Landmark Judgments by the Hon'ble NCLAT 16TH -30TH SEPTEMBER

Soneko Marketing Pvt. Ltd. Vs. Girish Sriram Juneja & Ors., Company Appeal (AT) (Insolvency) No. 807 of 2023 & I.A. No. 2721 of 2023 with Company Appeal (AT) (Insolvency) No. 607 of 2023 with Company Appeal (AT) (Insolvency) No. 724 of 2023 with Company Appeal (AT) (Insolvency) No. 735 of 2023.

In the instant case, the RP had received Resolution Plans from two PRAs – Independent Sugar Corporation Ltd & AGI Greenpac Ltd. Independent Sugar Corporation Ltd sought clarification from the RP with regard approval of CCI as well as the timelines for obtaining such approval as the RFRP had contradictory clauses. The RP issued a clarification that in light of the available jurisprudence, the RFRP granted relaxation to the Resolution Applicants to procure the CCI approval post the approval of the Resolution Plan by the CoC, but prior to filing of the Resolution Plan before the Adjudicating Authority. Independent Sugar Corporation Ltd. received the requisite approval from the CCI prior to the approval of Resolution Plan by the CoC. However, the application filed by AGI Greenpac Ltd. was declared as not valid by the CCI. Later, the Resolution Plan submitted by AGI Greenpac was approved by the CoC. Accordingly, Application for approval of Resolution Plan was preferred before the Ld. AA. In the meantime, Independent Sugar Corporation Ltd had also preferred an Application before the Ld. AA seeking setting aside the selection of the Resolution Plan submitted by AGI Greenpac Ltd. However, the CCI granted approval to the AGI Greenpac Ltd subsequent to the approval of Resolution Plan by the CoC. Thereafter, the Adjudicating Authority vide impugned order rejected the application filed by the Independent Sugar Corporation Ltd./Appellant. **Thus, the issue that arose for consideration before the Hon'ble NCLAT was whether as per Section 31 of the Code, the requirement of approval of the CCI prior to approval by the CoC is mandatory?**

The Appellate Authority held that the RP had subsequently clarified that approval can be obtained even after the approval by the CoC, which was in accordance with the prevalent legal position as settled by the NCLAT in **Arcelor Mittal India Pvt. Ltd. vs. Abjijit Guhathakurta** wherein the Hon'ble NCLAT had held that the proviso to sub-section (4) of Section 31 of the 'I&B Code' which relates to obtaining the approval from the CCI under the Competition Act, 2002 prior to the approval of such 'Resolution Plan' by the 'Committee of Creditors', is directory and not mandatory. Further, the NCLAT held that it is open to the COC, which looks into viability, feasibility and commercial aspect of a Resolution Plan to approve the Resolution Plan subject to such approval by Commission, which may be obtained prior to approval of the plan by the Adjudicating Authority under Section 31 of the Code. Further, the Appellate Authority held that Section 31, sub-section (4) proviso has to be read to mean that the approval by the CCI is 'mandatory', the approval by the CCI prior to approval of CoC is 'directory'. Thus, the appeal was dismissed.

Link: *https://shorturl.at/AVY19*

Pan Pacific Engineering Services Pvt. Ltd. Vs. Ayyappa Hydro Power Ltd. – Company Appeal (AT) (Insolvency) No. 1239 of 2023.

In the present appeal, the appellant is the operational creditor and was shortlisted by the Corporate Debtor vide Tender Process for labour work. Further, the work order was issued in 2013 but the amount was not paid and the default was committed on 15th June 2015. Thereafter, the appellant filed an Application before the Chairman MSME in 2019 for amount of Rs. 49,33,296/- which was allowed by Order dated 10th November, 2020. After the said Order, Section 8 Notice was issued by the appellant and Application was filed on 12.11.2021. Thereafter, the Adjudicating Authority took the view that the default having been committed on 15th June, 2015, the Application is barred by time. However, the Appellant challenging the order contended that the default has to be treated as on 10th November, 2020 when the Order was passed by MSME Council and default was committed thereafter. **Thus, the issue before the appellate authority was whether the date of default for Section 9 application was 15.06.2015 or when the MSME council order was passed?**

The Appellant Authority while determining the said matter held that the date of default in the present case is 15.06.2023, and thus the section 9 filed by the Application is barred by time, and further there is no reason as to why again fresh period of limitation can be given to the Appellant from the date of MSME Order dated 10th November, 2020. Hence, the Appeal was dismissed.

Link: *https://shorturl.at/xCHK0*

Vinod Kumar Kothari Liquidator Vs. Sneha Techno Equipments Pvt. Ltd.- CA (AT) (INS) No. 316 of 2023 & I.A. No. 1079 of 2023.

