IBC

Recent Judgments

1. B.K Educational Services (P) Ltd. Vs. Parag Gupta and Associates [Civil Appeal No. 23988 of 2017]

This case arose from a batch of matters in which the National Company Law Appellate Tribunal (**"NCLAT"**) had held that the Limitation Act does not apply to applications made under Sec.7 and Sec.9 of IBC from the date of commencement of IBC,(i.e., 01.12.2016) till the date on which the law was amended by incorporating Sec. 238A, IBC i.e., 06.06.2018.

The NCLAT had held that even if it was to be assumed that Limitation Act is applicable to filing of an application to initiate insolvency proceedings under IBC, since IBC commenced on 01.12.2016 three years have not elapsed from the date when the right to apply accrued.

The Supreme Court here in this case held that:

a. An application filed after the IBC came into force in 2016, cannot revive a debt which is no longer due, having become time- barred.
b. The amendment of Sec. 238A would not serve its object unless it is construed as being retrospective. Otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation.
c. It is clear from a reference to the Insolvency Law Committee Report of March, 2018, that the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of IBC.
d. Section 433 of the Companies Act, 2013 which makes the provisions of Limitation Act applicable to proceedings or appeals before the NCLT or NCLAT, was applicable from the very inception of IBC.
e. The expression "debt due" in the definition sections of IBC has already been interpreted by the Supreme Court to mean debts that are "due and payable" in law, i.e., the debts that are not time-barred. The Supreme Court has referred to its earlier judgment in ***Innoventive Industries Ltd. v. ICICI Bank & Anr.*, (2018) 1 SCC 407** wherein it had held that "*a debt may not be due if it is not payable in law or in fact".*
f. Since the Limitation Act is applicable to applications filed under Sections 7 and 9 of IBC from the inception of IBC, Article 137 of the Limitation Act gets attracted. Article 137 of the Limitation Act provides the period of limitation in case of *"any other application for which no period of limitation is provided elsewhere*" as three years from the time when the right to apply accrues. "The right to sue", therefore, accrues when a default occurs.

g. If the default has occurred three years prior to the date of filing of application under IBC, the application would be barred under Article 137 of the Limitation Act, except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applicable to condone the delay in filing such application.

2. **STATE BANK OF INDIA Vs. V. RAMAKRISHNAN & ANR. [Civil Appeal No. 3595 of 2018]**

The scope of Moratorium u/s 14, IBC was discussed by Supreme Court in this case. In this matter, first respondent was personal guarantor in respect of credit facilities availed by Corporate Debtor (here in referred to as "CD") from SBI, the appellant. Since, the CD did not pay its debt in time, the appellant issued a notice under the SARFAESI Act demanding outstanding payment from the respondents. Since no payment was made, a possession notice under the SARFAESI Act was issued. Meanwhile, the CD filed an application under section 10 of the Code for initiation of its own insolvency, which was admitted by the Tribunal and moratorium under section 14 of the Code got attracted. The first respondent filed an application before the NCLT pleading that moratorium would apply to the personal guarantor and as a result, the proceedings against him and his property be stayed. The NCLT allowed the interim application restraining the appellant from moving against the first respondent. The Appellate Tribunal, dismissed the appeal against the order of the NCLT.

The Supreme Court considered the issue whether section 14 of the Code, which provides for a moratorium, would apply to a personal guarantor of a CD. It noted that section 14 refers to the CD and the CD alone. It observed: "Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said Section. A plain reading of the said Section, therefore, leads to the conclusion that the moratorium referred to in Section 14 will have no application to personal guarantors of a corporate debtor. It also noted that the scope of moratorium under section 14 is different from that under sections 96 and 101. It observed: "We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, the protection of the moratorium under these Sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed.

The difference in language between Sections 14 and 101 is for a reason. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and coextensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, in so far as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor – often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor." It took note of the amendment in section 14 (3) of the Code which makes it clear that section 14 does not apply to a surety. Accordingly, it allowed the appeal.

3. **ARCELORMITTAL INDIA PRIVATE LIMITED Vs. SATISH KUMAR GUPTA & ORS**. **[CIVIL APPEAL NOs. 9402-9405 OF 2018]**

The Supreme Court exercised its extraordinary power under Article 142 of the Constitution and granted one more opportunity to mining major Arcelor Mittal and Russia's VTB Capital-backed NuMetal to bid for Essar Steel if they clear their NPA dues in two weeks.

A bench comprising Justices R F Nariman and Indu Malhotra held that both the firms were ineligible under Section 29 A (c) of the Insolvency and Bankruptcy Code to bid for the firm but granted them a fresh opportunity after taking note of the plea of Committee of Creditors that it does not want liquidation of Essar Steel.

