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'The Insolvency & Bankruptcy Code' – Issues concerning implementation of the Resolution Plan, in the wake of Covid-19 Pandemic

The Insolvency and Bankruptcy Law in India is changing rapidly to prevent the Companies, which are in distress due to the current 'Global Pandemic of Covid-19' and the consequential 'Lockdown' in the Country, from facing Insolvency and Liquidation Proceedings. A lot of thought has been given to safeguard the interest of such Companies, which may or would have defaulted in discharge of their liability, during the period of Lockdown. Apart from increasing the threshold for default from Rs.1 Lakh to Rs.1 Crore, the Legislature has suspended the operation of Sections 7, 9 & 10 of the Code, for the defaults arising on or after 25th March, 2020, for a period of Six (6) months.

The present economic conditions will not only have an adverse effect on Companies with regards to payment of their debts, but it also affects such Companies, which are already undergoing/implementing the CIRP (Corporate Insolvency Resolution Process). Due to the nationwide lockdown resulting into disruption of business operations, the Commercial feasibility & viability of an approved 'Resolution Plan' may get changed and the Resolution Applicant may find it difficult to implement the terms and schedule, as envisaged in the Resolution Plan.

The I&B Code *per se*, has no provision, addressing any of the concerns of a Resolution Applicant, regarding implementation of the Resolution Plan and the Government seems to be oblivious towards this aspect.

The 'Global Pandemic of Covid-19' and the consequential national lockdown imposed by the Government of India, has restricted trade, and thereby crumpled the Country's economy since March 2020. The course of normal business operations has been disrupted. All such extreme conditions have been considered to be the **only** reason, possible, for any default committed by corporate entities during such times, which may result in initiation of insolvency proceedings; therefore, an adequate protection has been provided by suspending the operation of Sections 7, 9 & 10 of the Code. Applying the same analogy, the disruption of normal course of business, may also result in default in strict implementation of the approved Resolution Plan and the Implementation Schedule. In the event of such defaults or contravention of the Resolution Plan, the Corporate Debtor will be pushed to liquidation under Sub-Section (4) of Section 33 of the Code. The Legislature

has not contemplated this real-time scenario and therefore, there is no mechanism provided for protection of a Corporate Debtor from liquidation, due to contravention / deviation from the approved 'Resolution Plan' during an event of '*force majeure*' like the present Global Pandemic of Covid-19.

"Regulation 40C" has been inserted w.e.f. 29-03-2020, whereunder the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall be excluded from the prescribed 'timelines' in relation to a Corporate Insolvency Resolution Process (CIRP). In terms of the Code, CIRP gets completed, once the Resolution Plan is approved by the Adjudicating Authority. Therefore, this amendment, though will come handy to those Corporate Debtors against whom CIRP is not concluded, but will be of no help to those where Resolution Plan is already approved and is in the process of implementation.

The Resolution Plan once approved by the Adjudicating Authority, attains finality. Therefore, in the wake of such a provision, the question which needs answers is – What is the recourse available to a Resolution Applicant (RA) and how the Corporate Debtor can be protected from facing liquidation proceedings, resulting from failure to implement the Resolution Plan, due to the unexpected Global Pandemic and a consequential nationwide lockdown?

Force-Majeure:

Will Force-Majeure come to the rescue of a 'Resolution Applicant', against contravention of Resolution Plan?

The answer to this crucial question lies in the Resolution Plan itself. At the first instance, it needs to be ascertained, whether or not the Resolution Plan has a *Force-Majeure* clause to excuse the Resolution Applicant from its obligation to implement the Resolution Plan. If the Resolution Plan provides for a *force majeure* clause, the next step would be to determine as to what constitutes a *force majeure* event as per the Resolution Plan. If the clause includes pandemic, epidemic, lockdown, curfews, disruption of business due to Government intervention or regulation, etc. as *force majeure* events, then the Resolution Applicant may approach the Adjudicating Authority and seek termination of its obligations to implement the Resolution Plan, which in-turn, will push the Corporate Debtor towards the liquidation, as CIRP gets terminated on approval of Resolution Plan by the Adjudicating Authority and the same cannot be re-initiated / re-opened. So, the entire process will ultimately result into Liquidation of the Corporate Debtor, primarily due to the unprecedented economic effects of a pandemic or a lockdown, which will defeat the objectives of the Insolvency & Bankruptcy Code, which emphasise on re-organisation of Corporate Debtor over liquidation.

