

September, 2021

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MDP Legal Updates

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MDP & PARTNERS
September 2021

MDP & Partners acted as the legal advisors in respect of the loan documentation for the following:

1. Malav Virani (Partner), Sunay Kargatia (Associate Partner) and Dhruvi Shah (Senior Associate) of MDP & Partners , Advocates and Solicitors, acted as the legal advisors for a public sector bank and negotiated the terms, drafted the supplemental round of loan documentation and ancillary documents in respect of the facilities aggregating to INR 90,00,00,000/- availed by a Real Estate Company.
2. Malav Virani (Partner), Sunay Kargatia (Associate Partner) and Dhruvi Shah (Senior Associate) of MDP & Partners , Advocates and Solicitors, acted as the legal advisors for a public sector bank and negotiated the terms, drafted the supplemental round of loan documentation and ancillary documents in respect of the facilities aggregating to INR 100,00,00,000/- availed by a Real Estate Company.
3. Malav Virani (Partner), Sunay Kargatia (Associate Partner) and Dhruvi Shah (Senior Associate) of MDP & Partners , Advocates and Solicitors, acted as the legal advisors for a consortium of banks and negotiated the terms, drafted the supplemental round of loan documentation and ancillary documents in respect of the facilities aggregating to INR 28,35,00,00,000/- availed by a leading airlines company.
4. Malav Virani (Partner), Sunay Kargatia (Associate Partner) and Dhruvi Shah (Senior Associate) of MDP & Partners, Advocates and Solicitors, acted as the legal advisors of a non- banking financial company and negotiated the terms, drafted the supplemental round of loan documentation and ancillary documents in respect of the facilities aggregating to INR 48, 00, 00,000/- availed by a private company majorly involved in the business of business services.

MDP & Partners conducted the due diligence in respect of approximately admeasuring 110 Acres or thereabouts at Bapgaon in Maharashtra.

Malav Virani (Partner), Sunay Kargatia (Associate Partner) and Dhruvi Shah (Senior Associate) acted for a private sector bank and conducted the title due diligence in respect of land admeasuring 110 Acres or thereabouts situated lying being at Villages Bapgaon and Lonad, Maharashtra.

The Hon'ble Supreme Court reversed the judgment of the Division Bench of the Delhi High Court which had interfered with the Tribunal's award. It held that there should be limited interference of the Courts while dealing with Arbitration matters.

The Hon'ble Supreme Court in this judgment passed on 9 September 2021 upheld the arbitral award of Rs 2782.33 crore plus interest made by the Arbitral Tribunal in favour of Delhi Airport Metro Express Pvt Ltd (DAMEPL).

The Hon'ble Supreme Court was deciding a question whether the Division Bench of Delhi High court was right in interfering with the award dated 11.05.2017 passed by the Arbitral Tribunal in favour of the Appellant - (DAMEPL).

FACTS

Delhi Metro Rail Corporation Ltd. (DMRC) entered into a 'Concession Agreement' with DAMEPL for design, installation, commissioning, operation and maintenance of the Airport Metro Express Line. Whereas, DMRC itself undertook design and construction of basic civil structure for the project. After completion of work, safety clearance were obtained from the Commissioner of Metro Railway Safety ("CMRS") and commercial operations ensued in February 2011.

Defects emerged in the civil structure constructed by DMRC. A notice was issued by DAMEPL on 9-7-2012, asking DMRC to cure the defects in its works within a period of 90 days from the date of the notice, failing which it shall be treated as a breach having Material Adverse Effect on the Concessionaire (DAMEPL) under the Concession Agreement. Thereafter, on 8-10-2012, DAMEPL issued a notice terminating the Concession Agreement as the defects were not cured within 90 days, resulting in an Event of Default under the Agreement.

