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"I have always known what I wanted, and that was beauty… in every form"

➢ The IBC VS. SEBI: Critical Analysis Of Moratorium Under IBC

Section 28A of the Securities and Exchange Board of India Act, 1992 ("SEBI Act") mentions about the recovery of proceeds from debtors in the form of attachment of immovable and movable property, attachment of bank accounts, etc. in order to make good the penalty imposed or to ensure the compliance with the regulations and the directions of the SEBI.

However, this provision of SEBI cannot be read in isolation and without interpreting it along with section 14 and section 238 of Insolvency and Bankruptcy Code, 2016 ("IBC"). Section 14 of the code talks about the declaration of moratorium on the commencement of the Corporate Insolvency Resolution Process ("CIRP").

It says that there should not be initiation of any fresh suit or continuance of ongoing suit in any court, tribunal or arbitration panel once the CIRP has been initiated. Section 238 of the IBC stipulates that if any other law of the land is inconsistent with any of the IBC's provisions, IBC will have prevalence over inconsistent provisions of other laws.

Conflict Between The Interest Of Investor And Creditor:
SEBI Vs IBC In recent times, the judiciary has taken inconsistent stand when it comes to effectuate the non-obstante clause of section 238 for giving overriding effect to a provision of IBC over the provision of any other statute.

In Ms.Anju Agarwal v. Bombay Stock Exchange, the NCLAT decided that section 14 of the IBC will take precedence over section 28A of the SEBI Act due to the nonobstante clause in section 238 of the IBC.

However, the NCLT in Mumbai held in Roofit Industries Ltd. v. BSE Limited[1] that the non-obstante clause, which is provided under section 238 can only be used when the provisions of another law that addresses the IBC's primary concerns are in conflict with those of the IBC.

The non-obstante clause, according to the NCLT's ruling in ShobhaLtd. v. Pancard Clubs, only supersedes regulations that are incompatible with the IBC's efficient operation.

Nature Of The Proceedings Included Under Section 14

The adjudicating authority may impose a moratorium under Section 14 of the code to prevent the filing of a new suit or the continuation of an existing suit or procedure against the debtor. Some uncertainty may exist regarding the types of lawsuits that fall under the purview of Section 14.

The question in M/S Ravi Infrastructure and Projects v. KSS Petron Private Limited was whether section 14 applies to all types of processes, including judicial, quasijudicial, and assessment, or if it makes any distinctions based on the nature of the proceedings.

The NCLT noted that in P. Mohanraj and Others v. ShahBrothers Ispat Private Limited, the court while explaining the rationale behind the imposition of moratoriums, held that they are designed to protect corporate debtors from monetary attacks, giving them time to regroup and resume operations.

The corporate debtor is immune from any and all legal action, including the enforcement of any judgement, decree, or decision issued by any court, tribunal, arbitration panel, or other body, pursuant to application of section 14 of the code.

The NCLT further noted that section 14 of the IBC does not distinguish between assessment proceedings, quasijudicial proceedings, and judicial proceedings. Accordingly, respondent's initiating actions would result in monetary liability being imposed on Corporate Debtor.

The IBC expressly forbids such conduct. It was also noted that a claim that was dead on the Insolvency Commencement Date cannot be indirectly permitted to be ascertained because doing so would result in numerous proceedings against the Corporate Debtor, defeating the purpose of the IBC and making it impossible to finish the CIRP on schedule.

Understanding The Legislative Intent The SEBI Act was enacted in the 1992, while on the other hand, the IBC was enacted in the year 2016. In numerous judicial decisions, the courts have established that the act which has been enacted on a later date will prevail over the act which came into existence on a prior date in case of any inconsistency between the two.

The reason is that the legislature had the knowledge about the provisions of all previous act at the time of the enactment of the subsequent act. If the legislature does not want the later law to take precedence, it will specify in the later law that the previous law's provisions will still be in effect. Applying the same logic here, the IBC must take precedence over the SEBI Act in situations where the two laws contradict because it was passed considerably at a later stage.

It has to be kept in mind that IBC is not merely a statute but a code and thus, on all matters pertaining to insolvency, the IBC will be having an overriding effect. Since IBC is in the nature of a complete code, the Supreme Court held that a corporate debtor in insolvency will completely come within the purview of the code.

This suggests that the "only" way SEBI can guarantee adherence to its rules and regulations is through the process made possible by the IBC. The SEBI Act strives to advance the growth, regulation, and integrity of the securities market while defending the interests of investors in securities.

In contrast, the IBC sets deadlines for the regulation of corporate person restructuring and insolvency resolution. The two legislations operate in different fields, hence there is no subject matter overlap between them. Section 14(1)(a) of IBC mentions about the term "other authority" along with any court of law, tribunal or arbitration panel, where it is prohibited to initiate or continue any suit at a time when CIRP is in process.

In Ms. Anju Agarwal v. Bombay Stock Exchange & Ors, it was decided that "regulatory agencies" like SEBI and the Bombay Stock Exchange ("BSE") were included in the definition of "other authority" under Section 14.

