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A landmark judgment clarifying various areas pertaining to Insolvency and Bankruptcy Code, 2016

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Background

Upon perusal of the records, it has been observed that more than 200 cases have been filed at the National Company Law Tribunal (hereinafter referred to as "the NCLT / Tribunal") for matters pertaining to Insolvency and Bankruptcy Code, 2016(hereinafter referred to as "the Code"). Out of the total cases filed before the NCLT, approximately 35 cases have been accepted[1] and the corporate insolvency resolution process (hereinafter referred to "CIRP") has been initiated.

Upon perusal of the cases filed before NCLT, it has been observed that there are few areas under the court wherein interpretation of the statute was required on the part of NCLT members and led to distinctive views from the industry as a whole. Areas pertaining to *'dispute'*, *'cause of action'*, *'jurisdiction of the matter'*, *'what overrides what?'* etc. have been the matter of debate among the persuaders of the Code. The following is Re: *M/s DF Deutsche Forfait AG and Anr. v. M/s Uttam Galva Steels Ltd.*[2]

With this article, we bring to the light distinctive highlights of the aforestated judgment and make it easy for the reader to adept themselves with regards to the stand taken by the NCLT in this regard.

Facts of the case

M/s. Uttam Galva Steels Ltd. (hereinafter referred to as "Uttam Galva" or "the corporate debtor" or "the buyer") has been engaged in manufacturing of steel rolls and import business in relation to steel. At some time, the buyer had entered into a sales contract with AIC Handels GmBH ("AIC" or "the seller") for supply of prime steel billets. It was decided that in case of any dispute, the arbitration shall be pursued in accordance with Swiss Rules of International Arbitration of the Swiss Chambers of Commerce. Further, it was decided that AIC is entitled to pursue payment obligation of the buyer before any competent court where a specially abbreviated form of legal procedure exists.

Upon the execution of the shipment, Uttam Galva accepted the imports by the seller without any faults and also confirmed that the amount set out in invoice represents entire purchase price.

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[1] http://www.deccanchronicle.com/business/economy/150417/35-corporate-insolvency-resolutions-in-progress-ibbi-chief.html

[2] C.P. no. 45/I&BP/NCLT/MAH/2017, the order can be viewed at: http://nclt.gov.in/Publication/Mumbai_Bench/2017/Others/index.html

Subsequently, AIC executed a discounting agreement with DF Deutsche Forfait AG ("Deutsche"), thereby assigning the entire debt with present and future rights, claims, and demands to it by endorsing the bills of exchange accepted by Uttam Galva.

Deutsche, in turn, subsequently assigned part of its debts to Misr Bank Europe GmBH ("Misr") through another discounting agreement. A notification of the same was sent by Deutsche to Uttam; however, was not confirmed by Uttam. This is the precise reason that both Deutsche and Misr are the parties to the application.

Matters clarified in the order

1. "Dispute" and "existence of dispute"

The representative of the corporate debtor maintained that the definition of "dispute" is inclusive; therefore, upon the perusal of the Code in its spirit; mere denial to the claim shall be understood as "dispute". Further, the word "and" as used in section 8(2)(a) of the Code shall be read and understood as "or" for the purpose of giving a harmonious interpretation of the provision relating to definition of "dispute".

After detailed deliberation, the Bench observed that whether the definition of "dispute" under section 5(6) is exhaustive, since the definition of "dispute" is primarily meant for application where notice has been served by an operational creditor under section 8.

"Dispute" is pendency of suit or arbitration. The same has been decided in come judicial pronouncing, even though the word "includes" is normally considered as inclusive purview of the satute. However, there are precedents where the word "includes" has been read and understood as "means" to enable the courts to achieve the purpose of legislation.

Consequently, the bench members confined meaning that interpretation to the word "includes" shall be read and understood as "means" with reference to the pendency of a suit or arbitration proceeding – the word "dispute" is qualified as such.

The corporate debtor also made contention that the same bench member had rejected the application by the operational creditor in the matter of *M/s. Kirusa Software Pvt. Ltd v. M/s. Mobilox*

Innovations Pvt. Ltd.[3] on the ground that reply to the notice shows existence of dispute. So gracefully, the bench member mistake once committed by them is not required to be committed again just for the sake of it. The members further said that if such orders are passed, than the judicial system will defeat the motive of the Code and that would be as good as throwing the law into dustbin.[4]

Further, if "mere denial of claim" has to be construed as occurrence of "dispute", this will lead to definitive ouster of operational creditors from filing an application under the Code. If bare denial of claim is labelled as dispute, sections 8 and 9 would become exactly like "cobra without fangs", or a mere show up, which was not the intent of the Parliament.