DMRC invoked arbitration under Article 36.2 of the Concession Agreement on 23.10.2012. The Arbitral Tribunal made an award of Rs 2782.33 crore plus interest in favour of DAMEPL. DMRC filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award, which was dismissed by a Single Judge. However, on DMRC's appeal under Section 37, a Division Bench partly set aside the award passed by the Arbitral Tribunal. Aggrieved, DAMEPL approached the Supreme Court.

FINDINGS

The Supreme Court observed that there is a disturbing tendency of courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity

or patent illegality, apart from the other grounds available for annulment of the award. This approach

would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorizing them as perverse or patently illegal without appreciating the contours of the said expressions.

The Supreme Court restated those permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of ‘patent illegality’ is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression ‘patent illegality’. The Supreme Court also said that if an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. In view of the above, the Supreme Court allowed the appeal filed by DAMEPL and set aside the judgment of the Division Bench of the High Court.

Due to the outbreak of COVID-19 pandemic Supreme Court directed extension of the period of limitation in all proceedings before the Courts/Tribunals Court w.e.f. 15.03.2020 till further orders.

Since there is consensus that there is no requirement for continuance of the initial order passed by this Court on 23.03.2020 and relaxation of the period of limitation need not be continued any further. Hence the Hon’ble Supreme Court has passed following Directions:

1. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.
2. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.
3. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

Delhi High Court: Banks to respect the right of the borrowers to maximize their profits from the sale of collaterals/securities.

Fact of the case :

Petitioner had on 04.11.1987 secured a loan of Rs.20 lakhs from the respondent against the mortgage of Plot No M-5, G.K.II, New Delhi. A Mortgage Deed was executed on 15.01.1988. The agreed rate of interest according to the petitioner was 18% simple interest per annum.

Since the petitioner defaulted in the repayment of the loan, a suit was filed in the High Court by the Bank for the recovery of Rs.20,19,158.65/- along with interest @ 18% p.a. from the date of filing of the suit till recovery, with a further prayer for the sale of the mortgaged property in case of non-payment.

Final decree being passed on 20.08.1996 directing the sale of the mortgaged property.

Execution was filed on 26.05.1997 for the recovery of Rs.57,04,365.90/- as on 31.03.1997. The petitioner was directed, vide orders dated 20.07.2010, to deposit the decretal amount along with simple interest. An order of attachment of the property was issued on 12.03.2018 and the possession taken on 13.04.2018. The valuers at the behest of the respondent submitted a valuation report dated 18.05.2018 valuing the property at Rs.24,16,78,125/-.

Valuer fixing the valuation of the property at more than Rs 24 crores, when the property was to be put for auction, it reduced the reserve price to Rs.16,00,00,000/- and thereafter, citing Covid-19 pandemic times when real estate prices were depressed, Bank filed application seek court directions to reduce the price further to Rs.13,75,00,000/-.

Which was challenged by the Borrower by way of an Writ Petition before the Hon'ble Delhi High Court.

During the pendency of the petition the sale has already been effected of the property for a sum of Rs.13,75,00,000/- except that the Sale Certificate had to be issued.

Courts Findings:

While the attempt of the banks and financial institutions such as the respondent to minimize their losses makes good business sense, there cannot be a free run for them at the cost of the borrowers who have mortgaged to them or

furnished valuable property as security to assure repayment, which are worth multiple times the value of the loan. It is, but reasonable, to expect the Banks such as the respondent, to also respect the right of the borrowers

to maximize their profits from the sale of collaterals/securities by the banks. The non-payment of loans is, of course, not to be countenanced, but where, the Banks such as the respondent, seek to sell the immovable properties that are provided as security including through mortgage, it is incumbent on them to be earnest in their efforts so that the valuable security is not disposed of to the prejudice of the borrower.

The creditors have the responsibility to get a fair and market value for the said collateral/security/immovable property. It is also incumbent on all Receivers of immovable property/security to maintain them in good condition and not to allow the property to waste

Order: The High Court directed the Executing Court to record satisfaction of the Decree dated 20.08.1996 for a sum of Rs.13,75,00,000/-, at which the mortgaged property has been auctioned.

