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INTERPRETATION OF THE DEFINTION OF "DISPUTE" UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Introduction

Ever since the inception of the Insolvency and Bankruptcy Code (**"I&B Code"**) in 2016, ironically, the most common dispute arising out of the I&B Code is the meaning of the term "dispute" under section 5(6) of the Code. The various benches of the National Company Law Tribunal ("**NCLT**") and the National Company Law Appellate Tribunal ("**NCLAT**") have interpreted the term in various ways and have been unable to arrive at one undisputed meaning of the term. The different interpretations have led to confusion among litigants and lawyers.

Judicial Intervention

With its judgment dated 21st September 2017, the Supreme Court cleared the air in the matter of *Mobilox Innovations Private Limited v. Kirusa Software Private Limited* wherein the meaning of the terms "dispute" and "existence" in the code were finally studied and decided.
In the facts of the case, Kirusa had filed a petition for commencement of insolvency resolution process against Mobilox. The application was dismissed by the NCLT on the ground that a 'notice of dispute' was sent by Mobilox. Kirusa filed an appeal against the dismissal and the NCLAT held that "dispute" means a bona fide dispute. It was further held that the dispute in the present case was not a bona fide dispute. Accordingly, the application was remanded to NCLT, Mumbai. Unhappy with the decision, Mobilox proceeded to file an appeal before the apex court and the issue was taken up by a bench consisting of R.F. Nariman and Sanjay Kishan Kaul.

In deciding the meaning of 'dispute', the Supreme Court referred to the draft of the Insolvency and Bankruptcy Code wherein 'dispute' meant only a bona fide dispute between the parties - either in the form of a suit or in the form of arbitration proceedings - regarding *"(a) the existence or the amount of a debt; (b) the quality of a good or service; or (c) the breach of a representation or warranty"*. This definition, however, was changed by the legislature and was made inclusive so as to accord a wider meaning to 'dispute' and not restrict it to just 'suit or arbitration'.

The court further observed that 'and' in section 8(2) be read as an 'or'. This would mean that a dispute need not exist on record for the application of insolvency resolution process to be dismissed.

Furthermore, it was observed that whether a dispute is bona fide or not is not up to the adjudicating authority to decide and that the adjudicating authority must see whether a dispute truly exists and is not *"spurious, hypothetical, illusory, mere bluster, plainly frivolous or vexatious"*.

Conclusion

In the end, adjudicating upon whether the timelines in the I&B Code are mandatory or only directory, the court observed that the very reason behind the enactment of the code was to put insolvency and liquidation proceedings on a fast-track and as such, the timelines mentioned in the code must be adhered to strictly and not following them would be contrary to the objective of the code.
While the meaning of the term 'dispute' has been widened and would ensure justice to honest debtors, it would also allow dishonest debtors to delay insolvency proceedings with ease thus delaying the entire process and beating the purpose of the code.

The vagueness of the code has gone to become a hurdle in achieving its purpose. It is now only up to the legislature to make necessary amendments to the I&B Code. Possible interpretations of the statutes need to be assessed and ascertained to make things easier for the litigants, lawyers and the judiciary.

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STRIKING DOWN TWIN BAIL CONIDITONS FOR BAIL UNDER SECTION 45 (1) OF THE PREVENTION OF MONEY LAUNDERING ACT, 2002

Introduction

Supreme Court Bench of Justices Rohinton Fali Nariman and Sanjay Kaul struck down Section 45(1) of Prevention of Money Laundering Act, 2002 insofar as it imposes the twin conditions for release on bail. Former Attorney General Mukul Rohtagi appeared for the petitioner Nikesh Tarachand Shah while present Attorney General KK Venugopal appeared for the Central Government.

Analysis of the Judgment

Section 45(1) imposes the following two conditions for grant of bail where an offence punishable for a term of imprisonment of more than 3 years under Part A of the Schedule to the Act is involved: (1) The Public Prosecutor must have been given an opportunity to oppose the application for such release, and (2) where the Public Prosecutor had opposed the application the court must be satisfied that there are reasonable grounds to believe that the applicant is not guilty of such offence and that he is not likely to commit any offence while on bail.

Prior to the Amendment Act 0f 2012, there were two classes of offences contained in Part A and Part B. Part A of the schedule only consisted of two offences under Indian Penal Code, 1860 and nine offences under the Narcotic Drugs and Psychotropic Substances Act, 1985. These offences were considered extremely heinous by the legislature and were, therefore, classified separately as against offences under Part B, which dealt with other offences under the Indian Penal Code and offences under the Arms Act1959, Wildlife (Protection) Act 1972, Immoral Traffic (Prevention) Act, 1956 and the Prevention of Corruption Act, 1988. The Amendment Act however incorporated Part B offences into Part A of the schedule, resulting in offences under twenty-six Acts, together with many more offences under the Indian Penal Code, all being put under Part A.

According to senior counsel Mukul Rohtagi, putting Part B offences together with heinous offences in Part A would amount to treating unequals equally and would be discriminatory and violative of Article 14 of the Constitution. A person will be punished for an offence contained under the PMLA Act, 2002, but will be denied bail because of a predicate offence which is contained in Part A of the schedule rendering Section 45(1) as manifestly arbitrary and unreasonable.

If the twin conditions are to be satisfied at the stage of bail, the applicants will have to disclose their defence at a point in time when they are unable to do so, having been arrested and not being granted bail at the inception itself.

