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NCLAT REFUSES TO APPOINT RETIRED EMPLOYEE OF FINANCIAL CREDITOR AS INTERIM RESOLUTION PROFESSIONAL

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A three-member bench of the National Company Law Appellate Tribunal (NCLAT), presided over by the Hon'ble Acting Chairperson, *vide* its judgment dated 22 May 2020 passed in the matter of *State Bank of India v M/s Metenere Limited* [Company Appeal (AT) (Insolvency) No. 76 of 2020], declined to interfere with an order passed by the National Company Law Tribunal, Principal Bench (NCLT) refusing to appoint an ex-employee of the Financial Creditor as the Interim Resolution Professional .

FACTUAL BACKGROUND

- State Bank of India (the Appellant) had filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) (Application) against M/s Metenere Limited (Corporate Debtor) before the NCLT.

- In the Application, the Appellant had nominated one Mr Shailesh Verma (the said IRP) to act as the interim resolution professional (IRP) in the prospective corporate insolvency resolution process (CIRP) against the Corporate Debtor. The said IRP had been an employee of the Appellant for 39 years and retired in 2016 as Chief General Manager (CGM). The Corporate Debtor objected to his appointment as IRP.

- Vide order dated 4 January 2020 (impugned order), the NCLT refused to appoint the said IRP, holding that in view of his past employment with the Appellant, there was apprehension of bias and he was unlikely to act fairly or as an independent umpire. In these circumstances, the Appellant was directed to nominate a substitute in place of the said IRP.

- Aggrieved by the impugned order, the Appellant preferred the instant appeal before the NCLAT.

ISSUE FOR CONSIDERATION BEFORE THE NCLAT

The NCLAT sought to examine whether an ex-employee of a financial creditor is eligible to be appointed as an IRP in proceedings under the IBC.

MAIN CONTENTIONS OF THE APPELLANT

- There is no bar under the IBC to the appointment of an ex-employee of a financial creditor as an interim resolution professional (IRP). In any event, neither was the said IRP on any panel of the Appellant nor did he play any role in the decision making committee of the Appellant bank.

- An IRP does not perform the functions of an "independent umpire" between a financial creditor and corporate debtor.

- The functions of an IRP/ Resolution Professional (RP) are not adjudicatory but merely facilitatory. The will of the Committee of Creditors (COC) reigns supreme in the CIRP and the RP only plays the role of a facilitator in the decision making process.

MAIN CONTENTIONS OF THE CORPORATE DEBTOR

- The said IRP, who was employed with the Appellant for 39 years and retired as a CGM in 2016, was drawing a pension from the Appellant. This would fall within the definition of "salary" defined under the Income Tax Act, 1961 (IT Act). As such, Mr Verma was an 'interested person' and ineligible to act as IRP under the IBC.

- Mere apprehension of bias was sufficient to render the proposed IRP ineligible to be appointed.

JUDGMENT

The NCLAT held as follows:

- The said IRP was held not to be an "interested person" merely because he was drawing pension from the Appellant, which was his entitlement under the relevant service rules for services rendered by him to the appellant in the past and not a favour extracted by him. Further, the inclusion of pension within the definition of "salary" under the IT Act was not relevant for present purposes and did not make the said IRP an "interested person" and ineligible to be appointed as IRP

- It was recognised that Regulation 3(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) merely required the insolvency professional to be "independent of the corporate debtor".

- The decision of the NCLAT in *State Bank of India v Ram Dev International Limited (Through The Resolution Professional)* [Company Appeal (AT) (Insolvency) No 302 of 2018] (Ram Dev) was considered. In *Ram Dev*, the NCLAT had held that the empanelment of a Resolution Professional as an Advocate or Company Secretary or Chartered Accountant with the financial creditor was not, by itself, a ground to reject his appointment as IRP or RP unless it was demonstrated that there were disciplinary proceedings pending against him or he was an interested person on the pay roll of the financial creditor. Applying the ratio of *Ram Dev* to the facts of the instant case, the said IRP was not found ineligible to be appointed IRP.

