

**Insolvency and Bankruptcy Board of India**  
**7<sup>th</sup> Floor, Mayur Bhawan, Connaught Place, New Delhi – 110001**

16<sup>th</sup> January, 2023

**Subject: Judgment<sup>1</sup> dated 13<sup>th</sup> January 2023 in the matter of Tata Steel BSL Ltd. Vs. Venus Recruiter Pvt. Ltd. [LPA 7/2021 and C.M. Nos. 2664/2021, 2665/2021 & 2666/2021]**

While setting aside the Order dated 26<sup>th</sup> November 2020 passed by the Single Judge in *Venus Recruiters Pvt. Ltd. Vs. Union of India & Ors. [W.P.(C) No. 8705 of 2019]*, the Hon'ble High Court made the following observations -

**A. Scope of avoidable transactions.**

- a. Provisions pertaining to various types of avoidable transactions were especially made a part of the Insolvency and Bankruptcy Code, 2016 (Code/IBC) so that they could be avoided by the resolution professional (RP) during the corporate insolvency resolution process) or the liquidator thereafter.
- b. These provisions, largely endeavor to enhance the pool of assets of the corporate debtor (CD) available for either making it a lucrative prospect for a resolution applicant or in the event of liquidation, for distribution among creditors.
- c. Sections 43-51, 66 and 67 lays down various transactions that may be avoided by the RP and the actions that can be taken against erstwhile management for fraudulent transactions. These provisions are primarily aimed at swelling the asset pool available for distribution to creditors and preventing unjust enrichment of one party at the expense of other creditors.

**B. Survival of Avoidance Applications beyond CIRP.**

- a. An avoidance application may take more time in adjudication especially in cases where multiple parties involved and are heavily contested by parties. While the endeavor, at all costs, should be to ensure resolution of the CD and the adjudication of avoidance applications simultaneously and as quickly as possible, the adjudication of such applications requires proper examination of facts as opposed to making mere objective determinations (as is the case with CIRP).
- b. The general position of law is that an avoidance application will survive the CIRP if all suspect transactions and applications filed in their respect have been accounted for in the resolution plan. Ultimately, all details of such pending applications are required to be placed before the NCLT for approval of the plan under section 31 of the IBC.
- c. The IBC and extant regulations have envisaged since inception that avoidance applications can survive the successful resolution of the CD.

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- d. IBC being a special statute endeavoring to ensure that the resolution process is time bound and efficient and regulation 35A of CIRP Regulations is in line with this object in attempting to make sure that an avoidance application is determined and filed at the earliest to facilitate resolution of the CD.
- a. The role of the RP *vis-à-vis* the resolution process ends, and rightly so, with the successful resolution of the CD. However, the scheme of IBC makes it clear that avoidance applications and CIRP are a separate set of proceedings.
- b. The avoidance of a transaction requires discovery of dubious transactions which are complex in nature and adjudication of these by the Adjudicating Authority (AA) takes time and the resolution process need not await the outcome of the exercise.
- c. The scheme of the Code suggests that proceedings for unearthing such transactions are ancillary proceedings and the resolution of the CD need not be stalled due to pendency of such proceedings. The RP has to thoroughly examine the transactions which the CD has undertaken in the period prior to commencement of the period of insolvency proceedings. This is a very cumbersome process and more so in respect of companies whose books and records do not properly document all its past transactions.
- d. The RP also has to assess if a suspicious transaction would meet the requirements that are necessary to be seen before terming it as a suspicious transaction. Not only the investigation but the adjudication of such transaction is a lengthy process and findings of these transactions by AA involves answering questions on both law and fact and, therefore, it will be impossible to conclude these proceedings within the time frame laid down in the process.
- e. Since investigation and adjudication of these transactions are time consuming this cannot allow persons who were managing the CD to escape from reversal of these transactions. The timeline given in the Code cannot be used as a premium by the unscrupulous persons who have forced the corporate entity into insolvency process.

