

The National Company Law Tribunal cannot assume the power to declare any provision of the Insolvency and Bankruptcy Code, 2016 as illegal or *ultra vires*

The Hon'ble Delhi High Court ("**Delhi HC**") in *Insolvency and Bankruptcy Board of India vs State Bank of India & Ors.*¹ has held that the National Company Law Tribunal ("**NCLT**") cannot assume to itself the power of declaring any provision of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") or the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") as illegal or *ultra vires*.

Brief Facts

In the case of *State Bank of India vs. Su Kam Power Systems Ltd.*² ("**Su Kam Case**"), an application was filed by State Bank of India before the NCLT seeking extension by 90 (ninety) days for completing the corporate insolvency resolution process ("**CIRP**") as no resolution plans were filed in response to the expression of interest. However, in the Su Kam Case, the splitting of CIRP into inviting expression of interest and then seeking resolution plans became the subject matter, and the NCLT held that Regulation 36A of the CIRP Regulations is *ultra vires* Section 240(1) of the IBC ("**NCLT Order**"). Accordingly, a writ petition was filed by the Insolvency and Bankruptcy Board of India ("**IBBI**") before the Delhi HC challenging the NCLT Order.

The Delhi HC *vide* its order dated September 26, 2018, clarified that the NCLT order will not apply to cases where 'expression of interest' was already issued. Subsequently, IBBI filed an appeal before the Division Bench of the Delhi HC. In the case of *Insolvency and Bankruptcy Board of India vs. State Bank of India & Ors.*³ ("**Division Bench Case**"), the Division Bench of the Delhi HC stayed the NCLT Order *vide* its order dated October 5, 2018 ("**Division Bench Order**").

Subsequently, noting that the subject matter was pending adjudication before the single judge of the Delhi HC, the Division Bench *vide* its order dated May 4, 2022, disposed of the Division Bench Case. It held that the Division Bench Order will continue to operate and requested the single judge of the Delhi HC to take up the instant writ petition for hearing and final disposal.

¹ W.P.(C) 10189/2018 & CM Appl. 39715/2018, judgement dated November 28, 2022

² CA-809(PB)/2018 in (IB)-540(PB)/2017, order dated September 5, 2018

³ LPA 566/2018 & CM Appl. 41158/2018

Issue

Whether NCLT can assume the power to declare any provisions of the IBC or CIRP Regulations as illegal or *ultra vires*?

Findings and Analysis:

The Delhi HC analysed various provisions of the IBC and the CIRP Regulations and *inter alia* observed as follows:

1. IBBI is responsible for carrying out a large number of functions including supervising implementation of the IBC. To this effect, IBBI has been vested with the power to make regulations and guidelines on matters relating to insolvency and bankruptcy. IBBI also has the power to make model bye-laws to be adopted by the insolvency professional agencies.
2. On the other hand, the IBC gives the power to the NCLT for adjudicating any application or proceeding, and also deciding on questions of law or fact arising out of a CIRP or liquidation proceeding. Thus, the Delhi HC was of the view that there are no provisions in the IBC which confer the power to NCLT to declare a regulation as being *ultra vires*.
3. The Delhi HC relied on the decision of the Hon'ble National Company Law Appellate Tribunal, New Delhi ("**NCLAT**") in the case of *M/s Mohan Gems & Jewels Pvt. Ltd. vs. Vijay Verma & Anr.*⁴ wherein it was held by the NCLAT that the need for judicial intervention or innovation from the NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC.

Considering the above, the Delhi HC held that the NCLT is a creature of the IBC. Given that the IBC does not confer any power to the NCLT deal with the validity and legality of the regulations framed under the IBC, it cannot assume to itself the power of declaring any provisions of the IBC or the CIRP Regulations as illegal or *ultra vires*.

JSA Comment

While there have been several judgments regarding the powers which NCLT can exercise at the time of approving a resolution plan, this is a landmark judgment to clarify that in the absence of any power under the IBC to decide the validity of a provision, the NCLT cannot by itself assume such powers. The powers of the NCLT are limited to those as set out under the law.

⁴ Company Appeal (Insolvency) No. 849 of 2020

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