Modification of the Resolution Plan:

Can an approved Resolution Plan be modified taking the present crisis into consideration and whether the Adjudicating Authority has power to modify the approved Resolution Plan?

The Insolvency & Bankruptcy Code in its present form does not provide for any provision to modify an approved Resolution Plan. NCLAT & Supreme Court have differently interpreted the use of inherent powers by the NCLT in Insolvency matters, under Section 60 (5) (c) of the Code & Rule 11 of NCLT Rules, 2016.

Section 60(5)(c) of the Code reads as:

> *"Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code".*

Rule 11 of NCLT Rules, 2016 reads as:

> *"Inherent Powers- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."*

Where at one hand, the NCLAT, in "**NUI PULP AND PAPER INDUSTRIES PVT. LTD. Vs. M/S. ROXCEL TRADING GMBH [2019] ibclaw.in 01 NCLAT**[1], while upholding the interim order passed by NCLT, Chennai, even before an application under Section 7 or 9 is admitted; has held that to ensure that one or the other party may not abuse the process of the Tribunal, or for meeting the ends of justice, it is always open to the Tribunal (Adjudicating Authority) to pass appropriate orders under its inherent power.

At the other hand, in "**R.G.G. VYAPAAR PVT. LTD Vs. ARUN KUMAR GUPTA & ANR"[2],** the NCLAT has held that the Adjudicating Authority has no jurisdiction to re-open resolution process under Section 31 of the Code.

In **QVC Exports Pvt. Ltd. Vs. United Tradeco FZC [2020] ibclaw.in 158 NCLAT [3],** NCLAT has gone a step further and held that Adjudicating Authority has no jurisdiction under Section 31 of the Code to allow rectification in the approved Resolution Plan. It further mentioned, "*Rule 11 of NCLT Rules, 2016 gives inherent power, but powers under this section cannot be used to dehor the statutory provision of law..... Given the law laid down by Hon'ble Supreme Court it is clear that under inherent powers of the Court, the Adjudicating Authority could only interfere in the field here I & B Code 2016 has authorized to do so. After approval of Resolution Plan, the Adjudicating Authority can exercise its power under Section 60 of the Code.....Since rectification of the Resolution Plan does not involve the question of priorities or any question of law or facts, arising out of or in relation to insolvency resolution or liquidation proceedings of the Corporate Debtor; therefore, it is not permitted to modify the Resolution Plan under the guise of inherent powers of the Tribunal..... Thus, it is clear that the order which has attained finality cannot be reviewed under the inherent powers of the Court. This power can only be exercised to correct clerical errors or arithmetical mistakes in the judgment.*"

These judicial interpretations, in my opinion, incapacitated the Adjudicating Authority from achieving the objectives of the Code especially during the lockdown and in its aftermath. Where at one instance, NCLAT allows the use of inherent power by the Adjudicating Authority, for meeting the ends of justice; at the second instance, it puts a blanket bar on the use of inherent power by the Adjudicating Authority under Rule 11 of NCLT Rules, post-approval of the Resolution Plan.

This has brought us back to the initial question, as to how the Corporate Debtor can be protected from facing Liquidation, due to failure in implementing the Resolution Plan. In my opinion, the

answer to this fundamental question is missing in I & B Code and in judicial precedents.

Now, let us deal with the situation where the approved Resolution Plan itself provides for its modification under certain specified circumstances. Such specified clause, may come to the rescue of the Corporate Debtor, only if it expressly or impliedly, includes circumstances like pandemic, lockdown, curfew, change in law, Government intervention / regulation, etc. In such a scenario, the only possible resort left to the Corporate Debtor, is to approach the Adjudicating Authority under Rule 15 of NCLT Rules, 2016, invoking such modification clause to extend the specific timelines envisaged in approved Resolution Plan.

