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NCLT has inherent power to recall an order passed by it for approving a resolution plan

In the case of ***Greater Noida Industrial Development Authority v. Prabhjit Singh Soni and Anr.***[1], a 3 (three) judge bench of the Hon'ble Supreme Court of India ("**Supreme Court**"), headed by Chief Justice of India, held that the National Company Law Tribunal ("**NCLT**") has inherent powers to recall an order passed by it for approving a resolution plan for a corporate debtor in certain limited circumstances.

Brief Facts

Greater Noida Industrial Development Authority ("**Appellant**"), a statutory authority constituted under Section 3 of the U. P. Industrial Area Development Act, 1976 ("**UP Development Act**") had acquired several parcels of land for setting up an urban and industrial township. On October 28, 2010, a parcel of land was leased to M/s. JNC Construction (P) Ltd ("**Corporate Debtor**") for a period of 90 (ninety) years. As per Sections 13, 13A and 14 of the UP Development Act, the Appellant had a charge over the said land. As the Corporate Debtor defaulted on lease payments, a demand cum pre-cancellation notice was issued by the Appellant to the Corporate Debtor.

Subsequently, the Corporate Debtor was admitted into corporate insolvency resolution process ("**CIRP**") *vide* an order dated May 30, 2019, passed by the NCLT. In or around January 2020, the Appellant submitted a claim for an amount of Rs. 43,40,31,951/- (Indian Rupees forty three crore forty lakh thirty-one thousand nine hundred and fifty-one) for unpaid lease premiums. The said claim was filed by the Appellant claiming to be a 'financial creditor' under Form 'C', as it had a charge over the land which was leased to the Corporate Debtor. After verifying the claim filed by the Appellant, the Resolution Professional ("**RP**") classified the Appellant as an operational creditor and requested the Appellant to file its revised claim in Form 'B'. However, the Appellant failed to re-file its claim as an operational creditor.

Thereafter, the NCLT basis an application filed by the RP approved the resolution plan for the Corporate Debtor *vide* its order dated August 4, 2020 ("**Plan Approval Order**"). The Appellant on being made aware of the Plan Approval Order on October 6, 2020, filed 2 (two) applications before the NCLT, Principal Bench[2] (*one seeking recall of the Plan Approval Order and other impugning the action of the RP in classifying the Appellant as an operational creditor*). The main grounds for challenge were as follows: (a) there was gross error on the part of the RP in treating the Appellant as an operational creditor; (b) the resolution plan erroneously stated that the Appellant did not submit a claim, when, in fact, it was submitted; (c) Appellant being owner of the land with statutory charge over the assets of the Corporate

[1] Civil Appeal Nos. 7590-7591 of 2023
[2] I.A.1380/2021; I.A.344/2021, (IB)-272(PB)/2019

Debtor ought to have been given top priority for its dues as a secured creditor; and (d) no opportunity of hearing was given by the committee of creditors ("**CoC**") of the Corporate Debtor.

The above applications came to be dismissed by the NCLT on April 5, 2021, on the ground that for a period of 7 (seven) months (i.e. date from RP's decision to treat the Appellant as operational creditor till Plan Approval Order) the Appellant failed to take any action and that NCLT would not be able to decide the said application as the CIRP of the Corporate Debtor was completed. Being aggrieved by the dismissal, the Appellant filed an appeal before National Company Law Appellate Tribunal ("**NCLAT**"). The said appeal was dismissed by the NCLAT on November 24, 2022 on the grounds that: (a) the Appellant is not a financial creditor of the Corporate Debtor; (b) the Appellant was not diligent in pursuing its right and accordingly its challenge was liable to be rejected; and (c) there was no material irregularity in the approval of the resolution plan, particularly when the commercial wisdom of the CoC is not justiciable.[3]

By way of a civil appeal, the Appellant assailed the order passed by the NCLAT.

Issues

1. Whether the RP is required to consider claims submitted to him in improper 'form'[4].
2. Whether NCLT has powers under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") to recall its order approving a resolution plan passed under Section 31(1) of the IBC.
3. Whether the resolution plan put forth by the resolution applicant met the requirements of the mandatory contents set out under Section 30(2) of the IBC read with Regulations 37 and 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**").

Analysis and Findings of Supreme Court

After appreciating the submissions advanced by the parties, the Supreme Court allowed the civil appeals. Whilst allowing the civil appeal, the Supreme Court held as follows:

1. ***Issue 1***

   a) The RP is mandated by statute to compile data and prepare the information memorandum. Accordingly, resolution applicants submit plans based on this information. Therefore, even if a creditor's claim against the Corporate Debtor is not submitted in the specified form outlined in the CIRP Regulations it must be duly considered by the RP, provided it is verifiable either through evidence submitted by the creditor or records maintained by the Corporate Debtor. Additionally, if an operational creditor misidentifies itself as a financial creditor, its claim should still be assessed in the correct category if verifiable.

   b) The use of "*a person claiming to be an operational creditor*" in Regulation 7 and "*a person claiming to be a financial creditor*" in Regulation 8 of the CIRP Regulations indicates that a creditor has to submit its claims basis its own understanding.

   c) Where a creditor (in good faith) filed its claim with proof, the same has to be verified by the RP regardless of its 'form'.

   d) Form in which a claim is to be submitted with the RP in terms of the CIRP Regulations is directory and not mandatory. Once a claim with proof is submitted to the RP, the same cannot be disregarded solely due to an incorrect 'form'.