The top court held that if nothing materializes within eight weeks then Essar Steel shall go into liquidation. It also said that time lost in National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT) and apex court in dealing with cases under insolvency code shall be excluded from mandatory 270 days resolution period.

NCLAT had ruled that NuMetal's second bid for Essar Steel was eligible, but the same by Arcelor Mittal would qualify only if it cleared the Rs 7,000 crore dues of two firms it was previously associated with.

While Arcelor Mittal had challenged the order asking it to pay Rs 7,000 crore to become eligible for the bidding, NuMetal had alleged that NCLAT had "wrongly" applied legal provisions to enable its rival bidder to pay the dues of two debt-ridden firms.

4. **CHITRA SHARMA AND ORS Vs. UNION OF INDIA AND ORS [WRIT PETITION (CIVIL) NO 744 OF 2017]**

The Supreme Court, which had stalled insolvency proceedings against Jaypee Infratech to protect the interests of homebuyers, has referred it back to the insolvency court to start the process afresh under a new committee of creditors that includes homebuyers.
The top court also directed the Reserve Bank of India (RBI) to initiate similar resolution proceedings against parent company Jay Prakash Associates Ltd (JAL), observing that an audit had shown diversion of Rs. 10,000/- Crore from Jaypee Infratech to JAL. “JAL is undergoing a serious financial crisis,” said a bench led by Chief Justice of India Dipak Misra.
It hasn’t been able to pay Rs. 2,000 crore since September 11, 2017, and has so far only paid Rs. 750 crore, the bench observed. The company also owes more than Rs. 30,000 crore to 30 banks, it noted.

The SC also allowed second round of bidding for Jaypee Infratech but barred Jaypee Associates (JAL) and Jaypee Infratech (JIL) from participating in the resolution proceedings under section 29A of the Insolvency and Bankruptcy Code (IBC).

The bench of CJI and Justices AN Khanwilkar and DY Chandrachud also refused to refund any money to the homebuyers, saying it would be unfair to other creditors, and transferred Rs. 750 crore lying with it to National Company Law Tribunal (NCLT), Allahabad, to be disbursed eventually among creditors. That would take time.
However, in a rare show of unity, both homebuyers and Jaypee Associates have argued against liquidation.
The apex court had earlier reserved its order on "interim reliefs" sought by various stakeholders, including the home buyers of JIL, JAL, banks and financial institutions and the Insolvency Resolution Professional (IRP).
IDBI bank had moved the Corporate Insolvency Resolution application before the NCLT against the debt-ridden realty firm, JIL, after it allegedly defaulted in paying back a loan of Rs. 526 crore.

5. **Pr. Commissioner of Income Tax Vs. Monnet Ispat and Energy Ltd. [SLP No. 6483 of 2018]**

Upholding an order of the Delhi High Court, the Hon'ble Supreme Court held that in view of section 238 of the IBC Code, 2016, the provisions in the Code will override anything inconsistent contained in any other enactment, including Income-Tax Act.

6. **Shah Brothers Ispat Pvt. Ltd. Vs. P. Mohanraj & Ors. [CA (AT) (Insolvency) No. 306 of 2018]**

The question that arose for consideration in this case was whether the order of moratorium covers a criminal proceeding under section 138 of the Negotiable Instruments Act, 1881 which provides punishment of imprisonment for a term which may extend to 3 years or with fine which may extend to twice the amount of cheque or with both. The NCLAT held that section 138 is a penal provision, which empowers the court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceeding or any judgment or decree of money claim. Imposition of fine cannot be held to be a money claim or recovery against the CD nor order of imprisonment, if passed by the court of competent jurisdiction on the Directors, they cannot come within the purview of section 14 of the Code. It observed: "In fact no criminal proceeding is covered under Section 14 of I&B Code.

7. **Mr. Suresh Narayan Singh Vs Tayo Rolls Limited [CA (AT) (Insolvency) No. 112 of 2018]**

The Adjudicating Authority rejected, the application filed by the authorized representative of 284 workers of 'Tayo Rolls' under section 9 of the Code as it was filed jointly by the OCs, and not individually. While setting aside the said order on appeal, the NCLAT observed: "Section 5(20) read with Section 5(21) of the I&B Code makes it clear that the workmen of a Company come within the meaning of 'Operational Creditor'. If Sections 8 & 9 are read with Form-5, it will be clear that the person authorized to act on behalf of the 'Operational Creditor' is entitled to file an application under Section 9. Therefore, where workmen/employees are 'Operational Creditors', the application may be made either by an 'Operational Creditor' in an individual capacity or in a joint capacity by one of them who is duly authorized for such purpose. It also held that if there is a 'debt' and there is a 'default', the application being complete, the AA should have entertained it, instead of raising a technical ground that it was filed on behalf of 284 workmen.

