

May 2024

Bombay High Court affirms jurisdiction of NCLT to direct ED to release the attached properties after approval of resolution plan

In the case of *Shiv Charan and Ors. v Adjudicating Authority and Anr.*¹, the Division Bench of the Hon'ble High Court of Bombay ("**Bombay HC**") *inter alia* upheld the powers of the National Company Law Tribunal, Mumbai ("**NCLT**") to direct the Enforcement Directorate ("**ED**") to release attached properties of a corporate debtor, after the approval of a resolution plan by the NCLT, in light of Section 32A of the Insolvency & Bankruptcy Code, 2016² ("**IBC**").

Brief Facts

Various first information reports were filed against DSK Southern Projects Private Limited ("**Corporate Debtor**") and its erstwhile promoters in October 2017 alleging cheating and criminal breach of trust which were "scheduled offense" under the Prevention of Money Laundering Act, 2002 ("**PMLA**"). Accordingly, in March 2018, the Directorate of Enforcement ("**ED**") filed an Enforcement Case Information Report ("**ECIR**"). Pursuant to the ECIR, the ED attached certain assets of the Corporate Debtor by way of a provisional attachment. The provisional attachment was continued by the Adjudicating Authority under the PMLA *vide* its confirmatory order dated August 5, 2019. Subsequently, corporate insolvency resolution process ("**CIRP**") was initiated against the Corporate Debtor at the instance of a financial creditor. The NCLT *vide* its order dated February 17, 2023 ("**Approval Order**"), approved a resolution plan by Mr Shiv Charan, Ms Pushpalata Bai and Ms Bharti Agarwal (collectively referred to as the "**Resolution Applicants**"), and directed ED to release the attached properties of the Corporate Debtor. By way of a subsequent order dated April 28, 2023 ("**April 2023 Order**"), NCLT yet again directed ED to release the attached properties. However, the provisional attachment continued even after the commencement of CIRP of the Corporate Debtor, and further continued after approval of the resolution plan.

The Resolution Applicants filed a writ petition *inter alia* seeking directions to release the attached properties in light of the Approval Order. A counter-writ was filed by ED challenging the validity of the April 2023 Order passed by the NCLT.

Issue

Whether the NCLT has the jurisdiction to direct the ED to release the attached property by invoking Section 32A of the IBC?

¹ Writ Petition (L) No.9943 of 2023 along with Writ Petition (L) No.29111 of 2023. Judgement dated March 1, 2024.

² Section 32A of the IBC provides immunity to a corporate debtor and its assets from any prosecution, action, attachment, seizure, retention or confiscation, upon approval of a resolution plan by the NCLT, if such resolution plan results in the change in the management or control of the corporate debtor.

Analysis and Findings

The Bombay HC made the following observations:

1. Analysis of Section 32A of the IBC

At the outset, the Bombay HC analysed Section 32A basis which the April 2023 Order was passed by the NCLT. It observed that Section 32A is a *non-obstante* provision and becomes applicable once a resolution plan is approved by the adjudicating authority. It further observed that Section 32A provides immunity to a corporate debtor for an offense committed prior to the commencement of the CIRP upon fulfilment of the following conditions:

a resolution plan should be approved by the adjudicating authority;

- a) the promoters or those in the management or control of the corporate debtor prior to the commencement of CIRP, or any related parties of such persons, should be totally delinked from the management or control of the corporate debtor under the approved resolution plan;
- b) the Investigating Authority should not (based on material) have reason to believe that the new management had abetted or conspired for the commission of the offense in question; and
- c) in case of liquidation, the asset of the corporate debtor should be sold to a person who is not connected to the corporate debtor.

However, the immunity under Section 32A is available only to the corporate debtor and its properties. The erstwhile management of the corporate will continue to remain liable to prosecution, and the corporate debtor will continue to cooperate with the enforcement agencies in the prosecution against its erstwhile management. The Bombay HC also took note of the case of *Manish Kumar vs Union of India*³ wherein it was argued by the Union of India that the purpose of introducing Section 32A was to ensure that the new management starts on a clean slate basis.

The Bombay HC noted that the conditions specified under Section 32A were complied with and accordingly held that the Corporate Debtor and its assets will be immune from any proceedings commenced prior to the commencement of the CIRP.

2. Jurisdiction of the NCLT to direct ED to release the attached properties by invoking Section 32A of the IBC

In the instant case, it was argued by the ED that the jurisdiction of the NCLT under Section 60(5) is limited to interpreting the IBC and ought not to traverse beyond the IBC and enter upon the domain covered by the PMLA.

To address the argument raised by the ED, the Bombay HC proceeded to analyse Sections 31 and 60(5) of the IBC. It observed that Section 31 pertains to approval of the resolution plan by the adjudicating authority and as per the *proviso* to the section, prior to approving the resolution plan, the adjudicating authority should be satisfied that the resolution plan has effective provisions for its implementation. The Bombay HC noted that it was in exercise of its obligation under Section 31 to ensure effective implementation of the resolution plan, that the NCLT directed the ED to raise the attachment of the attached properties.

It further observed that Section 60(5) is also a *non-obstante* provision just like Section 32A and confers jurisdiction on the NCLT to entertain or dispose of any question of law or fact arising in relation to the CIRP of a corporate debtor which includes the right to decide grant of immunity under Section 32A.

Accordingly, the Bombay HC rejected the argument raised by the ED and held as follows:

“the NCLT is well within its jurisdiction and power to rule that prior attachment of the property of a corporate debtor that is the subject matter of an approved resolution plan, must be released, if the jurisdictional facts for purposes of Section 32A exist.”

³ (2021) 5 SCC 1.

Conclusion

By way of this judgment, the Bombay HC has comprehensively laid down the scheme under Section 32A of the IBC and has clarified that attachments made under the PMLA must be raised once the conditions under Section 32A of the IBC are met. This is in consonance with the legislative intent and objective of the IBC, by way of which a successful resolution applicant must be allowed to take over the affairs of a corporate debtor with a *clean slate* so as to avoid ghosts from the past emerging to confiscate the assets of the corporate debtor. Further, the Bombay HC clearly laid down the powers of NCLTs to decide upon such questions of facts and law, which is derived from Section 60(5) of the IBC.

Pertinently, the Bombay HC has refrained from dealing with the important question of whether upon imposition of moratorium under Section 14 of the IBC, attachments under the PMLA must be raised. Successful resolution applicants across the country are facing the ire of central and state agencies refusing to comply with the provisions of the IBC for reasons best known to them, thus leading to a situation where agencies pursue actions seemingly without due regard to the law of the land. It is imperative that the powers of agencies *vis-à-vis* the IBC be clarified so as to avoid situations where the objective of legislations are defeated due to the cavalier attitude of the state machinery.

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