He further raised the issue that since there is no prohibition against anticipatory bail in the 2002 Act, it could be granted for both offences under the 2002 Act and the predicate offence. This would mean that a person charged of money laundering and a predicate offence could continue on anticipatory bail throughout the trial without satisfying any of the twin conditions, as opposed to a person who applies for regular bail, who would have to satisfy the twin conditions, which in practice would mean denial of bail.

Section 44 of the Act conferred powers on Special Court to try both the offence of Money laundering and the predicate offence.
The Court cited clause 39 of Magna Carta stating that “No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way except by the lawful judgment of his equals or by the law of the land.”

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Finding of the Court

The Court explained how the twin conditions are manifestly arbitrary and discriminatory. It held:
"manifestly arbitrary, discriminatory and unjust results would arise on the application or non application of Section 45, and would directly violate Articles 14 and 21, inasmuch as the procedure for bail would become harsh, burdensome, wrongful and discriminatory depending upon whether a person is being tried for an offence which also happens to be an offence under Part A of the Schedule, or an offence under Part A of the Schedule together with an offence under the 2002 Act. Obviously, the grant of bail would depend upon a circumstance which has nothing to do with the offence of money laundering. On this ground alone, Section 45 would have to be struck down as being manifestly arbitrary and providing a procedure which is not fair or just and would, thus, violate both Articles 14 and 21 of the Constitution."

Conclusion

The Court declared the Section 45(1), so far as the twin conditions are concerned as manifestly arbitrary, unreasonable and discriminatory and struck it down for being unconstitutional and violative of Articles 14 and 21.

The court further directed that all those matters in which the bail was denied due to the presence of the twin conditions were to go back to the respected courts which

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- **APPROVAL OF FRAMEWORK FOR CONSOLIDATION OF PUBLIC SECTOR BANKS**:

An Alternative Mechanism for consolidation of the Public Sector Banks (PSBs) has been constituted under the Chairmanship of the Union Minister of Finance and Corporate Affairs, Shri Arun Jaitley. The Alternative Mechanism will have Shri Piyush Goyal, Minister of Railways and Coal and Smt. Nirmala Sitharaman, Minister of Defence as Members.
The proposals received from banks for in-principle approval to formulate schemes of amalgamation will be placed before the Alternative Mechanism. A Report on the proposals cleared by Alternative Mechanism will be sent to the Cabinet every three months.

[Source: https://economictimes.indiatimes.com/news/economy/policy/alternative-mechanism-to-suggest-merger-proposals-finance-ministry/articleshow/61412572.cms]

- **SEBI ALLOWS ENTITIES INCORPORATED IN A FOREIGN JURISDICTION TO ISSUE SECURITIES**

In a notification dated 14th November 2017, via *Circular No.: SEBI/HO/MRD/DRMNP/CIR/P/2017/120*, SEBI amended the definition of "issuer" in the SEBI (International Financial Services Centres) Guidelines, 2015 to include entities incorporated in foreign jurisdictions, provided that such entities are permitted to issue securities outside the country of its incorporation.
Prior to the amendment, the definition of "issuer" only included entities incorporated in India.

[Source: http://www.sebi.gov.in/legal/circulars/nov-2017/securities-and-exchange-board-of-india-international-financial-services-centres-guidelines-2015-amendments_36586.html

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- **NEW CODE OF CONDUCT FOR NON-BANKING FINANCIAL COMPANIES**:

Through a notification on 9th November 2017, the Reserve Bank of India (RBI) issued new norms for non-banking financial companies (NBFCs) to regulate outsourcing by NBFCs.
The new code of conduct prohibits NBFCs from outsourcing core management functions like internal auditing, strategic and compliance functions for KYC norms, sanction of loans and management of investment portfolio. The RBI said "Access to customer information by staff of the service provider shall be on 'need to know' basis i.e., limited to those areas where the information is required in order to perform the outsourced function".
The new norms have to be complied with within a period of two months and any leakage of customer information must be reported to the central bank and the NBFCs will be liable for any damage caused to customers due to such leakage.

[Source: https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11160&Mode=0]

- **NOTICE ISSUED BY A LAW FIRM ON BEHALF OF AN OPERATIONAL CREDITOR CANNOT BE TREATED AS A NOTICE OF SECTION 8 OF INSOLVENCY AND BANKRUPTCY CODE, 2016.**

The National Company Law Appellate Tribunal, New Delhi via its judgment dated 12th October 2017 in the case of *Smartcity (Kochi) Infrastructure Pvt. Ltd. versus Synergy Property Development Services Private Limited & Anr.* held that a notice issued under Section 8 of the I&B Code and even under Section 9 is not maintainable under law.

[Source: http://nclat.nic.in/final_orders/Principal_Bench/2017/insolvency/12102017AT802017.pdf]

- **RBI NOTIFIES FOREIGN EXCHANGE MANAGEMENT (TRANSFER OR ISSUE OF SECURITY BY A PERSON RESIDENT OUTSIDE INDIA) REGULATIONS, 2017**

The Reserve Bank of India has notified an updated FEMA 20, consolidating amendments to the earlier FEMA 20 (investment by non-residents in India) and FEMA 24 (investment by non-residents specifically in partnership and proprietary concerns in India). A major change brought in by the regulation is the introduction of mandating late fee in case of delay in reporting by entities.

[Source: https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=11161]

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