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THE DICHOTOMY SURROUNDING THIRD PARTIES BEING MADE AMENABLE TO FRAUDULENT PROCEEDINGS UNDER IBC

INTRODUCTION

Recent judgements have presented diverse views on third party claims. Hence, it is pertinent to understand the contradictions present in third party claims. Section 66, IBC pertains to passing of directions seeking contribution towards the assets of the corporate debtor either by persons who were knowingly party to carrying on of the business of the corporate debtor or by director / partner of the corporate debtor. Section 66, IBC has evolved as a tool of recovery vide the persons specified shall be recovered. The mandatory pre-requisite entails delineation of the Corporate Debtor's business and examining if it has been carried on with an intent to defraud the Creditors of the Corporate Debtor or that the acts done are for a fraudulent purpose. The purpose behind the exercise of fixing of liability promotes not only the objects of the Insolvency Code but also ensures that no person is devoid of the illegal gains accrued from such fraudulent and wrongful activities.

Above all, Section 66 limits the scope of enquiry of the NCLT (hereinafter, "Adjudicating Authority") to the persons specified above and establishment of mens rea to ensure that no frivolous proceedings are instituted against innocent parties.

FRAUDULENT AND WRONGFUL TRADING: CONTRAST IN FIXING OF LIABILITY WITHIN THE CORPORATE DEBTOR

It is important to note the fine difference in the language used in Section 66(1) and Section 66(2). Section 66(1) of the Code prima facie has a wider import in as much as it brings in its fold "any person(s) who was knowingly party to the carrying on of the business in such manner". On the other hand, Section 66(2) fixes liability upon "a director or partner of the corporate debtor". Therefore, it can be concluded from the combined reading of the above that a higher degree of threshold is required to pass directions against 'any person' and a lesser degree of threshold is required to pass directions against 'director or partner' as the case may be.

It is relevant to note that a higher degree of threshold is required to be satisfied for any persons under Section 66(1) and a lesser degree in as much a director or partner is concerned under Section 66(2) for not exercising due diligence, which is contrary and for a person to be held liable under Section 66(1), the person has to perform affirmatively.

Thus, it can be observed that the criteria for fixing of liability is different in both sub sections. A question that arises of the said anomaly is whether the wider import provided under Section 66(1) of the Code is a conscious decision of the legislature to bring person(s) carrying on the business of the Corporate Debtor within the ambit of Section 66 or is it a lacuna in the Code.

WHETHER THIRD PARTIES CAN BE HELD LIABLE UNDER SECTION 66 OF THE CODE?

It is apparent from the above analysis, that there exists a lacuna or an intentional gap by the legislature under Section 66 of the Code with regard to applicability of the term: “any persons involved in the working of the Corporate Debtor”, as a test is yet to be formulated, as to who all are held liable to make contributions to the assets of the corporate debtor (whether is it transaction based or operations based). However, conclusively, there does not exist even an iota of doubt that the Adjudicating Authority has not been conferred with any power to pass any orders under Section 66 of the Code against third parties, third party organizations and/or third party legal entities other than the Corporate Debtor with whom such business was carried out or against any person responsible in such third party organization for carrying on business with the Corporate Debtor. The ratio of the judicial pronouncement of the Hon'ble Supreme Court of India in “Usha Ananthasubramanian vs. Union of India” squarely covers the context described above.

The exclusion of third parties under Section 66 of the Code does not exclude them, as an Application preferred under Section 66 by the Resolution Professional against the management of the Corporate Debtor does not bar any civil action in accordance with

the law prescribed, either at the instance of the Resolution Professional or Liquidator or by the Corporate Debtor through its new avatar as Successful Resolution applicant seeking recovery of any dues payable to the Corporate Debtor by such third party. The independent legal action will not have any effect on the legality or maintainability of the proceedings under Section 66 of the Code. Moreover, not only civil but criminal action, in accordance with the law prescribed, can also be initiated against such third parties responsible for the conduct of their businesses with the Corporate Debtor. The Hon'ble Supreme Court of India vide its Order dated 19.05.2023 in the judicial pronouncement titled as “Glukrich Capital Pvt. Ltd. v. The State of West Bengal & Ors.”² has categorically clarified its position against institution of such proceedings against third parties under Section 66 of the Code. The aforesaid decision by the highest order of court in our country has brought relief to various stakeholders.

CHALLENGES AHEAD

• Right to be heard of third parties

As a precautionary measure, the Resolution Professional before conclusively portraying its views with regard to the alleged transactions undertaken by the Corporate Debtor, is always granted the Management of the Corporate Debtor with an opportunity to evade future litigation and offer a valid explanation with regard to the alleged transactions. The question arises as to how a third party against whom such allegations are being levelled defend itself and is further subjected to a lengthy and expensive litigation due to the whims and fancy of the Resolution Professional. One could say that the exercise of litigation against a third party is futile, whereby the Successful Resolution Applicant is bound for dual enrichment from the erstwhile management and third parties while duly violating the

fundamental right of third parties under Article 19 (1)(g) and Article 20 of the Constitution of India. On the other hand, it could also be said that due to procedural ambiguity and other related lapses, a third party could easily get away with the illegal gains accrued by them as it would require a diligent and rigorous exercise on the part of the Resolution professional to establish a case against a third party for a transaction which would at least be 2 – 3 years earlier. Ultimately, it has to be considered that the resolution professional is a court appointed officer whose responsibilities revolve around clarifying the ambivalence of the suspended management of the corporate debtor.

