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*Innoventive Industries Ltd. v ICICI Bank**

ABSTRACT

Indian insolvency regime was hazy and inefficient until the government came up with the Insolvency and Bankruptcy Code, 2016. The code attempts to resolve several long-standing issues but at the same time it faces several difficulties that every new legislation faces. The first application under the code was made to the National Company Law Tribunal (NCLT) by ICICI Bank against their corporate debtors- Innoventive industries Ltd. The Innoventive Industries Ltd. challenged the order of the NCLT in the appellate authority. Several important questions were answered in the judgment by the appellate authority on 15th May, 2017.

INTRODUCTION

India currently ranks 130 in the World Bank's index on the ease of resolving insolvencies.[1] India's feeble insolvency regulations, inefficiencies and systematic abuse are the major reasons for the state of credit markets in India. There were more than one overlapping laws and forums dealing with insolvency of companies and individuals in India. The framework did not aid lenders in effective and quick recovery or restructuring of defaulters caused undue strain on the Indian credit system. On realising that changes in the bankruptcy and insolvency regime are critical for making the business environment better and raising distressed credit markets, the Indian government introduced the Insolvency and Bankruptcy Code Bill in November 2015.

The Insolvency and Bankruptcy Code, 2016 (the Code) was passed by the Parliament in 2016 and it has been welcomed with overhaul of the existing regime dealing with insolvency. The

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[1] http://www.worldbank.org/, last accessed on 1st June 2017.

Code paves the way for much needed reforms and simultaneously focusing on creditor driven insolvency resolution. The Code provides an umbrella and comprehensive insolvency legislation covering all companies, partnerships as well as individuals.

One of the fundamental features of the Code is that it allows creditors to assess the viability of a debtor as a business decision, and agree upon a plan for its revival or a speedy liquidation. The Code creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms, that will facilitate a formal and time bound insolvency resolution process and liquidation.

In the matter of **Innoventive Industries Ltd. v ICICI Bank & Anr.,**[2] a landmark judgment was delivered by the National Company Law Appellate Tribunal (NCLAT) in its order dated **15th May 17, 2017.** The Appellate tribunal ruled on certain important requirements to be complied with at the time of admitting an application under Section 7 of the Code. Section 7 of the Code provides for initiation of an insolvency resolution process by a financial creditor against a corporate debtor.

The NCLAT dismissed the appeal against the order[3] passed by NCLT (Mumbai Bench) admitting and initiating insolvency resolution against Innoventive Industries by ICICI Bank and elucidated that adherence to principles of natural justice does not mean that in every situation the NCLT is bound to provide reasonable opportunity of hearing to the corporate debtor before passing its order.

Facts of the case in brief

Innoventive Industries Ltd. (the "corporate debtor") based in Pune, Maharashtra had taken working loan, term loan and external commercial borrowing facilities from ICICI Bank Ltd. (the "financial creditor"). A default in repayment occurred in respect of partial debt on 30 November 2016 for total outstanding amount of Rs. 1,019,177,034/-. Therefore, the financial creditor initiated application under section 7 of the Code, for corporate insolvency resolution process against the corporate debtor. The corporate debtor claimed that, the Maharashtra Government, under the provisions of the MRU Act has provided a "relief undertaking" to them. According to the corporate debtor, for a period of one year from 22 July, 2016 to 21 July, 2017,

[2] Innoventive Industries Ltd. v ICICI Bank & Anr. Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017.

[3] Order dated 17 January, 2017 as modified by the order dated 23 January, 2017.

the affairs of the industrial undertaking shall be conducted to aid as a measure of preventing unemployment. Moreover, it was contended by them that, as a result of the undertaking the rights, privileges, obligations or liabilities accrued or incurred prior to 22 July, 2016 and any remedy for the enforcement of the same shall remain suspended, and all proceedings relating thereto pending before any Court, Tribunal, Officers or Authority shall be stayed, for the said time period.

Rejecting the contentions of the corporate debtor, the NCLT admitted the application of the financial creditor and made an order for moratorium and public announcement as necessary under Section 13 of the Code.

The main contentions raised by Innoventive in the appeal against the order of NCLT were:

1. The order was passed sans giving notice to Innoventive and was thus violative of the principle of natural justice as provided under Section 424 of the Companies Act, 2013. It was also argued that since NCLT was established under the Companies Act, 2013, it is bound by section 420 of Companies Act, 2013, which mandated 'reasonable opportunity of being heard' to be given to the parties before delivering an order.
2. It was argued that the provisions of Maharashtra Relief Undertaking (Special Provisions Act, 1958 will prevail over the Code as it was a beneficial piece of legislation.
3. It was argued that the financial creditor did not get consent of the Joint Lenders Forum to initiate the proceedings.