Supreme Court: Moratorium under Section 14 of the IBC does not prevent initiating proceedings against the promoters.

Anjali Rathi and Others Versus Today Homes & Infrastructure Pvt. Ltd. and Others

Facts of the case:

Home buyers instituted proceedings before the National Consumer Dispute Redressal Commission (NCDRC) seeking refund of their moneys with interest. On 12th July 2018, the NCDRC allowed their claim by directing the Corporate Debtor (Builder) to refund the principal amount paid by the petitioners; Execution proceedings initiated by the petitioners, Managing Director of the first respondent was directed to appear personally. By an order dated 27 March 2019, the Delhi High Court issued notice to the petitioners and also issued a direction that no coercive steps shall be taken against the Managing Director of the first respondent in terms of the order passed by the NCDRC. 1st April 2019, the NCDRC passed a further order that the execution proceedings, shall be given effect into only after the Hon'ble Delhi High Court decides the matter. Thus, the execution applications were disposed of. The order of the NCDRC has resulted in the filing of civil appeals before the Supreme Court.

During the pendency of the proceedings, S.9 Petition was filed against the first respondent before the National Company Law Tribunal admitted the petition, following which the corporate insolvency resolution process was initiated and a moratorium was declared under Section 14 of the IBC. CoC consists only of representatives of the home buyers, no financial institutions being involved, by a vote of 96.93 per cent, approved the Resolution Plan which was submitted by the consortium of home buyers. The Adjudicating Authority is yet to decide on this application for approval.

Held:

Petitioners would not be prevented by the moratorium under Section 14 of the IBC from initiating proceedings against the promoters of the first respondent Corporate Debtor in relation to honoring the settlements. Court cannot issue such a direction relying on a Resolution Plan which is still pending approval before NCLT

Supreme Court : The NCLT and the NCLAT should endeavor, on a best effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans

Ebix Singapore Private Limited Versus Committee of Creditors of Educomp Solutions Limited & Anr.

Facts of the case:

Ebix Appeal

NCLT allowed the Third Withdrawal Application filed by Ebix under Section 60(5) of the IBC to withdraw its Resolution Plan submitted for Educomp. While reversing that order, the NCLAT held that the application to withdraw from the Resolution Plan could not have been allowed since: (i) it was barred by res judicata; and (ii) the NCLT does not have jurisdiction to permit such a withdrawal.

Held

Res judicata cannot apply solely because the issue has previously come up before the court. The doctrine will apply where the issue has been “heard and finally decided” on merits through a conscious adjudication by the court. Hence, since the NCLT did not adjudicate Ebix’s prayer for withdrawal of their Resolution Plan on its merits while dismissing the First Withdrawal Application, the opportunity to seek the relief was not available to Ebix in a real sense. Therefore, we reverse the finding of the NCLAT on this issue and hold that Ebix’s Third Withdrawal Application was not barred by res judicata.

The time which may be taken before the Adjudicating Authority is an imponderable which none of the parties can predict. Parties cannot indirectly impose a condition on a judicial authority to accept or reject its Plan within a specified time period, failing which the CIRP process will inevitably come to an end. Resolution Plan becomes binding on all stakeholders as a consequence of the approval under Section 31. Hence the Appeal dismissed. The RP must be careful to clarify when its information is not comprehensive and what factors may cause a change.

Kundan Care Appeal

The NCLT had dismissed an application¹⁹ filed by Kundan Care under Section 60(5) of the IBC to withdraw its Resolution Plan submitted for the fourth respondent – Corporate Debtor, Astonfield. In appeal, the NCLAT upheld the NCLT’s decision, relying on its judgment impugned in the Ebix Appeal. It held that an application filed by a Resolution Applicant to withdraw from the Resolution Plan approved by the CoC could not be allowed since: (i) there was no provision in the IBC for it; (ii) the Resolution Plan is enforceable as a contract against the Resolution Applicant; and (iii) the Resolution Applicant was estopped from withdrawing.

