefore cannot agitate this plea at such a belated stage.

DECISION OF THE NCLAT:

- The Bench relied on the Supreme judgment of Dena Bank v C. Shivkumar Reddy and Anr.[7] The Bench observed that the Corporate Debtor has addressed a letter dated 22.11.2018 to the DGM, Bank of Baroda stating that as per 'Mutually Agreed Settlement Terms' they had so far paid a sum of Rs.3,25,00,000/- and have also deposited a sum of Rs.50,00,000/- in DRT Pune.

[7] (2021) 10 SCC 330

- The Bench observed that it is seen from the record that the date of default has been mentioned as 13.09.2013, which stood revived with the OTS proposal dated 01.08.2016 filed vide I.A. 1155/2016 before the DRT Pune, well within the three-year period. Subsequently, another settlement proposal dated 07.03.2018 was accepted by the Bank on 27.03.2018, wherein a timeline was provided for the payment of the balance amount. We are of the considered view that the OTS proposal dated 01.08.2016 filed vide I.A. 1155/2016 falls within the ambit of 'acknowledgement of debt' as defined under **Section 18 of the Limitation Act, 1963**, which is further fructified by the admitted OTS dated 27.03.2018 again within three years of the previous proposal where the 'debt' is acknowledged to be 'due and payable'.

- The Bench thus held that the OTS proposal dated 01.08.2016 and 27.03.2018 fall within the definition of the ambit of 'acknowledgement of debt' as envisaged under **Section 18 of the Limitation Act, 1963** and accordingly dismissed the appeal filed by the Corporate Debtor.

VIEWPOINT:

- It appears that the date of default was 13.09.2013, which was revived with the OTS proposal dated 01.08.2016 filed before the DRT Pune, well within the three-year period. A second settlement proposal dated 07.03.2018 was then accepted by the Bank on 27.03.2018, which provided a timeline for the payment of the balance amount. Our considered opinion is that the OTS proposal dated 01.08.2016 filed in response to I.A.1155/2016 falls within the scope of "acknowledgement of debt" according to **Section 18 of the Limitation Act, 1963**, which is further substantiated by the admitted OTS dated 27.03.2018, which again acknowledges the "debt" as due and payable within three years of the previous proposal.

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