Vital observations made in the judgment

1. *Adherence to principles of natural justice:* While dealing with the issue whether issuance of notice to the corporate debtor before initiation of corporate insolvency resolution process is necessary, the appellate tribunal relied on landmark judgments of Maneka Gandhi v Union Of India[4], Union Of India v J. N. Sinha[5], Swadeshi Cotton Mills v Union

[4] Maneka Gandhi v Union Of India (1978) 1 SCC 248.

[5] Union Of India v J. N. Sinha (1970) 2 SCC 458.

Of India[6], State of Orissa v Bina Pani[7], A. K. Kraipak v Union Of India[8], etc and drew out the exceptions to the application of principles of natural justice.

In Maneka Gandhi v Union of India[9], it was held by Supreme Court that

> *"audi alteram partem rule is intended to inject justice into the law and not defeat the ends of justice , or to make the law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation"*[10]

In Union of India v J. N. Sinha[11], it was held by Supreme Court that principles of natural justice cannot be equated with fundamental rights. If the legislature excludes the application of principles of natural justice, then the court cannot ignore the mandate of the legislature or the statutory authority.[12]

In A. K. Kraipak v Union of India[13], Hon'ble Supreme Court held that principles of natural justice can supplement the law but not supplant it.

In Union of India v W. N. Chadha[14], their Lordships, while adverting to the issue of applicability of the doctrine of natural justice, have ruled that rule of audi alteram partem can be excluded where the rule itself leads to injustice.[15]

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[6] Swadeshi Cotton Mills v Union Of India (1981) 1 SCC 664.

[7] State of Orissa v Bina Pani AIR 1967 SC 1269.

[8] A. K. Kraipak v Union Of India (1969) 2 SCC 262.

[9] Maneka Gandhi v Union Of India (1978) 1 SCC 248.

[10] Para 23, NCLAT order, Innoventive Industries Ltd. v ICICI Bank, dated 15th May, 2017.

[11] Union Of India v J. N. Sinha (1970) 2 SCC 458.

[12] Para 25, NCLAT order, Innoventive Industries Ltd. v ICICI Bank, dated 15th May, 2017.

[13] A. K. Kraipak v Union Of India (1969) 2 SCC 262.

[14] Union of India v W. N. Chadha 1993 Supp. (4) SCC 260.

[15] Para 29, NCLAT order, Innoventive Industries Ltd. v ICICI Bank, dated 15th May, 2017.

In Union of India v Tulsiram Patel[16], Hon'ble Supreme Court observed that, *"the right of opportunity to be heard can be excluded where the nature of action taken, its objects and purpose and the scheme of the relevant statutory provision warrant its exclusion"*[17]

In D.K. Yadav v. J.M.A. Industries Limited[18], the Hon'ble Supreme Court has held as follows:-

> *"Particular statute or statutory rules or orders having statutory flavour may also exclude the application of the principles of natural justice expressly or by necessary implication. In other respects the principles of natural justice would apply unless the employer should justice its exclusion on given special and exceptional exigencies."*[19]

In S.L Kapoor v. Jagmohan[20] the Hon'ble Supreme Court was of the view:

> *"Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not insist on the observance of the principles of natural justice."*[21]

In Dharampal Satyapal v Deputy Commissioner Central Excise[22], Hon'ble Apex court was of the view that if it is felt that a hearing would not change the ultimate conclusion reached by the decision maker, then no legal duty to supply a hearing arises.[23]

From the aforesaid decisions of the Hon'ble Supreme Court, the exceptions to the Principle of natural justice were summarized as follows:

(i) Exclusion in case of emergency.

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[16] Union of India v Tulsiram Patel AIR 1985 SC 1416.

[17] Para 28, NCLAT order, Innoventive Industries Ltd. v ICICI Bank, dated 15th May, 2017.

[18] D.K. Yadav v. J.M.A. Industries Limited (1993) 3 SCC 259.

[19] Para 30, NCLAT order, Innoventive Industries Ltd. v ICICI Bank, dated 15th May, 2017.

[20] S.L Kapoor v. Jagmohan, (1980) 4 SCC 379.

[21] Para 40, NCLAT order, Innoventive Industries Ltd. v ICICI Bank, dated 15th May, 2017.

[22] Dharampal Satyapal v Deputy commissioner central Excise (2015) 8 SCC 519.

[23] Para 34, NCLAT order, Innoventive Industries Ltd. v ICICI Bank, dated 15th May, 2017.

(ii) Express statutory exclusion.

(iii) Where disclosure would be prejudicial to the public interest.

(iv) Where prompt action is needed.

(v) Where it is impracticable to hold hearing or appeal.

(vi) Exclusion incase of purely administrative actions.