Held

EXIM Bank and Power Finance Corporation Ltd represent 98 per cent of the financial creditors of Astonfeld. In view of the above agreement which has been arrived at, we deem it appropriate to exercise our jurisdiction under Article 142 of the Constitution of India for a one-time relief and direct that: revised Resolution Plan is agreed upon by the A-CoC, it shall be submitted through the A-RP for the approval of the NCLT within a week thereafter. In the event that a revised Resolution Plan is not agreed upon, the original Resolution Plan, as submitted before the NCLT, shall prevail; and We clarify that the above directions have been issued in view of the submission which has been urged as noted, and shall not amount to any finding by this Court on the issues raised with regard to modification or withdrawal of Resolution Plans at the behest of the Resolution Applicant.

Seroco Appeal

NCLT dismissed an application³⁰ by Seroco under Section 60(5) seeking permission to modify its Resolution Plan submitted for the Corporate Debtor – Arya Filaments. NCLT relied on the impugned judgment in the Kundan Care Appeal. Further, it noted that while the application prayed for a modification of the Resolution Plan, its title was “Application for withdrawal under section 60(5) of the Insolvency and Bankruptcy Code, 2016”.

In appeal, the NCLAT partly upheld the NCLT’s decision and held that Seroco could not be allowed to modify or withdraw the Resolution Plan approved by the Arya-CoC since: (i) it was the sole Resolution Applicant in the CIRP; (ii) Arya Filaments was an MSME; and (iii) it was aware of Arya Filaments’ financial condition when it submitted the Resolution Plan. However, it set aside the NCLT’s decision in relation to the costs imposed on Seroco.

Held: Resolution Plan provides that the preliminary approval of the Resolution Plan by the Arya-CoC is binding on Seroco; common law remedies available under the Contract Act are not available to the parties since a submitted Resolution Plan is not a contract which can be otherwise voidable on account of frustration, force majeure or other such instances. Hence the Appeal was dismissed.

Supreme Court Conclusion:

330 days outer limit of the CIRP under Section 12(3) of the IBC, including judicial proceedings, can be extended only in exceptional circumstances, this open-ended process for further negotiations or a withdrawal, would have a deleterious impact on the Corporate Debtor, its creditors, and the economy at large as the liquidation value depletes with the passage of time existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC-approved Resolution Plans, at the behest of the successful Resolution Applicant, once the plan has been submitted to the Adjudicating Authority; A submitted Resolution Plan is binding and irrevocable as between the CoC and the successful Resolution Applicant in

terms of the provisions of the IBC and the CIRP Regulations; The NCLT and the NCLAT should endeavor, on a best effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans forthwith;

Supreme Court: NCLAT can't condone delay beyond the period of 15 days under sub-section (2) of Section 61 of the IBC

National Spot Exchange Limited Versus Mr. Anil Kohli, Resolution Professional for Dunar Foods Limited

Facts of the Case:

