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Analysing developments impacting business

SC UPHOLDS DISQUALIFICATION UNDER SECTION 29A OF THE IBC; BUT INVOKES ARTICLE 142 TO PROTECT INTERESTS OF HOMEBUYERS

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Background

The corporate insolvency resolution process (CIRP) against Jaiprakash Infratech Limited (JIL) commenced when the National Company Law Tribunal, Allahabad (NCLT) passed an order dated 09.08.2017 admitting the petition of IDBI Bank Limited under Section 7 of the Insolvency and Bankruptcy Code 2016 (IBC).

Home buyers who had invested in housing projects by JIL, were permitted by the Interim Resolution Professional (IRP) to submit their claims as 'other creditors', subordinate to financial and operational creditors of JIL. Thereafter, a series of writ petitions were filed before the Supreme Court to specifically protect the interests of home buyers as the IBC did not provide them with any preferential treatment. These writ petitions were clubbed together with the lead matter being *Chitra Sharma & Ors. v. Union of India & Ors., W.P. (C) No. 744 of 2017* (Chitra Sharma).

In the interim, the IRP was permitted to take over the management of JIL and proceed with the CIRP process while protecting the interests of the home buyers, since home-buyers did not have a representative in the committee of creditors of JIL (CoC). The Supreme Court also directed Jaiprakash Associates Limited (JAL) as the holding company of JIL to deposit a sum of Rs. 2000 crores to secure the interests of home buyers.

Although discussions took place with four resolution applicants, no resolution plan was approved by the CoC within the mandated CIRP period of 270 days ending 12.05.2018.

As per Section 33 (1) of IBC, in the event a resolution plan is not approved by CoC and presented to the adjudicating authority for approval under Section 31 within the CIRP period of 270 days, the adjudicating authority is mandated to pass an order liquidating the corporate debtor. Citing the 'interests' of the home-buyers, JAL contended before the Supreme Court that liquidation of JIL was not in the interest of home-buyers and that JAL/JIL should be allowed to complete the housing projects in a time-bound manner, which could be supervised by a Court appointed committee.

In the meantime, IBC was amended vide the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 (Ordinance) which came into force on 06.06.2018, whereby home buyers were brought within the purview of 'financial creditors'.

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Proceedings before Supreme Court

In this background, the Supreme Court was called upon to secure the interests of homebuyers, while maintaining the 'discipline of the law'. The Court was confronted with the following options:

- exercising its jurisdiction under Article 142 of the Constitution of India (Article 142) to:
 - revive the CIRP of JIL by extending the time period of 270 days under IBC and allowing submission of fresh resolution plans in the interests of home buyers; or
 - accepting the proposal of JAL and appointing a committee to monitor the execution of JAL's proposal; or
- proceeding with the liquidation of JIL as per the scheme of IBC.

Findings

The Supreme Court while dealing with the proposal of JAL to submit a resolution plan for CIRP of JIL, observed the following:

- JAL is disqualified under Section 29A of the IBC under sub-clauses (c) and (g), as it has an account which has been classified as a non-performing asset for a period of over one year from the date of commencement of the CIRP of JIL and is also a person who has been a promoter or in the management or control of the corporate debtor, who has engaged in a fraudulent transaction;
- JAL also lacks the financial capacity to complete the unfinished projects, as the Reserve Bank of India is seeking to initiate insolvency proceedings against JAL.

In view of the foregoing considerations, the Supreme Court rejected the proposal of JAL and declined to appoint a committee to oversee the CIRP. The Supreme Court, thereafter, in exercise of its powers under Article 142 of the Constitution of India, issued directions for re-recommencement of the CIRP of JIL from the stage of appointment of IRP as per the order dated 09.08.2017 of NCLT, thereby renewing the CIRP period of JIL.

Comment

The *Chitra Sharma* judgment demonstrates a tough stand of the Supreme Court that CIRP is a process that requires 'expert determination', and therefore courts must not intervene or supervise its intricacies. The court also observed that CIRP is a 'market driven' process wherein primacy is given to commercial decisions, and the responsibility for its success is on the IRP and the CoC. While sympathising with home buyers, the Supreme Court confirmed that there cannot be any preferential payments made under IBC to any class of creditors. This observation essentially is a caution to courts not to interfere with the CIRP process.

The Supreme Court has also sent a clear message that strict adherence to Section 29A of the IBC is mandated and that errant promoters shall not be permitted to participate in CIRP of the corporate debtors. It refrained from directing the release of the amount of Rs. 750 Crores deposited by JAL along with interest to the home buyers, now recognised creditors under IBC as being against the interest of other stake holders i.e. financial creditors. The

said amount was directed to be transferred to NCLT along with the re-commenced CIRP proceedings of JIL.

The Supreme Court reiterated that it was bound by the discipline of the law and intervened to protect the interests of home buyers only to the extent of restarting the CIRP even though the IBC mandates compulsory liquidation after the expiry of the CIRP period of 270 days. This was on account of the 'peculiar situation', where an amendment to the law solved the vexed issue of treatment of homeowners, a question that was the crux of the petitions before it.

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