(vii) Where no right of the person is infringed.

(viii) The procedural defect would have made no difference to the outcome.

(ix) Exclusion on ground of 'no fault' decision maker.

(x) Where the compliance with principles of natural justice is a useless formality.

The NCLAT also cited a very recent Calcutta High Court decision in the case of Sree Metaliks Limited & Anr v Union of India[24], wherein the Court held:

"A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application.

The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires

[24] Sree Metaliks Limited & Anr v Union of India (Writ Petition 7144 (W) of 2017).

the NCLT to ascertain the default of the corporate debtor. Such ascertainment of default must necessarily involve the consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed against it. The proceedings before the NCLT are adversarial in nature. Both the sides are, therefore, entitled to a reasonable opportunity of hearing."

There is no specific provision under the code to provide hearing to corporate debtor in a petition under section 7 or 9 of the code. Section 5(1) of the Code talks about "adjudicating authority" which refers to the "NCLT" constituted under Section 408 of Companies Act 2013. Further, section 420(1) says that reasonable opportunity of hearing shall be given to the parties before passing its orders.

The tribunal observed that the case of Innoventive does not fall into exceptions to application of principles of natural justice and the issuance of notice is mandatory. However, in this present case, though no notice was given to the Appellant before admission of the case, the appellant intervened before the admission of the case and all the objections and contentions raised by the appellant have been heard and considered by NCLT on 17th January 2017. Hence, just on the grounds of non issuance of notice the matter cannot be remitted back to the "adjudicating authority" as it would merely be a "useless formality"

2. Insofar as the Master Restructuring agreement was concerned, it was held that the appellant cannot take advantage of the same. Even if it is presumed that a fresh agreement came into force, it does not absolve the appellants from paying any previous debts due to the financial creditor.

3. *Distinction between Sections 7 & 9 of the Code:* Under Section 7, the default has to be ascertained and satisfaction has to be recorded by the Adjudicating Authority. Whereas, there is no similar provision under Section 9 of the Code. While in Section 7 neither a notice of dispute nor a notice of demand is relevant, in Sections 8 and 9 notice of dispute and notice of demand become relevant for the purposes of admission and rejection.

4. *Ascertainment and Satisfaction:* The statute makes it compulsory for the Adjudicating Authority to ascertain and record satisfaction regarding the occurrence of default prior to admitting the application. Mere claim made by the financial creditor that the default has taken place does not suffice.

5. *Overriding effect of the Code:* Section 238 of the Code vividly requires that the provisions of the Code shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.[25] The appellate tribunal was of the view that the appellants are not protected under Maharashtra Relief Undertaking Act, 1956 because the Code is non-obstanate in nature. It was observed that Maharashtra Relief Undertaking Act and the Insolvency and Bankruptcy Code have completely different areas of application.

6. The NCLAT rejected the appellant's contention that the respondent's insolvency application is liable to be rejected as the financial creditor had not obtained consent of Joint Lenders Forum before filing the insolvency application by holding that the NCLT is not bound to look into this before admitting the application.

CRITICISM

The NCLAT order states that the decision o the NCLT ought to have severe impacts on the welfare and existence of a company and hence, it is imperative for the authority to adopt a cautious approach while admitting an insolvency application by ensuring adherence to the principles of natural justice. Evidently, the order is capable of delaying and slowing down the adjudication process.

Another significant ruling of NCLAT in JK Jute Mills Co. Ltd. v Surendra Trading Co.[26], where it examined the nature of time limits (whether mandatory or directory) prescribed under the Code, including those for the admission or rejection of an insolvency application by the NCLT, can add to the difficulties of the creditors and eventually defeat the purpose of speedy redressal. The NCLAT in this case, held that the time limit of 14 days for the NCLT to admit or reject an application for initiating insolvency proceedings under sections 7, 9 and 10 is directo-

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[25] Section 238, Insolvency and Bankruptcy Code, 2016.

[26] Jute Mills Co. Ltd. v Surendra Trading Co. Company Appeal (AT) No. 9 of 2017.

ry rather than mandatory, and that the NCLT has inherent powers to extend the 14 day period on a case-to-case basis in the interest of fairness and justice.[27]

If the above-mentioned judgment of NCLAT is read with Innoventive judgment, then the NCLT's will get a free hand to delay the proceedings and in-turn be detrimental to the interests of the creditors.

Conclusion

This judgment provides great clarity regarding the scope and extent of the rights of a corporate debtor to contest admission of insolvency applications by financial creditors and will has laid down guidelines for the NCLT's across India for deciding insolvency applications filed by financial creditors. However, there are is one negative aspect in respect of time period of disposal, which needs to be addressed.

[27] *Ibid.*