[3] Company Appeal (AT) (Ins.) No. 867 of 2021
[4] This was not an issue which was specifically framed by the Supreme Court while deciding the matter. However, the Supreme Court has given important findings on this question.

2. ***Issue 2***

a) A court or tribunal, in the absence of any provisions to the contrary, has inherent power to recall an order to secure the ends of justice. Neither the IBC nor its regulations prohibit the exercise of such inherent power by the NCLT. Section 60(5)(c) empowers the NCLT to address questions of priorities or law or facts arising out of or relating to insolvency resolution or liquidation proceedings. Rule 11 of NCLT Rules, 2016 preserves the inherent power of the NCLT to make orders for meeting the ends of justice or for preventing the abuse of the process of NCLT. Thus, even without explicit provisions, the NCLT has the authority to recall its order.

b) Such power should be used sparingly, and not as a tool to re-hear the matter. The Supreme Court has identified certain grounds on which a recall application is maintainable:

   i) the order is without jurisdiction;

   ii) the party aggrieved with the order is not served with notice of the proceedings in which the order under recall has been passed; and

   iii) the order has been obtained by misrepresentation of facts or by playing fraud upon the tribunal resulting in gross failure of justice.

3. ***Issue 3:***

a) The Supreme Court relied upon its judgment in *Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd.*[5] and reiterated that whilst the commercial wisdom of the CoC in approving a resolution plan may not be reviewable judicially, the NCLT/ NCLAT can identify deficiencies in the plan based on Section 30(2) of the IBC and Regulations 37 and 38 of the CIRP Regulations. If such deficiencies are found, the plan may be sent back to the CoC for revision to meet specified parameters.

b) In the present matter, the Supreme Court observed that the resolution plan failed to adhere to the mandatory contents set out under Section 30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations on account of the following shortcomings:

   i) The resolution plan did not acknowledge the claim of the Appellant as a creditor to the Corporate Debtor. The correct claim amount of the Appellant was also not specified in the resolution plan. This omission or error materially affected the resolution plan as it affected the total outlay owed to the Appellant.

   ii) The resolution plan did not specifically acknowledge the Appellant as a secured creditor of the Corporate Debtor despite a charge being created on the assets of the Corporate Debtor in respect of the amounts payable to the Appellant under statute.

   iii) Since the resolution plan conceived utilisation of land owned by the Appellant, which is a statutory body governed by its own regulations. This circumstance necessitated a thorough examination of the plan's feasibility, particularly the need for approvals from the relevant statutory authority and the timelines for the same. This was not addressed in the resolution plan.

The Supreme Court also noted the following facts: (a) the Appellant was not informed about the meetings of the CoC; (b) the proceedings up to the stage of approval of the resolution plan by the NCLT were *ex parte*; (c) the RP misrepresented that the Appellant had not submitted a claim when otherwise, a claim was submitted of an amount higher than what was shown outstanding towards the Appellant; (d) there was gross error on the part of the NCLT in approving a resolution plan which did not fulfil the mandatory contents of Section 30(2) of the IBC. Based on these it concluded that the present facts met the parameters set out above and would qualify for a recall order to be passed. In view of the above, the Supreme Court held that the recall application filed by the Appellant is maintainable even though the Appellant had a right of appeal before the NCLAT against the Plan Approval Order. The resolution plan was remanded to the CoC for resubmission and for adhering to the statutory parameters.

[5] (2022) 1 SCC 401

Conclusion

This judgment upholds that NCLT has inherent powers to recall an order passed by it to meet the ends of justice and to prevent abuse of court process. This opens up another avenue to challenge an order passed by the NCLT for approving a resolution plan which is in addition to preferring an appeal before the NCLAT. One of the substantive grounds identified by the Supreme Court for recalling an order is when an order has been obtained by misrepresentation of facts or by playing fraud upon the tribunal. This rule will have to be interpreted very strictly and has to be specific to the facts of the case at hand. The Supreme Court has also noted that this power available to the NCLT should be used sparingly and only in very limited circumstances and that too in order to ensure that there is no gross failure of justice. It will be interesting to see how the NCLT will interpret and act upon this ruling. The NCLT would have to ensure that this remedy is not used as a tool to engage in disruptive tactics by stakeholders to prolong proceedings which would lead to defeating the very objective of IBC, i.e. time bound resolution of the corporate debtor.

This judgment also recognises that determining feasibility and viability of a resolution plan forms part of the domain of the CoC and such determination is not ordinarily subject to judicial review. However, based on the facts specific to this case, the Supreme Court has laid down additional parameters for the CoC to consider feasibility and viability, especially due to the involvement of a governmental authority as a stakeholder, whose approvals would be necessary for the successful implementation of the resolution plan. Accordingly, for corporate debtors where such facts would be relevant the CoC, the RP as well as the resolution applicants will have to keep in mind that feasibility and viability of a plan would also depend on the treatment that is being accorded to such governmental authority in the resolution plan and the manner in which its approval is proposed to be sought under the resolution plan. If such parameters are not adhered to then, one runs the risk of the NCLT not approving the resolution plan.

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