Dispute over 'dispute'

Rahul Saraswat[1]

Introduction

In past few decades there have been so many global issues because of the economic growth in the country. The old insolvency and bankruptcy law did not affect the banking and financial sectors and the economic growth of the country got delayed. When a debtor is unable to pay its debts and other responsibilities as they become due, most legal systems provide a legal instrument to address the collective satisfaction of the outstanding claims from assets (whether tangible or intangible) of the debtor.[2]This insolvency of debtor is to be taken care by a good legislation on Insolvency and Bankruptcy. In a country where you want to have good and effective plus efficient insolvency law that you should have good legal and institutional framework and there should be proper implementation of that laws which are made. The insolvency law "should be transparent and predictable"[3] so as to fulfil and cater the need of present insolvency and bankruptcy disputes.

There were number of legislations, statues which governed the Insolvency regime before this 2016 code came. Such as Personal insolvency covering individuals and partnership firms were governed by the Provincial Insolvency Act, 1920 and other than that other statutes such as Presidency Towns Insolvency Act, 1909 4 ; Companies Act, 1956 (At present Companies Act, 2013); SARFAESI 5 ; SICA 6 (now repealed). Having different legislation governing one problem became very difficult to curb the problem. So there was need for a newand improved insolvency framework in India and this was recognised over the past years and then abundant undertakings finally led to the creation of Vishwanathan Committee by Governmentof India in 2014 which isalso known as Bankruptcy law reform committee (BLRC). The committee was formed to study the corporate bankruptcy legal framework in India.[4] The committee submitted its recommendations and then it submitted its draft of the Insolvency and the Bankruptcy draft bill, 2015. The Indian parliament thus approved the bill in the year 2016 and gave the nation a new legislationdealing with the Insolvency and Bankruptcy in India. Thus it was a big step taken by the Government to fill the gap and also towards achieving great economy.

---

[1]Student, 3rd Year, Gujarat National Law University.

[2] United Nations, *Legislative guide on Insolvency law*, UNITED NATIONS (Feb. 15, 2018), https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.

[3]*Ibid.*

[4] H. Jayesh; Aditi Bagri &Aaheree Mukherjee, *A New Look to the Indian Corporate Insolvency Regime*, 10 INSOLVENCY & RESTRUCTURING INT'L 34, 34 (2016).

The new legislation provides an intact new legal system for both substantive and proceduralmatters to deal with the issues pertaining to Insolvency and Bankruptcy in country. The reason for sanctioning such a law was that since there were manifoldoverlapping laws and adjudicating forums dealing with financial failure and insolvency of companies and individuals in India[5] so as to combine them and make a distinct legislative system out of it. The Insolvency and Bankruptcy code has been passed when the frugality of the banking industry was struggling with a rise in NPA's, bad loans and fraud and thus it was passed with an aim to resolve the NPA's and the debt of the various entities mentioned in the code.

Insolvency and Bankruptcy code, 2016(hereinafter to be refereed as IBC) is a law which provides for resolution of Insolvency & Bankruptcy through an institutional framework in a time-bound and highly proficient manner.[6] The code thus seeks to amalgamate the existing framework by creating a single law for insolvency and bankruptcy and thus the aim of a distinct legislation has been fulfilled. The legislation has acted as a one-stop place for all insolvency relatednecessities from an Indian context and has replaced all existing Indian laws on the subject[7] moreover the purpose of sanctioning such a code can be found in its preamble:[8]

1. To remove the ambiguity that had been prevailing in the previous legislations;
2. To prevent unnecessary delays and to ensure fast dismissal of matters, i.e., within 180 days;
3. To prevent loss to corporate creditors due to depreciation of assets of the insolvent company;
4. To establish a balance among the interests of the various stakeholders; and
5. To create a common forum to deal with such matters.

The provisions in section 8 of the code provide that an application for the commencement if insolvency resolution process by an operational creditor can be rejected on a mere ground that a notice of dispute has been received by the corporate debtor. The word 'dispute' has been the issue of contention form the day of initiation of the code, thus has been given various consideration by different benches of the NCLT & NCLAT, but there was no consistency in the decisions. Thus it became the interpretational issue and there was a need of

[5]Trilegal, *The Insolvency and Bankruptcy Code, 2016 - Key Highlights*, CHAMBERS & PARTNERS (Feb. 12, 2018), https://www.chambersandpartners.com/article/903/the-insolvency-and-bankruptcy-code-2016---key-highlights.

[6]KPS Kohli, *The Insolvency & Bankruptcy Code 2016 – The Dawn of A New Era*, MONDAQ (Feb 12, 2018), http://www.mondaq.com/india/x/622894/Insolvency+Bankruptcy/The+Insolvency+Bankruptcy+Code.