- However, despite arriving at the aforesaid findings, the Bench took cognisance of the fact that the Appellant, and not Mr Verma, had filed the instant appeal and went on to hold that it was obvious that the said IRP had been nominated by the Appellant owing to his past service and loyalty.

- The Bench held that the aforesaid facts were to be considered in light of the apprehension of bias perceived by the corporate debtor. The Bench also held that the decision of the NCLT regarding the IRP acting as an "independent umpire" had to be viewed in the context of the IRP being required to discharge his statutory duties in a fair manner, including collating claims (despite not having the power to admit or reject them) . This bundle of facts justified the decision of the NCLT in directing the said IRP to be substituted.

- In view of the aforesaid, the Bench held that the apprehension of bias perceived by the Corporate Debtor regarding the appointment of the said IRP had to be considered. The NCLT was justified in seeking substitution of the said IRP so that "the CIRP could be conducted in a fair and unbiased manner", despite the said IRP "not being disqualified or ineligible to act as IRP". The Bench also observed that the Appellant was not prejudiced by the impugned order and ought not to have preferred the instant appeal. In such circumstances, the Bench declined to interfere with the impugned order and dismissed the appeal.

COMMENT

It is difficult to reconcile the judgment passed by the NCLAT with the scheme of the IBC. Section 16 read with Sections 7, 9 and 10, as the case may be, of the IBC makes it obligatory for the Adjudicating Authority i.e., the NCLT to appoint the IRP nominated in applications for initiation of CIRP , if there are no disciplinary proceedings pending against such IRP. No discretion is conferred on the NCLT in this regard. The CIRP Regulations additionally require the IRP/RP to merely be independent qua the corporate debtor (A specific declaration to this effect is also required to be made by the proposed IRP in the "Written Communication" to the Adjudicating Authority in the prescribed form along with the application for initiation of CIRP.). It is only the COC which has been empowered to replace the IRP and RP under Sections 22 and 27 of the IBC respectively.

The judgment is also silent on the statutory provision under which the appointment of the proposed IRP has been declined. The fact that this has been done despite recognising that the IRP/RP does not perform any adjudicatory functions, even when it comes to collation of claims, makes the judgment even more perplexing. The Code and the relevant regulations under the Code, contemplate for the IP to act independently and impartially. However, it is to be noted that these provisions mainly pertain to the IP's relationship with the corporate debtor and not with the creditor.

It is interesting to note that the First Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (IP Regulations), provides that an insolvency professional has to disclose whether he has been an employee or on the panel of any financial creditor of the corporate debtor, to the COC and the Insolvency Professional Agency of which he is a member, who is required to publish these details on their website. In other words, there is no outright bar on an ex-employee acting as an IRP/RP. Rather, the statutory intent was to allow the COC to make an informed choice and exercise its options under Section 22 of IBC. This is in line with the statutory mandate giving primacy to the COC, which has been recognised by the Supreme Court in various decisions. In this context, another question which begs answering is what would happen if the COC exercises its powers under Section 22 of IBC and chooses to replace the IRP appointed with the said IRP. To our mind, the COC would be well within its rights to do so and such decision cannot be interfered with by the NCLT, unless such

appointment is vetoed by the Insolvency and Bankruptcy Board of India. It must also be borne in mind that an applicant seeking initiation of CIRP has an unfettered right under the IBC and the Rules/Regulations framed thereunder to nominate an insolvency professional as an IRP in whom it has confidence to perform the task at hand. This fact seems to have been lost sight of by the NCLAT in the instant judgment. Unfortunately, these points have neither been considered by the NCLT nor the NCLAT in this case, except to the limited extent elaborated above. As has been the case in the past with several aspects of the IBC, it may once again become incumbent upon the Supreme Court to set the record straight.

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