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India: NCLAT Decides On The Requirement Of Seeking Government Approval For Making An Insolvency Application Against A Tea Company

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On 20 June 2019, the National Company Law Appellate Tribunal (NCLAT), in *A.J. Agrochem v Duncans Industries Limited*, passed an order deciding the issue of whether approval of the Central Government under Section 16G(1)(c) of the Tea Act, 1953 (Tea Act) is necessary for filing an application under of the Insolvency and Bankruptcy Code, 2016 (IBC) against a tea company.

The NCLAT set aside the order of the National Company Law Tribunal, Kolkata Bench (NCLT) and *inter alia* held that no prior approval / sanction of the Central Government is required for making an insolvency application against a tea company, since Section 16G(1)(c) of the Tea Act and Section 9 of the IBC operate in separate spheres.

The NCLAT made certain important observations in relation to the objects and reasons of the IBC, the difference between corporation insolvency resolution process (CIRP) and winding up proceedings, and the overriding effect of the IBC over other laws.

Brief Facts of the Case

A.J. Agrochem (Operational Creditor) had filed an application under Section 9 of the IBC against Duncans Industries Ltd (Corporate Debtor), a tea company, before the NCLT. Notably, the Central Government, by way of its notification dated 28 January 2016, had authorised the Tea Board of India (Tea Board) to take over the management and control of seven tea estates of the Corporate Debtor in terms of the Tea Act. The debt of the Operational Creditor was in relation to supply of goods to one of these seven tea estates which was under the management of the Tea Board.

The NCLT dismissed the application of the Operational Creditor on the ground that the Operational Creditor had failed to comply with the requirement of Section 16G(1)(c) of the Tea Act. Section 16G(1)(c) of the Tea Act requires approval of the Central Government to be taken before initiating winding-up proceedings / proceedings for appointment of a receiver in relation to a tea company, whose management has been taken over by the Tea Board.

Aggrieved by the order of the NCLT dismissing its application, the Operational Creditor preferred an appeal before the NCLAT.

Arguments on behalf of the Appellant / Operational Creditor

- In terms of Section 238 of the IBC, the provisions of the IBC including Section 9 would have an overriding effect over the provisions of the Tea Act. Therefore, requirements of seeking consent under Section 16G of the Tea Act would not be applicable; and
- Initiation of CIRP is different from initiation of winding up proceedings. As such, Section 16G of the Tea Act is not applicable to the present application.

Arguments on behalf of Respondent / Corporate Debtor

- The statement of objects and reasons of the Tea Act makes it clear that it is necessary in public interest that the Central Government has control over the tea industry. Accordingly, it is necessary to seek approval of the Central Government

under the Tea Act prior to initiation of proceedings against a tea company controlled by the Tea Board;

- Section 9 of the IBC does not have an overriding effect over the provisions of the Tea Act, which is prior in time. The judgment in *Macquarie Bank Limited v Shilpi Cable Technologies Limited (2018) 2 SCC 674* was relied on to support this point; and
- The claims of the Operational Creditor are barred by limitation since the cause of action had arisen in 14 November 2014 i.e. over 3 years before the filing of the application.

Reasoning of the Court

- In terms of the statement of objects and reasons of the IBC, it is evident that the primary objective of the IBC was to ensure revival and continuation of debtor companies by undertaking the CIRP process in a time-bound manner. Liquidation is only provided as a last resort and is not a desirable outcome under the IBC. The judgment in *Swiss Ribbons Pvt Ltd v Union of India (2019 SCC Online SC* 73) (*Swiss Ribbons case*) was relied on to support this point;
- The nature and rationale of initiation of CIRP in terms of an application under Section 9 of the IBC is, therefore, entirely distinct from 'winding-up' proceedings mentioned in Section 16G(1)(c) of the Tea Act. As such, there is no conflict between the two acts, and Section 16G(1)(c) of the Tea Act is not applicable to the provisions of Section 9 of the IBC;
- Section 238 of the IBC deals only with situations where there is a conflict between the provisions of the IBC and other laws. Since there was no such conflict in the present matter, Section 238 was not applicable to the matter at hand; and
- The right to make an application under Section 9 of the IBC only accrued to the Operational Creditor on 1 December 2016 when the IBC came into force. As such, in terms of Article 137 of the Schedule of the Limitation Act, 1963 (Limitation Act), the limitation period would be calculated from 1 December 2016. However, this point was kept open for adjudication, since limitation is mixed question of law and fact.

Decision of the Court

Based on the aforesaid reasoning, the NCLAT has held that the requirement to seek prior approval of the Central Government under Section 16G(1)(c) of the Tea Act is not applicable to an application under Section 9 of the IBC.

Comments

The present decision of the NCLAT is significant since it uses the jurisprudence relating to the nature of CIRP proceedings provided by the Supreme Court in the *Swiss Ribbons* case and applies it to the requirements under the Tea Act. Since both the Tea Act and IBC are special acts dealing with specific matters, this order is also significant since it clarifies the field of operation of these two acts.

It may be interesting to see if this decision becomes the basis of similar rulings by courts and tribunals in India while dealing with the interplay of the IBC with other acts, which have similar provisions regarding seeking of government approval for initiation of winding-up / other proceedings.

It may also be noted that the NCLAT, in this order, has made an observation that the date of commencement of limitation for cases where the cause of action arose prior to the IBC coming into force, will be 1 December 2016, in terms of Article 137 of the Schedule of the Limitation Act. While this question has been ultimately left open by the NCLAT, this observation may run contrary to the decision of the Supreme Court in *B.K. Educational Services Private Limited v Parag Gupta And Associates, Civil Appeal No. 23988 of 2017*, which has conclusively held that time barred claims cannot be revived under the IBC. It will now be interesting to see how the NCLT deals with this issue, in light of the seemingly contrary observations of the Supreme Court and NCLAT.

The content of this document do not necessarily reflect the views/position of Khaitan & Co but remain solely those of the author(s). For any further queries or follow up please contact Khaitan & Co at legalalerts@khaitanco.com

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