**C. Beneficiaries of the proceeds of the avoidance transactions and RP to pursue avoidance applications.**

- a. The provisions pertaining to avoidable transactions is to primarily benefit creditors. While the CD ceases to exist in its erstwhile avatar, in cases where the resolution plan is silent on the treatment of any pending applications because such information could not be made available to the applicant, the creditors of the CD can still be the beneficiaries of the sum or properties that may be recovered from adjudication of an avoidance application.
- b. The amount that is available after the transactions are avoided cannot go to the kitty of the resolution applicant. For the resolution applicant, it was purely a commercial contract, a commercial decision whereunder the resolution applicant knew the ground reality, the assets and the liabilities.
- c. The benefit arising out of the adjudication of avoidance applications is not for the CD in its new avatar since it does not continue as a debtor and has gone through the process of resolution. The expectation that some more amount could come to the kitty was not present

when the commercial decision was taken by the resolution applicant while agreeing to take over the CD.

- d. The purpose of the avoidance application as stated above is to enhance the asset pool available for the decision of creditors who are primarily financial institutions and have taken the haircut in agreeing to accept a much lesser amount than what was due and payable to them. This is public money, and, therefore, the amount that is received if and when transactions are avoided and receive the imprimatur of AA must be distributed amongst the committee of creditors in a manner determined by the AA.
- e. The scheme of IBC is just not a commercial call taken by the CoC. It was enacted by the legislature to ensure maximum recovery due to the creditors. The endeavour must always be to ensure maximum recovery of that money to the CoC because it is public money and public cannot be made to suffer on account of dubious/nefarious transactions entered into by the company.
- f. The price that has been offered by a resolution applicant is a commercial decision. He has accepted to take over the entity at a particular price. He cannot be a beneficiary of that amount because that amount was actually paid by the CoC which is a public money. Resolution process is for the CD and also to ensure that the CoCs are not put to a loss because the amount lost by the CoC is principally public money.

#### **D. Effect of Amendment in CIRP Regulations dated 14.06.2022 and 16.09.2022.**

- a. The amendment to regulation 35A dated 16.09.2022 makes it amply clear that an avoidance application can be pending even beyond the submission of the resolution plan. The timelines under this regulation are directory and not mandatory in nature. Regulation 35A pertains merely to the RP discharging his statutory burden of filing an avoidance application within an outer limit of 135 days from the commencement of the CIRP. This timeline takes date of commencement of CIRP as the reference point. However, the CIRP process itself is not strictly or mandatorily bound by its timelines. The intent behind regulation 35A appears to be that a resolution applicant is able to take cognizance of the avoidable transactions at the earliest.
- b. The duty cast by the IBC under section 25(2)(j) is with respect to the RP filing the application before conclusion of the CIRP. But adherence to regulation 35A cannot be required so strictly as to render the provisions of avoidable transactions redundant. There is no time limit prescribed for the AA to adjudicate these applications.
- c. Amended regulation 38(2)(d) necessitates a resolution plan to provide for the manner in which the resolution applicant seeks to deal with a pending avoidance application and the proviso sets a cut-off date for the applicability of the new regulation. Therefore, all resolution plans submitted before the AA for approval on or after 14.06.2022 must mandatorily provide for the manner in which they seek to deal with a *sub-judice* avoidance application. Resolution plans submitted for approval before 14.06.2022 are not necessitated to provide for the manner in which the resolution applicant seeks to deal with such claims.

- d. Therefore, the provision only deals with what ought to be in resolution plans and cannot be interpreted to extinguish proceedings pertaining avoidable transactions in resolution plans submitted before 14.06.2022 altogether.

**Conclusion –**

- a. Adjudication of an avoidance application is independent of the resolution of the CD and can survive CIRP. In cases wherein such transactions could not be accounted at the time of submission of resolution plans, the AA will continue to hear the avoidance application.
- b. The amount that is made available after transactions are avoided cannot go to the kitty of the resolution applicant. The benefit arising out of the adjudication of the avoidance application is not for the corporate debtor in its new avatar since it does not continue as a debtor and has gone through the process of resolution. This amount should be made available to the creditors who are primarily financial institutions and have taken a haircut in agreeing to accept a lesser amount than what was due and payable to them.

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