[7]*Supra* note 4.

[8]V.S. WAHI, TREATISE ON INSOLVENCY AND BANKRUPTCY CODE18 (1st ed. 2017).

apex court ruling on it, therefore the apex court got this opportunity. We will be discussing the approach of apex court in the matter.

Matter of 'dispute' & 'existence of dispute':*Mobilox v. Kirusa*[9]

Kirusa and Mobiloxagreed by an agreement for various facilities for conducting tele-voting for a TV show on Star TV in India. In furtherance of it they also executed a Non-Disclosure Agreement (NDA) under which the Kirusa owed certain non-disclosure onus towards Mobilox. For the service provided by Kirusa, it raised monthly invoices and when demanded form Mobilox, Mobilox declined the payment on the ground that Kirusa has breachedthe NDA. Kirusa under section 8(1) of the code sends demand notice to Mobilox, in reply to which Mobilox answered that there exists serious disputes between the parties before raising any demands for the debt.

Kirusa filed an application before the Mumbai NCLT for initiation of the insolvency process against the Mobilox, but the NCLT dismissed the application on ground that Mobiloxhas issued a notice of Dispute which acts as impedance on instigation of insolvency proceedings.[10] Consequently this decision was appealed before the NLCAT, on the ruling as to what constitutes 'dispute' & 'existence of dispute'. NCLAT held[11]:

1. The Definition of 'Dispute is Illustrative and not exhaustive as intended by the legislature and for proving dispute it requires evidence and not mere presence of dispute.
2. The section 8(2) of the code does not require a dispute to be pending prior to the notice of demand and that too in arbitration or a civil court;
3. Even a dispute concerning execution of a judgment or decree passed in a suit or award passed by an arbitral tribunal can be used to prove a dispute under the IBC;
4. The onus to prove that there is a dispute pending is of the corporate debtor;
5. The NCLT has to examine whether the 'dispute' raised by the corporate debtor qualifies as a 'dispute' as defined under sub-section (6) of Section 5, and whether notice of dispute given by the corporate debtor fulfils the conditions stipulated in sub-section (2) of Section 8 of the IBC.

The NCLAT remanded matter to NCLT, but the Mobilox appealed the decision of the NCLAT before the Hon'ble Supreme Court.

Interpretation of 'Dispute' and 'Existence of Dispute'

[9]Mobilox Innovations Private Limited v. Kirusa Software Private Limited,AIR 2017 SC 4532.
[10]02/I&BP/NCLT/MAHI20 17.
[11]Company Appeal (AT) (Insolvency) 6 of 2017.

Interpretation of 'dispute':

The word 'dispute' in the code is defined under the section 5(6) as follows:

"Dispute" includes a suit or arbitration proceedings relating to— (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty;"

The word 'Dispute' has been the issue of interpretation before the various adjudicating authorities and the word 'Dispute' was interpreted in line of the provision of section 5(6) of the code. The term "Dispute' was observed to be inclusive and not exhaustive because of the word 'includes' succeeding the word 'dispute' in the provision and thus legislature intended the same.[12] Therefore the word cannot be interpreted in a narrower sense it must be given a wider interpretation.[13]The apex court found the need to look into legislative history before giving any interpretation or construction, thus court looked into the background of the enactment and found that there is difference in the definition of the 'dispute'. The Bankruptcy Law reform Committee in November 2015 (the "BLRC Draft") gave the Definition of Dispute as:

"Dispute" means a bona fide suit or arbitration proceedings relating to – (a) the existence or the amount of debt; (b) the quality of goods and service; or (c) the breach of a representation or warranty"

Now looking at the present enactment, it does not contain words "means" & "bona fide" but it contains the word "include" which immediately succeeds the word dispute , therefore the apex court was of the view that since the parliament omitted the words from section 5(6), therefore the same cannot be introduced to term "dispute" under section 8(2)(a). Since the word "include" has been included, it makes the definition of the dispute 'inclusive' and not 'exhaustive'. Further in *PenugondaSatishBabu v. Amarpali Biotech India,*[14]heldthat it is not mandatory for pending proceedings to exist in order to come under the purview of the word "dispute".

"And" should be read as "or"

The court not just went into the historical backdrop of the enactment yet in addition looked into various jurisdiction legal perceptions and the glossaries and held that "and" as a part of the section 8(2) (A) ought to be perused as "or".

Section 8(2)(A) of the code states:

[12]One Coast Plaster v. Ambience Private Limited, Company Application No.(I.B.) 07/PB/2017.
[13]Philips India Limited v. Goodwill Hospital and Research Centre Limited Company, Application No. (I.B.) 03/PB/2017.
[14]C.P. No. (IB)-58/ (PB)/2017.