The next roadblock for the Corporate Debtor is – can the Adjudicating Authority modify the Resolution Plan to extend such timelines, without there being an approval for such modification from the Committee of Creditors (CoC). Under the Code, approval of the Resolution Plan is the prerogative of the CoC, and only after its approval, a particular Resolution Plan can be approved by the Adjudicating Authority under Section 31 of the Code.

Supreme Court in "**K. SASHIDHAR VS INDIAN OVERSEAS BANK [2019] ibclaw.in 08 SC**"[4] has held:

> *"No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoC much less of the dissenting financial creditors for not supporting the proposed Resolution Plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority."*

The same view is re-affirmed by the Supreme Court in "**COMMITTEE OF CREDITORS OF ESSAR STEEL INDIA LTD. V. SATISH KUMAR GUPTA [2019] ibclaw.in 07 SC "**[5]**.** When the Adjudicating Authority has no power to modify/rectify or differ from the Resolution Plan, as approved by CoC, can NCLT exercise its power to extend the timelines without the approval of the Creditors?

Once again, a roadblock is met, as the Code is silent on the role of CoC, after it approves the Resolution Plan under section 30. CoC, as formed under the Code, ceases to exist on completion of CIRP. Then what is the way out left for the Resolution Applicant? Even though CIRP is completed and CoC has ceased to exist; but the creditors and their respective debts are still existing. When the Code has not addressed all these issues, in my personal opinion, the best solution for the Resolution Applicant would be to enter into a Settlement Agreement with the Creditors for the purpose of extending the timelines fixed in Resolution Plan for the payment of debts and thereafter, apply before NCLT under Rule 15 of NCLT Rules, 2016 for the approval of such modified timelines under the Settlement Agreement.

The Courts in India have many times referred to the "UNCITRAL Legislative Guidelines on Insolvency Law", while interpreting the IBC Law in India. Even "UNCITRAL Legislative Guidelines on Insolvency Law", also recommends amendment of a plan after approval of Creditors, if its implementation breaks down or it is found to be incapable of performance, whether in whole or in part. Now is the time for India to adopt such recommendations.

The I & B Code is silent on all the questions raised in this article and in my opinion, there is a need to amend the Code, by introducing appropriate measures to safeguard the interest of various stakeholders of the Corporate Debtors and for that matter, to safeguard the interest of the Resolution Applicants, who would have infused funds under the Resolution Plan for the revival of Corporate Debtor or would have provided security for the implementation of the Resolution Plan. If no arrangement is made in this regard, by way of an Amendment to the Code, many Resolution Applicants may fail in implementing the Resolution Plan, which eventually, will not only result in liquidation of the Corporate Debtor, but will also have an adverse impact on the Resolution Applicant, financially or on its reputation. More-so when, under Regulation 38, the Resolution Applicant, while submitting a Resolution Plan, is required to disclose if they have failed to implement any other Resolution Plan approved by the Adjudicating Authority at any time in the past.

Therefore, given the larger object of the I & B Code to protect the Corporate Debtor and to safeguard the interest of the stakeholders and the Resolution Applicant, 'The Insolvency and Bankruptcy Code' needs necessary amendments, in terms of the aforementioned lacunae.

About the Author : Manisha Sravan Unnam, is a Partner of 'Unnam Law Firm', based out of Hyderabad, and is also the Secretary General / Registrar of 'Hyderabad Arbitration Centre', (HAC). Ms. Manisha is also empanelled as a 'Mediator' with 'Ministry of Corporate Affairs', Government of India.

Reference

[1] [2019] ibclaw.in 01 NCLAT

[2] Company Appeal (AT) (Insolvency) No. 509 of 2018, decided on 31-08-2018

[3] **[2020] ibclaw.in 158 NCLAT**

[4] **[2019] ibclaw.in 08 SC**

[5] **[2019] ibclaw.in 07 SC**

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