When a moratorium was in force, BSE was prohibited from requiring the corporate debtor to follow the SEBI (Listing Obligations and Disclosure Requirements) Regulations. This was based on the argument that since section 238 overrides any compliances with the LODR Regulations, the regulations are covered within the ambit of section 14(1)(a).

In Bhanu Ram and Ors. v. HBN Daries and Allied Ltd, the SEBI attached the properties of the corporate debtor. As a result, NCLT overturned the SAT's judgement and directed SEBI to release the corporate debtor's assets.

An appeal was filed in the Supreme Court by SEBI, wherein, although the SC issued a stay on the NCLT's decision ordering SEBI to hand over the title deeds, the SC also warned SEBI from placing any encumbrances on the properties they hold as a result of the title deeds.

The 2018 Report of the Insolvency Law Committee distinguishes between a proceeding pertaining to the determination or assessment of the liability and recovery of the determined or assessed liability, wherein it has been proposed that section 14 only prohibits a proceeding to recover the liability and not the proceeding to determine the liability.

However, in the present case, the recourse to external aid is not required as it is referred only in case when the intent of the legislature cannot be culled out from the statute itself.

There is no ambiguity in the provisions of IBC so as to require the aid to external sources.

It can be inferred from the IBC's legislative framework and the aforementioned analysis of judgements and reports that SEBI cannot exercise its right under Section 28A of the SEBI Act to recover penalties and attach assets from corporate debtors when a moratorium has been issued.

Upon the declaration of the moratorium, SEBI can only make a claim for the penalty amount owed to it in accordance with Regulation7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, as an operational creditor.

In light of this, SEBI is recommended to respect the obligations of the resolution professional and the court's rulings by refraining from starting or continuing any legal actions —including those to recover money—against a corporate debtor while a moratorium is in effect.

The SEBI Act, in particular, has been significantly impacted by the IBC's ongoing implementation. To avoid limiting SEBI's regulatory authority, the SEBI Report appropriately emphasised the need for further defining the boundaries of section 14 of IBC.

Additionally, section32A of IBC may prevent SEBI from taking appropriate steps against any corporate debtor's property which is a part of the resolution plan because section 24 of the SEBI Act declares any violation of the Act's requirements to be an "offence".

In order to prevent SEBI from being hindered from recovering penalties for violations that it would otherwise be able to recover in case the moratorium is removed, section 32A must be relooked and amended.

Source: Live Law
Read Full news at: *https://www.livelaw.in/columns/the-ibc-vs-sebi-critical-analysis-of-moratorium-under-ibc-221119*

➢ NCLAT rejects bankruptcy board's plea against telecom tower firm GTL Infra

The National Company Law Appellate Tribunal (NCLAT) has dismissed as "infructuous" a plea by the Insolvency and Bankruptcy Board of India, saying IBBI has nothing to do with the litigation between lenders and GTL Infrastructure.

The Mumbai bench of the National Company Law Tribunal (NCLT) last November dismissed a petition by Canara Bank against GTL Infrastructure and associate unit GTL, saying both companies are going concerns and are repaying their debt.

As per the NCLT order, GTL Infrastructure, a telecom tower company, has monthly revenues of Rs 120 crore (net of GST), showing that it is a viable going concern. "Further, the company has repaid an amount of Rs 16,915 crores between 2011 to August, 2018, which clears that the position of the corporate debtor is reasonably healthy and is in a position to repay the sustainable debt," the order had said.

"The corporate debtor (GTL Infrastructure) has made claims aggregating to Rs 13,393.83 crores against Aircel entities. Further, this Tribunal has directed to pay approx. Rs 900 crores to the corporate debtor, same has been pending on appeal. Moreover, the corporate debtor has to recover Rs 49.84 crores from Tata Teleservices; Rs 20.38 crores from ATC and Rs 351 from BSNL in pending arbitration proceeding. The amount received would be sufficient to pay the debt of the petitioner (Canara Bank)," the NCLT had said.

Citing the Vidarbha Industries case, the NCLT said the business of the corporate debtor is sustainable and it is a viable going concern under its current management and the overall financial health of the corporate debtor is not bad enough to be admitted under bankruptcy.

Moreover, the adjudicated and un-adjudicated claims of the GTL Infrastructure are far more than the debt claimed in the present petition.

The NCLAT said as the NCLT has dismissed the bank's petition, it was refraining from expressing any opinion on merit as to whether IBBI is authorised to file a petition or not and hence the petition is dismissed as "infructuous."

NCLAT in March will hear a separate petition filed by Canara Bank in the GTL Infrastructure matter.

Lenders received an additional Rs 1900 crore from the Edelweiss Asset Reconstruction Company (EARC) when it purchased the debt from banks. Thus, the aggregate payment to banks is almost Rs 19,000 crore since its debt restructuring in 2012.

GTL Infrastructure has argued that it is not a defaulter as it has made payments to banks in time as per debt restructuring scheme.

Source: Business Standard
Read Full news at: *https://www.business-standard.com/article/companies/nclat-rejects-bankruptcy-board-s-plea-against-telecom-tower-firm-gtl-infra-123020800666_1.html*