"The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

1. existence of a dispute, if any and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;"

The issuearose with respect to word "and" in the section 8(2) (A) whereby on bare perusal of the provision it was considered there must be existence of a dispute and also the record of pendency of such dispute before any adjudicating authority, but the intention of parliament was not the same and has to be understood. The Apex court went into deep history of the legislation and found that when the whole sentence is read it means that dispute would stave off the bankruptcy process only if they are already pending in a suit or arbitration and not otherwise. Along these lines it would prompt extraordinary anomaly and hardship. Thus to avoid such construal there was a need for interpretation.

In Stroud's Judicial Dictionary, it is expressed that the word 'and' has for the most part amassed sense, however now and then it is by power of a setting read as 'or'. The word 'and' need not really be comprehended as showing a conjunctive sense. Maxwell on Interpretation of Statutes[15] has recognised the above use to carry out the interpretation of the legislature.[16] It is very much settled rule that on occasion "and" can signify "or" and here and there "or" can signify "and".[17]The interpretation to 'and' so given by the apex court in their decisions was in keeping with the legislative intent manifested by the scheme of the code[18]so that there can't be any oddity and hardship. Such an anomaly cannot possibly have been intended by the legislature[19].

Interpreting the 'existence of dispute'

The apex further went on to interpreting the word "existence of dispute" befalling in the section 8(2) (a) of the code. The apex Court in this regard primarily looked the meaning of the word 'existence' in the Oxford Dictionary[20] whereby it has been comprehended as:

1. Reality, as opp. to appearance.

[15]Maxwell on Interpretation of Statutes, 12thedn, sweet and Maxwell.
[16]Samee Khan v. BinduKhan, (1998) 7 SCC 59; Ishwar Singh Bindra v. State of U.P., AIR 1968 SC 1450: 1969 Cri LJ 19.
[17]Gujarat UrjaVikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755.
[18]Director of Mines Safety v. Tandur and Nayandgi Stone Quarries (P) Ltd., (1987) 3 SCC 208.
[19]Mobilox Innovations Private Limited v. Kirusa Software Private Limited,AIR 2017 SC 4532.
[20]*Existence*, Oxford Dictionary (11thed. 2004).

2. The fact or state of existing; actual possession of being. Continued being as a living creature, life, especially under adverse conditions. Something that exists; an entity, a being. All that exists.

Besides to comprehend the elucidation of "existence of Dispute" it was require investigating different jurisdictions. The Australian bankruptcy law utilize the word 'bona fide' before the word 'debate', whereby the elucidation of the same was done that there must exist a genuine dispute about the existence or amount of a debt to which the demand relates.[21]Moreover the word 'genuine dispute' was the subject of construction in different cases whereby it was held that the word 'genuine dispute' means a 'conceivable dispute' or 'plausible contention' requiring examination and raises much an indistinguishable kind of thoughts from the 'serious question to be tried.[22]The court went ahead to state that the thought of a ‘genuine dispute' in this regards proposes that the court must be satisfied that there is a question that isn't doubtlessly vexatious or negligible. It must be satisfied that there is a claim that may have some substance.[23] It isn't normal that the court will sets out upon any stretched out inquiry keeping in mind the end goal to decide if there is a genuine question between the parties and absolutely won't endeavour to measure the merits of that Dispute. All that the enactment requires is that the court discovers that there is a question and that it is a real and genuine dispute.[24]Unmistakably what is required in all cases is something between negligible assertion and the confirmation that would be fundamental in a courtroom on the grounds that if that were not all that then anybody could say that he did not owe a debt.[25]The Court does not at this stage look at the merits of the question but to the degree appeared above inasmuch as a Dispute really exists isn't false, spurious, theoretical or deceptive; the adjudicating authority needs to dismiss the application.

The word recently interpreted again and thus the adjudicating authority gave the decision which was in consonance to the decision of the apex court and that the apex court in the Mobilox case has made a landmark precedent for the NCLT and NCLAT.[26]

The plausible contention test

[21]Spencer Constructions Pty Ltd v. G & M Aldridge Pty Ltd., [1997] FCA 681.
[22]Eyota Pty Ltd v.Hanave Pty Ltd,(1994) 12 ACSR 785 at 787.
[23]Chadwick Industries (South Coast) Pty Ltd. v. Condensing Vaporisers Pty Ltd. (1994) 13 ACSR 37.
[24]See Mibor Investments Pty Ltd v. Commonwealth Bank of Australia, (1993) 11 ACSR 362; Moyall Investments Services Pty Ltd v. White, (1993) 12 ACSR 320.
[25] See John Holland Construction and Engineering Pty Ltd v. Kilpatrick Green Pty Ltd, (1994) 12 ACLC 716; Aquatown Pty Ltd v. Holder Stroud Pty Ltd (Federal Court of Australia, 25 June 1996, unreported).
[26]Deutsche Forfait AG &Anr.v. Uttqam Galva Steel Ltd, C.P. no. 45/I&BP/NCLT/MAH/2017.