NCLT admitted the petition and commenced the corporate insolvency resolution process against one Dunar Foods Limited (Corporate Debtor) pursuant to Section 7 petition filed by SBI on the ground that Corporate Debtor had taken credit limits by hypothecating the commodities kept in the warehouses of the National Spot Exchange Limited (Appellant); IRP invited the claims from the creditors of the corporate debtor on or before 17th January, 2018 that the appellant herein submitted its claim and also forwarded its claim through courier to IRP as per Form 'F' of the IBC. Appellant submitted the claim of Rs. 673.85 crores; that it was the case on behalf of the appellant that a decree has been passed against PD Agro for an amount of Rs.633,66,98,350.40 and on investigation by the Directorate of Enforcement, it is found that Rs. 744 crores have been siphoned off by PD Argo to the Corporate Debtor; IRP rejected the claim of the appellant on 18.06.2018 on the ground that there is no privity of contract between the appellant and the corporate debtor and that there is no letter or guarantee issued by the corporate debtor in favour of the appellant. That the rejection of the claim by IRP came to be challenged by the appellant before NCLT being Miscellaneous Application and the NCLT by order dated 6.3.2019 rejected the said application and upheld the decision of the IRP not to include the claim of the appellant as a creditor. Being aggrieved and dissatisfied with the order passed by the NCLT dated 6.3.2019, the appellant herein preferred an appeal before the NCLAT. There was a delay of 44 days in preferring the said appeal. Appellate Tribunal has dismissed the appeal on the ground that the Appellate Tribunal has no jurisdiction to condone the delay beyond 15 days and thereby the appeal is barred by limitation. Feeling aggrieved and dissatisfied with the impugned order passed by the learned NCLAT the Appellants has preferred the present appeal.

Held:

Considering the fact that even the certified copy of the order passed by the adjudicating authority was applied beyond the period of 30 days and as observed hereinabove there was a delay of 44 days in preferring the appeal which was beyond the period of 15 days which maximum could have been condoned and in view of specific statutory provision contained in Section 61(2) of the IB Code, it cannot be said that the NCLAT has committed any error in dismissing the appeal on the ground of limitation by observing that it has no jurisdiction and/or power to condone the delay exceeding 15 days. The present appeal fails and deserves to be dismissed and is accordingly dismissed

Supreme Court: One of the principal objects of the IBC is providing for revival of the Corporate Debtor and to make it a going concern. Every attempt has to be first made to revive the concern and make it a going concern, liquidation being the last resort.

K.N. RAJAKUMAR Versus V. NAGARAJAN & ORS.

Facts of the case: An ex-employee of the M/s Aruna Hotels Ltd. (hereinafter referred to as ‘the Corporate Debtor’) N. Subramanian, issued a Demand Notice dated 29.6.2017 under Section 8 of the IBC. On failure by the Corporate Debtor to comply with the Demand Notice, N. Subramanian filed an application under Section 9 of the IBC before NCLT which came to be admitted on 17th November, 2017. The 8th Committee of Creditors (hereinafter referred to as ‘CoC’) vide its resolution dated 25.5.2021 passed in its 8th meeting, unanimously resolved to withdraw CIRP initiated in respect of the Corporate Debtor. NCLT Vide order dated 4th June, 2021, allowed the application filed by K.N. Rajakumar (ex-Director of the Corporate Debtor) for withdrawal of CIRP in respect of the Corporate Debtor and directed RP to hand over the management of the Corporate Debtor to the Board of Directors. The application filed by D. Ramjee seeking to set aside the resolution dated 25.5.2021 passed in the 8th CoC meeting thereby approving the withdrawal of CIRP initiated against the Corporate Debtor was dismissed by NCLT vide order dated 6.7.2021, having been rendered infructuous. Appellant D. Ramjee in Civil Appeal, who is an ex-employee Corporate Debtor has approached the Supreme Court being aggrieved by the resolution passed in the CoC meeting dated 25th May 2021; the order passed by the NCLT dated 4th June, 2021 thereby permitting withdrawal of CIRP in respect of the Corporate Debtor; and the order passed by the NCLT dated 6th July, 2021 thereby closing the proceedings initiated by D. Ramjee who has also filed Section 9 against the Corporate Debtor.

Held: We find that NCLT vide order dated 6th July, 2021, passed in the application filed by D. Ramjee, has rightly held that from the date of the order dated 4th June, 2021, after the withdrawal of CIRP proceedings, the powers and management of the Corporate Debtor were handed over to the Directors of the Corporate Debtor and from that date RP and CoC in relation to the Corporate Debtor had become functus officio. NCLT has rightly disposed of the application filed by D. Ramjee having rendered infructuous.

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September 2021
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