8. State Bank of India v. Shakti Bhog Foods Limited [Civil Appeal No. 4536/2018]

The Appellant had filed an application under Section-7 of IBC, 2016 before the NCLT-Principal Bench, New Delhi. The NCLT had rejected the application on the ground that the High-Court had already admitted the winding-up petition against the same Respondent.
The Appellant challenged the order of NCLT on the basis of Section 238 of IBC, 2016. It was submitted that the IBC, 2016 has an overriding effect and thus pendency of proceedings before the High Court is not a bar to initiate CIRP.

The NCLAT observed that similar issue had taken place in the case of ***Unigreen Global Private Limited Vs. Punjab National Bank & Ors (AT)****,* wherein it was held that when any winding up proceedings are initiated against the Debtor by the High Court/ Tribunal in such case CIRP cannot be initiated.

The NCLAT held that the High Court had already admitted the winding up proceedings and ordered for winding-up of the Respondent and hence CIRP cannot be initiated against the same.

9. State Bank of India Vs. D. S. Rajender Kumar [Company Appeal (AT) (Insolvency) No. 87 to 91/2018]

The Adjudicating Authority (AA) did not allow the financial creditors to proceed against the personal guarantors till the moratorium period came to an end. While disposing of the appeal against the said order, the NCLAT reiterated its decision in the matter of ***State Bank of India Vs. V. Ramakrishnan & Ors***. It, however, made clear that order of moratorium would be applicable only to the proceedings against the CD and the personal guarantor, if pending before any court of law/tribunal or authority. The order of moratorium will not be applicable for filing application for triggering CIRP under sections 7, 9 or 10 of the Code against the guarantor or the personal guarantor under section 60 (2). If CIRP has been initiated against the CD, the insolvency and bankruptcy process against the personal guarantor can be filed under section 60 (2) before the same NCLT and not before the Debt Recovery Tribunal.

10. **Quinn Logistics India Pvt. Ltd. Vs. Mack Soft Tech Pvt. Ltd. & Ors**. **[Company Appeal (AT) (Insolvency) No. 185 of 2018]**

In this matter, the CIRP remained stayed for about 166 days due to an interim order passed by the Adjudicating Authority (AA). The AA failed to exclude the period of 166 days from the CIRP period. The NCLAT observed that it is always open to the AA to exclude certain period for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion, in unforeseen circumstances.

It listed out the following good grounds and unforeseen circumstances, for excluding the intervening period for counting of the total period of 270 days:-

(a) If the CIRP is stayed by a court of law or the AA or the Tribunal or the Supreme Court;

(b) If no RP is functioning for one or other reason during the CIRP, such as removal;

(c) The period between the date of order of admission/moratorium is passed and the actual date on which the RP takes charge for completing the CIRP;

(d) On hearing a case, if the AA or the Appellate Tribunal or the Hon'ble Supreme Court reserved the order and finally passed order enabling the RP to complete the CIRP;

(e) If the CIRP is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and CIRP is restored; and

(f) Any other circumstances which justifies exclusion of certain period.

11. Tarini Steel Company Pvt. Ltd. v. Trinity Auto Components Ltd. & Anr. [Company Appeal (AT) (Insolvency) No. 75 of 2018]

The Appeal was filed by the Tarini Steel Company Pvt. Ltd., Resolution Applicants for the Corporate Debtor, to NCLAT against an order passed by NCLT, Mumbai. Subsequent to the admission of application against the Debtor, an “expression of interest” was called for. In this regard, only the Appellant approached the NCLT with a Committee of Creditor (COC) approved Resolution Plan. The Resolution Applicants were existing promoters of the Company. The NCLT accepted the Resolution Plan and observed that the certificate declaring the promoters not to be “willful defaulter” made them eligible to submit a Resolution Plan under Sec: 29A of the Code. However, the NCLT modified the Resolution Plan considering the financially stressed position of the Debtor Company.

The aggrieved Resolution Applicant approached the NCLAT contending that the Adjudicating Authority had no jurisdiction to modify the ‘resolution plan’ once approved by the Committee of Creditors.

The NCLAT found that the modification made by the NCLT was not illegal. It further observed that if the Appellant’s claim was admitted, the NCLT would have no other choice but to reject the Resolution plan and thereby order for liquidation of the Debtor Company. The same was however, not intended by the Appellant. The NCLAT thus, disposed of the Appeal by granting liberty to the Appellant to withdraw the resolution plan, if it was not satisfied with the amendment made therein.