The issue now emerged under the steady gaze of the court as to how to decide upon presence of dispute, so whether bona fide test, as applied in the company law will be a valid solution to the present situation.The Hon'ble court examined the "bona fide" test which was upheld by the Supreme Court[27] , the court observed present case does not apply to the code. The Supreme Court again investigated the enormous history of the code and with the reference of some foreign decisionhas defined a way or a test for the adjudicating authorities to decideupon existenceof a dispute, which is known as "plausible contention test".

The court while analysing the code, thought about the recent indebtedness regimen under the Companies Act, 1956 and the intention of legislature while drafting the code, "Dispute" was characterized to signify "a bona fide suit or arbitration proceeding". Notwithstanding, when the IBC was at long last endorsed, "debate" in Section 5(6) was tossed down from the definition. The court deduction on this demonstration of parliament was that since the word has been erased from the code, it can't be transported in into the section 8(2)(a) keeping in mind the end goal to judge whether a dispute exist or not. Along these lines, to decide the presence of dispute the competent authorities needs to see that "plausible contention which requires further examination and that the "dispute" isn't a plainly weak legitimate contention or a statement of truth uncorroborated by evidence. Further on relying on various foreign decisions SC further held:

"It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

Subsequently court held that test of plausible contention and not going into merits of the question, the Mobilox had raised a conceivable dispute requiring further examination which isn't a legitimate contention or an attestation of reality uncorroborated by evidence.

Pre-existing dispute

The content of section 8 of the code suggests that the dispute must be a for every per-existing dispute , the word emerging existence of dispute was understood to bring a debate up in an official courtroom or arbitration council before receipt of the Demand Notice issued.[28]A dispute brought up in reply notice by a corporate borrower out of the blue can't be dealt as a

[27]Gobind Ram v. State Of Maharashtra, 1972 SCR (2) 20.

[28]RichaSaraf, *Deciphering "Dipute" In Insolvency and Bankruptcy Code*, VINOD KOTHARI CONSULTANTS (Jan. 10, 2018), http://vinodkothari.com/blog/deciphering-dispute-in-insolvency-and-bankruptcy-code/.

question in presence if the same being not disputed under the steady gaze of any courtroom preceding receipt of the Demand Notice.[29]The Supreme Court by exploring the whole insolvency resolution applications recorded by operational creditors and was of the view that the dispute must be per-existing and must exist prior receipt of demand notice.Presently the inquiry will emerge as a primary concern that at that point how to settle on the existence of dispute and whether its previous or not, the apex court gave 3 stages to decide the existence of a dispute i.e. the competent authorities must choose and affirm these 3 stages while looking at the suitability of an application under area 9 of IBC:

1. The operational debt is exceeding Rs. 1 Lakh and as defined in IBC.
2. The evidence(Documentary)given with the application shows that the above-mentioned debt is due and payable and has not yet been paid
3. There is an existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding with respect to such debt and it exists prior to receipt of Demand notice.

The apex court held that these issues must be replied before recognizing any application under section 9 of the code. In the event that if any of the previously mentioned conditions is deficient with regards to, the application must be rejected. Hence the Hon'ble court held that there exist a legitimate dispute and in this manner the application of the Kirusa must be rejected and in this way permitted Mobilox's appeal.

Conclusion

India was positioned 136 out of 189 on the world banks' index of ease of resolving insolvency in 2016. Presently then in 2017 India had moved to the rank 103 as per the World Bank on the ranking of nations on the basis of Resolving Insolvency,the credit to this accomplishment was given by Government of India to the Insolvency and Bankruptcy code, 2016. The code is in nonstop procedure of change, the administration is endeavouring to make the code more viable and smooth. The judiciary is additionally assuming its part in forming this new enactment. The Hon'ble Supreme court landmark decision has settled the debate of understanding of 'dispute' and 'existence of dispute'. The apex court has made a path for authorities simply by giving a plausible contention test whereby now the authorities by applying this test can distinguish whether the dispute is genuine or deceptive. It will energize to perceive how the NCLT's apply the test. With this intercession of the apex court, it is obvious to us that the vulnerabilities and ambiguities in the code is settled and we now

[29]Essar Projects India Ltd. v. MCL Global Steel Pvt. Ltd., 2017 (4) TMI 1156.

guaranteed that judiciary will assume its part in moulding the code by settling the ambiguities coming later on and will develop the rising statute of corporate indebtedness.