- **The Assignor cannot improve its title at a later point in time**

It is a matter of presumption that the Successful Resolution Applicant is aware of the true state of affairs of the Corporate Debtor and only after conducting its proper due diligence does the Successful Resolution Applicant enters its bid and subsequently, after due process, takes over the Management of the Corporate Debtor. This implies that the Successful Resolution Applicant cannot, at a later stage, improve its title by making new recoveries at the hands of the suspended management and third parties. Although on the contrary, a fair view also mandates that any guilty party who has unjustly gained from the loss of other parties should not be left unaccounted.

- **Applicability of Limitation Act**

It is also upheld that for any proceedings to be instituted against a third party, the Resolution Professional has to first and foremost arrive at a sound conclusion with regard to the alleged transaction by taking assistance of the transaction audit report. A question with regard to the applicability of the Limitation Act must also be considered as no revision period is provided qua the

management of the corporate debtor under Section 66 of the Code but it is mute qua the limitation period with regard to the transactions entered into by third parties.

- **NCLT is a court of limited jurisdiction**

The enactment of Section 66 has to be read with the objects and features of the code, implying that any proceeding under IBC, is in the nature of a summary proceeding and for any court of competent jurisdiction to declare a transaction to be fraudulent or wrongful, a higher degree of proof and verification / trial is required. NCLT and NCLAT are courts of limited jurisdiction which cannot go into detailed questions of facts and law, which means that for any transaction to be declared as fraudulent or wrongful against a third party, independent proceedings before a civil or criminal court are the only respite available.

CONCLUSION

Over a period of time, more and more intricate and complex transactions falling within the ambit of Section 66 of IBC are coming to the forefront. The need of the hour is to harmoniously read and construct the provisions of Section 66 in light of the object and purpose of Section 66. Section 66 cannot be read in a manner to either provide complete immunity to third parties or to provide unfettered rights to the Resolution Professional or purchasers of avoidance application to seek recoveries from third parties without following the due process of law. Since Section 66 specifically uses the term “any other person”, the third parties in case involved in defrauding the creditors ought to be made amenable to the jurisdiction of NCLT. However, the said jurisdiction can only be against parties having mens rea and ‘fraud’ being established on pleadings. The provisions of IBC are to be read in consonance with the established principles deducing a case

of 'fraud' as per legal parlance coupled with legislative intent of bringing back the illegal benefits derived out of fraud. The harmonious and balanced approach shall also be in line with jurisprudence, exercised world over and in accordance with the principles provided in UNCITRAL Model Insolvency Law.

However, the recent judgment of the Hon'ble Supreme Court in the matter of "Glukrich Capital Pvt. Ltd. v. The State of West Bengal

& Ors. (Supra), reiterating the finding of the Hon'ble Tripura High Court in the matter of "Smt. Sudipa Nath v. Union of India"³ makes out an interesting issue which shall now be brought under the purview of the Adjudicating Authority while dealing with prayers against third parties in proceedings under IBC.

¹(2020) 4 SCC 122

²Misc. Application No. 1302 of 2023 in Diary No. 6732 of 2023

³WP (C) (PIL) 04 of 2023



THE ESG RESEARCH LAB, 2023; UNITING FOR A GREENER FUTURE ON WORLD ENVIRONMENT DAY

Dhir & Dhir Associates, a leading law firm, committed to promoting sustainability and responsible business practices, successfully hosted the 3rd edition of Virtual Legal Marathon on ESG that garnered tremendous attention from the legal community. With over 850 registrations received from more than 80 esteemed law colleges across the country, the event served as a platform to foster meaningful discussions and raise awareness about the importance of ESG in today's business landscape.

The ESG event, brought together legal professionals, academics, and students who are passionate about driving positive change and shaping a sustainable future. Dhir & Dhir Associates aimed to create an inclusive space for dialogue, knowledge sharing, and collaborative problem-solving.

The overwhelming response to the event reflects the growing interest and commitment among the legal fraternity to incorporate ESG considerations into their practice. Participants had the opportunity to engage with industry experts, thought leaders, and experienced practitioners, gaining invaluable insights into the legal aspects of ESG compliance, reporting, and impact assessment.

"By creating platforms and opportunities for young individuals to actively participate, we foster a sense of responsibility, ownership, and empowerment" said Alok Dhir, Managing

Partner at Dhir & Dhir Associates. "This research lab will serve as a platform for the youth to connect with industry leaders, experts, and like-minded peers who share their passion for sustainability. It will encourage networking, knowledge sharing, and collaboration, fostering a sense of ownership and responsibility among them towards creating a better and more sustainable future."

