

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 415 of 2018

IN THE MATTER OF:

Insolvency and Bankruptcy Board of India

...Appellant

Vs

Wig Associates Pvt. Ltd. & Ors.

....Respondents

Present:

**For Appellant: Ms. Swarupama Chaturvedi, Mr. B. N. Dubey,
Ms. Vaishali Verma, Advocates.**

**For Respondents: Mr. Dhaval Deshpande, Advocate for R-1&2.
Mr. H. S. Kohli, Advocate for R-4.**

ORDER

01.08.2018: This is very unfortunate that Insolvency and Bankruptcy Board of India (IBBI), which is a regulatory body and required to act in terms of Section 196 and Section 240 of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code') has preferred an appeal under Section 61, though it cannot be held to be an aggrieved person.

2. The present appeal has been preferred by the IBBI against order dated 4th June, 2018 so far it related to finding given by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai at para 7 and 8, which reads as follows:

“7) While discussing the Resolution Plan, the Learned Resolution Professional had made it clear that ‘Expression of Interest’ was invited as per due process of law by publishing in the Newspaper on 4th April, 2018 and in pursuance only Mr. Mahendra Wig had presented the impugned Resolution Plan, now stood approved by 100% Vote of the CoC.

8) Before examining the contents of the Resolution Plan to record “satisfaction” of the Bench a legal question is to be answered that

in a situation when the Resolution Applicant Mr. Mahendra Wig is related to the Promoter Directors of the Corporate Director Company, whether his Resolution Plan can be entertained or admitted after the introduction of Section 29-A of the I&B Code. The point wise discussion is hereinbelow.

8.1 A New Section is introduced in the Insolvency and Bankruptcy Code, 2016. At the first stage an **Ordinance was promulgated on 23rd November, 2017** under the title **“THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2017 No. 7 of 2017”**. As per the Ordinance Section 29-A prescribes that a person shall not be eligible to submit a Resolution Plan if such person is a “connected person”. Under ‘Explanation’, below the Section, defined “connected person” means any person who is Promoter or in the management of control of the Resolution Applicant. Further we have noted that under section 29-A(h) a person who has executed an enforceable guarantee in favour of the creditor, in respect of a corporate debtor under insolvency resolution process or liquidation under this Code, is also not entitled to submit a Resolution Plan. The admitted factual position is that Mr. Wig does fall under this category “such connected persons” after the introduction of Section 29-A.

8.2 Later on the said Ordinance took the shape of “Amendment” on **18th January 2018** as **“THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2017 No. 8 of 2018”**.

It is important to note that as per Section 1(2) it is clarified that the Amended Act shall be deemed to have come into force on the 23rd day of November 2017.

8.3 It is also relevant to note that vide Section 10(1) of the Amended Act it was declared that, The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 is hereby repealed. Once the expression “hereby” is used in the language, hence there is no confusion that the repealed Act has come into force from that day. In other words the term “hereby” is also to be read “henceforth”.

8.4 Further vide Section 10(2) it was made clear that :-

“Notwithstanding such repeal, anything done or any action taken under the Insolvency and Bankruptcy Code, 2016, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the said Code, as amended by the Act.”

This sub-section has thus made it clear that any action taken under the Code shall be deemed to have been done or taken under the corresponding provision of the Act, but this sub-section is silent about the retrospective applicability.

*8.5 Although the amendment itself is very clear that the provisions of **Section 29-A** of the Code had come into force with effect **from 23rd November, 2017**, but to arrive at a final decision it is expedient to discuss the Law laid down relating to applicability of an amendment. Hence a brief description is required. In this regard few case laws are worth mentioning, named as under:-*

- (i) Municipal Corporation, Poona V/s Bijlee Products (India) Limited (1978) 4 SCC 214.***

- (ii) ***Shyam Suinder V/s RamKumar (2001) 8 SCC 24.***
- (iii) ***Zile Singh V/s State of Haryana (2004) 8 SCC.***
- (iv) ***Videocon International Limited V/s SEBI (2015) 4 SCC 33.***
- (v) ***Sou. Kamal V/s Anna, 2014 SCC OnLine Bom 1618.***

8.6 On due reading of these judgments it clearly emerges that the settled rule of interpretation of the statute is that any Amendment to a statute affecting the legal rights of an individual must be presumed to be **prospective** unless it is made expressly or is impliedly **retrospective**. It further emerges that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of the suit or adjudication of the suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from as been rendered because the rights of the parties in an appeal are determined under the law in force on the date of the suit. So a cardinal principle of construction is that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have a retrospective operation. In one of the precedent viz. *Videocon International (supra)* an observation was made that **pending proceedings are to continue as if the unamended provision is still in force**. Respectfully following the Law pronounced in the afore cited proceedings it can be safely held that the present **amended section 29-A of the Code is effective from the date of passing of the Ordinance i.e. 23rd November 2017.**”

3. Learned counsel for the Appellant submits that the finding as noticed above is not the correct interpretation of Section 29A which resulted in selection of an ineligible Resolution Applicant, and further resulted in approval of an ineligible Resolution Plan.

4. We have heard learned counsel for the Appellant. The observation as made by the Adjudicating Authority and noticed as above, in relation to interpretation of Section 29A which may not be proper, but the IBBI having no locus standi cannot challenge the finding aforesaid.

5. Section 196 of I&B Code relates to powers and functions of IBBI, relevant portion of which reads as follows:

“196. Powers and functions of Board. - (1) The Board shall, subject to the general direction of the Central Government, perform all or any of the following functions namely:—

(a) register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations;”

“(g) monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued hereunder;”

6. From the clause (g) it is clear that the IBBI can monitor the performance of the Insolvency Professionals and in appropriate cases, may pass any direction as may be required for compliance of the provisions of the Code.

7. It is the duty of the Resolution Professional under Section 30(2) to find out which of the resolution plans are in conformity of the provisions prescribed thereunder. If the resolution plan submitted by applicant is contrary to Section 29A, in view of Section 30(2)(e) read with Section 30(3), the Resolution Professional should not have placed such resolution plan before the Committee of Creditors.

8. Further, if the provisions of the code has not been followed resulted in wrong finding given by the Adjudicating Authority, as the Resolution Professional represents the Corporate Debtor, it was open to him to prefer an appeal under Section 61 against the impugned order.

9. The legal interpretation may be in the domain of the Adjudicating Authority, but if the interpretation is against the provisions of the Code and is against the legislative intent, it is the duty of the Resolution Professional to bring the same to the notice of the Appellate Authority by preferring an appeal.

10. For the reasons aforesaid while we are not inclined to entertain the appeal at the instance of the IBBI, give liberty to IBBI to inform the Resolution Professional to move appeal under Section 61 of the code to ensure that law is properly explained at the appellate stage. The appeal stands disposed of with aforesaid observations. No cost.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

am/uk