In the instant appeal, the Appellant is the liquidator of the Corporate Debtor. Subsequent to the commencement of Liquidation process, the Appellant had put one of the assets of the Corporate Debtor for sale by way of e-auction in terms of Regulation 32 r/w schedule 1 of the IBBI (Liquidation Process) Regulations. 2016. Thereafter, the liquidator floated the EOI for sale vide invitation dated 08.07.2020 and the e-auction took place on 30.07.2020 in which the respondent was declared as the successful bidder. The liquidator further asked the respondent to remit the amount of sale consideration as (a) 25% of the sale consideration within 5 days of the demand, that is by 05.08.2020 (b) 75% of the sale consideration, plus applicable taxes within 15 days of the demand i.e., by 15.08.2020. The respondent had paid 25% of the total consideration by 17.08.2020 however, the Respondent did not make the payment of the balance 75% of sale consideration till 15.08.2020 as per the EOI. Accordingly, he sent a notice to the Respondent on 17.08.2020 asking for payment of the entire remaining amount on or before 13.09.2020 (being the 45th day from the date of demand) in terms of clause 12.18 of the EOI. It is alleged that since no money was paid till 09.09.2020 therefore, the Appellant sent a final pre-deadline reminder on 09.09.2020 but the Respondent made a request for an additional 90 days' time for arranging the funds. It is further alleged that since timeline was fixed as a part of EOI dated 08.07.2020 which was circulated to all and the terms were agreed to, the request made by the Respondent was rejected by the Appellant for extension of time but was allowed to make the balance payment by 16.09.2020 vide its mail dated 14.09.2020.

However, since no payment was made even till 16.09.2020, the Appellant sent a pre-forfeiture notice on 18.09.2020 and gave final opportunity to Respondent to pay the balance sale consideration by 21.09.2020 and upon the failure of the payment within stipulated time, the amount paid by the Respondent was forfeited. Thereafter, the appellant had issued the fresh invitation on 23.09.2020 and the said property was sold. However, after the fresh invitation floated by the Appellant, an application was filed by the Respondent both for extension of timeline for making payments towards balance sale consideration and or a direction to the Appellant to refund the entire forfeited amount within two weeks from the date of the order. Thus, the issue before the Ld. AA was that though there has been an amendment in Clause 12 of Schedule 1 of the Regulations which deals with the mode of sale and has been brought into effect from 25.07.2019 but thereafter IBBI issued a circular dated 26.08.2019 as per which the amendment in Schedule dated 25.07.2019 would apply prospectively and shall not apply to the liquidation process which has been initiated prior to that date and in the present case the Liquidation process started on 17.10.2017. Thus, the adjudicating authority held that the Appellant was required to issue EOI in terms of the Regulations as its stood amended on 25.07.2019 providing 90 days for payment of balance sale consideration from the date of demand. The issue before the NCLAT in the present matter was **whether the parties were bound by the terms and conditions fixed by the Appellant in the EOI dated 08.07.2020 or the Appellant was required to follow the terms and conditions of Clause 12 of Schedule 1 of the Regulations which was amended on 25.07.2019?**

Thus, the NCLAT after considering all the facts held that the Appellant (Liquidator) have to follow Clause 12 of Schedule 1 and could not have laid down its own terms and conditions because the invitation (EOI) was given on 08.07.2020 after the amendment dated 25.07.2019. In the EOI, the period was given 15 days whereas the Respondent had been asking for 90 days from the date of demand in terms of amendment dated 25.07.2019. further, the NCLAT held that the action of the Appellant was totally unsustainable and therefore the appeal was dismissed.

Link: *https://shorturl.at/swyY2*

Mayuras Industrial Services Vs. S R Shriraam Shekher RP- Company Appeal (AT) (CH) (Ins) No. 07/2023 (IA No. 45/2023)

In the instant case, the appellant, an operational creditor had preferred an application under Section 9 of the Code for initiating the CIRP against the Corporate Debtor, the same was admitted and thereby CIRP was initiated. However, subsequent to the commencement of CIRP, the CoC had passed a resolution for withdrawal of CIRP and the RP in furtherance of the same had preferred an Application before the Ld. AA under Section 12A for withdrawal. The said Application was allowed. That it becomes pertinent to mention that the RP along with Section 12 A application had not filed Form FA. Aggrieved, by the same, the OC had preferred an Appeal before the Hon'ble NCLAT. The issue that arose for consideration before the Hon'ble NCLAT was **whether the Adjudicating Authority was correct in allowing the withdrawal of the CIRP without hearing the Appellant?**

The Appellate Authority held that the jurisdiction of the Adjudicating Authority/ Tribunal under Section 12A of the Code is very limited. Thus, where COC had approved the withdrawal of the CIRP of the Corporate Debtor with more than 90% of voting share, it is not open to an Adjudicating Authority/Tribunal in law to reject the application. Further, the Appellate Authority relied upon the judgment of the Hon'ble Supreme Court passed in the matter of 'Rajakumar V Nagarajan & Ors. Civil Appeal 1792/2021' wherein it was held that a 'Company Director', is entitled to seek withdrawal of an application initiating 'CIRP', if, is able to establish that he would be settling the dues of Creditors. Further, in the instant case, the Corporate Debtor had already settled the dues of two Operational Creditors i.e., SS Metal & Amsa Agencies and Services to their satisfaction and made a 'draft' already in favour of M/s. Mayura's Industrial Services. Thus, the appeal was dismissed.

Link- *https://shorturl.at/blP89*

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