2. Is the concurrence of debtor required for assignment?

Upon perusal of the facts as stated therein in the pronounced order, AIC had executed a discounting agreement / forfaiting agreement with DF Deutsche Forfait AG ("Deutsche"), thereby assigning the entire debt with present and future rights, claims, and demands to it by endorsing the bills of exchange accepted by Uttam Galva. The same was accepted by the buyer. Subsequently, Deutsche further assigned part of its debts to Misr Bank Europe GmBH ("Misr") through another discounting agreement. A notification of the same was sent by Deutsche to Uttam; however, was not confirmed by Uttam. This is the precise reason that both Deutsche and Misr are the parties to the application.

Therefore, upon perusal of the order and the bench members annotated that approval of the corporate debtor is not sought for incase there is a discounting agreement and mere intimation bounds the corporate debtor to be liable towards the new assignee.

3. Where the contract provides for jurisdiction for English laws, whether the application can be filed under the Insolvency and Bankruptcy Code?

One such fact of the order mentions that the sales contract executed between Uttam Galva and AIC shall be governed by the English law. The corporate debtor also raised his concern by asserting that the creditors proceed directly through the processes of the Code if the provision pertaining to the

[3] http://nclt.gov.in/Publication/Mumbai_Bench/2017/Others/Kirusa%20Software%20Pvt.%20Ltd..pdf
[4] Refer para 40, 23, 24 and 25 of the C.P. no. 45/I&BP/NCLT/MAH/2017, the order can be viewed at: http://nclt.gov.in/Publication/Mumbai_Bench/2017/Others/index.html

English law is not properly dealt with. The corporate debtor's assertion was contested on the fact that assignment of the dues has to be assented by them. However, the Bench members asserted that the corporate debtors has been under alarming situation as the corporate debtor is consistently into losses with amounts aggregating more than INR 15 billion. The bench members are of the view that if any further delay is made in accepting the application, it will become nothing but defeat the purpose and object of the Code.[5]

4. Issue as regards to power of attorney?

After the sequential flow of the application, the question pertaining to maintainability of the application was raised in front of the bench members, as the corporate debtor propounded that the attorney holder (i.e. the representative of the applicant) is not a valid attorney holder. The corporate debtor contemplated that there is no explicit provisions in the PoA pertaining to initiate CIRP against the corporate debtor under the Code.

If the Power of Attorney Act of 1882 is perused, there appear four elements in a power of attorney to know as to whether any action of attorney is valid or not. The four elements are enunciated herewith:

- there shall be an instrument;
- there shall be an empowerment to the attorney to do act and acts;
- attorney shall be a specified person in the instrument;
- such action shall be in the name of the person executing it.

Also, the sections of the Companies Act, 2013 pertaining to winding up are now redundant, even before its notification, with the commencement of the Code. Therefore, now a creditor cannot take a company into the cohorts of voluntary winding up, the only option that creditors revive the company through CIRP. Consequently, the bench members stated that upon commencement of the new law which has lead to the repeal of the previous law, the power of the PoA does not extinguish upto the extent the Code has repealed the Companies Act, 2013 and therefore the PoA is a valid PoA.

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[5] Refer para 43 of the C.P. no. 45/I&BP/NCLT/MAH/2017, the order can be viewed at: http://nclt.gov.in/Publication/Mumbai_Bench/2017/Others/index.html

The bench members also enunciated upon the aforestated elements and therefore the members think it prudent that the PoA in question is a valid PoA and there seems no need to pass a new PoA for the maintainability of the matter.

Our Take

The spate of action by the regulators has been tremendously superlative in terms of bringing out the Code, notifying its commencement and setting up of infrastructure and other modalities. With more than 250 applications being filed with NCLT pertaining to CIRP, the spate of action on the part of the industry is also commendable. With cases like this, there is an era of clarity among the neutral territories under the Code. The territories pertaining to "*dispute", "existence of dispute"* and other areas have been demystified by the NCLT Mumbai bench.

With this case, the NCLT has clarified issues pertaining to interpretation of terms like "dispute", "existence of dispute", jurisdictional challenges among other areas. Going one step further, the judgment order also lays the precedent that mistake once committed by the bench members does not mean it has to be committed again, just for the sake of it and shall stand corrected in future.

In such a short span of time, we are of the opinion that the judgment is a substantial landmark as far as laying the precedent and the intent and spirit of the Code is concerned.

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