The event featured keynote speeches and panel discussions that delved into various ESG dimensions, including environmental conservation, social responsibility, and corporate governance. Chief Guest, Amit Jain, CEO and Co-Founder of CarDekho Group, emphasized the significance of taking small yet impactful steps towards leading a sustainable life. During his keynote address, Mr. Jain also shed light on the grave consequences of plastic pollution, emphasizing the immense threat it poses to marine life, ecosystems, and human health. He underscored the urgent need to revamp our consumption patterns and reduce plastic waste generation.

The panel discussion commenced with Monu Jain, Partner at Aavishkaar Capital, providing an insightful perspective on the meaning of ESG and the rising trend it has gained in the investor market. Aneel Gambhir, the esteemed CFO of DTDC, emphasized the significance of integrating ESG aspects into business strategies, highlighting its



broader scope beyond traditional corporate social responsibility (CSR). Vijay Kalra, the VP Legal of HT Media, contributed to the discussion by emphasizing the need to expand the applicability of BRSR (Business Responsibility Sustainability Report). Saket Sah, the Head of Investor Relations & ESG Reporting at RPSG Group, delved into the crucial topic of corporate disclosures on ESG and the influential role played by global proxy advisory firms. Finally, Zameer Nathani, the Group General Counsel for CarDekho Group, concluded the discussion by shedding light on the transformative impact of ESG initiatives and emphasizing on the paramount importance of ESG compliance.

Guiding the proceedings with finesse and expertise, Sonal Verma, Partner - ESG, Dhir & Dhir Associates, assumed the role of the moderator. With his extensive knowledge and exceptional communication skills, Mr. Verma adeptly steered the discussions, ensuring a dynamic and engaging exchange of ideas among the esteemed panellists. He skilfully guided the discussions, setting the tone for meaningful dialogue and fostering an inclusive environment where diverse viewpoints could be shared and explored.

The Panel discussion was followed by a special message from Ms. Vimla Bahuguna, a key figure in the Chipko Movement that was aimed at raising awareness about sustainable forestry practices and the role of women in environment conservation.

The second day of the event marked a significant milestone with the induction ceremony, where participants were formally welcomed and oriented towards their tasks, responsibilities, and guidelines for the duration of the event. This ceremony served as a crucial introduction, ensuring that participants were well-prepared and equipped to make the most of their experience.

During the induction ceremony, attendees received detailed instructions on their roles and responsibilities, enabling them to actively engage and contribute effectively throughout the event. The organizers emphasized the importance of teamwork, professionalism, and adherence to ethical standards, setting clear expectations for participants.

Moreover, the ceremony provided a platform to familiarize participants with the event's code of conduct and outlined the dos and

don'ts that would govern their behaviour and interactions. This ensured a respectful and inclusive environment for all attendees, promoting a harmonious and productive atmosphere throughout the event.

The main event unfolded over the course of the third and fourth days, immersing participants in a riveting and interactive experience. On these days, the participants were divided into 12 breakout rooms, fostering a focused and collaborative environment. To ensure smooth operations and facilitate query resolution, each group was assigned a Single Point of Contact (SPOC) who served as a dedicated resource for addressing any concerns or questions. The event was dedicated to active participation and task-oriented work. Each participant was assigned a unique task aligned with the theme of ESG, which they diligently worked on from 9 am to 9 pm. This dedicated time allowed participants to dive deep into their assignments, leveraging their knowledge and skills to develop innovative solutions, research papers, or project proposals.

This intensive approach enabled participants to immerse themselves in their assignments, utilizing their expertise to create inventive solutions, research papers, or project proposals. During the event, participants were given distinct tasks that encompassed various aspects of sustainability and environmental consciousness. These tasks included activities such as UNSDG Mapping, which involved identifying and aligning actions with the United Nations Sustainable Development Goals, Case Indexing, which entailed analysing and categorizing relevant case studies, and Company Reviews, where participants assessed different companies' ESG practices.

The research conducted by the team of participants was diligently recorded and documented using pre-established

templates. These submissions were then meticulously reviewed by a panel of experts, who served as the jury responsible for determining the winners of India's First Virtual Legal Marathon - the 24-Hour Research Lab. From the array of submissions, a total of thirty exceptional candidates emerged as the winners. These individuals not only garnered recognition for their exceptional work but were also rewarded with an invaluable opportunity: internships with Dhir & Dhir Associates. These internships are designed to provide the winners with hands-on experience and the chance to refine their skills under professional guidance. The internships are not just a recognition of their achievements but also an avenue for these talented individuals to apply their acquired knowledge in real-world scenarios.

During the course of their internships, these winners will receive comprehensive training, enabling them to further develop their expertise. This hands-on experience will empower them to bridge the gap between theoretical knowledge and practical application. By actively contributing to projects and tasks within their field, they will not only enhance their own capabilities but also make meaningful contributions to their chosen area of focus. This unique opportunity thus represents a significant stepping stone for these individuals as they continue to grow as professionals in their respective fields.

As the fourth day commenced, the ESG lab reached its conclusion at 6 pm, marking a significant milestone in the event. This intensive lab experience provided participants with a valuable opportunity to apply their newfound insights, collaborate with their peers, and present their work to a discerning audience.

Following the conclusion of the ESG lab, the event culminated in a memorable

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