

25th November, 2020

AN ANALYSIS :: SBI-VS-MENTRE LIMITED

Introduction

1. Resolution Professional being an Officer appointed under the Insolvency and Bankruptcy Code, 2016 (for short “IBC”) is compulsorily required to impartial in discharge of his duties under the IBC.
2. Regulation 3 (1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (for short “CIRP Regulation”), specifically provides for the independence of the RP. The same reads as follows:-
“(1) An insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.”
3. The independence and impartiality are the sacrosanct qualities for being appointed as an RP.
4. This was also recognized by the report of the Bankruptcy Law Reforms Committee, November, 2015 wherein the Committee observed that “As the RP plays a key role in the life-cycle of the insolvency resolution process – from the time of the acceptance of the application, the design and agreement of the repayment plan, to the final execution of the plan – it is possible that unfair conduct of the RP jeopardizes the interests of either party”.
5. However, an objection was raised by the Corporate Debtor to the nomination of proposed RP by SBI, namely, Mr. Shailesh Verma, on the ground that the Mr. Verma being an ex-employee of SBI with employment spanning over 39 years and drawing pension, causes apprehension of serious biasness, if, Mr. Verma is appointed as RP, which may likely not result in transparent and independent Insolvency process.
6. The Ld. NCLT being seized of the objection on 04.01.2020, held that:-
 - Proposed RP, Mr. Verma is an ex-employee and draws pension from SBI.
 - Such RP unlikely to act fairly and as such directed SBI to propose fresh name for substitution of the RP
7. SBI being aggrieved, approached the Ld. NCLAT by way of Company Appeal (AT)(Insolvency) No. 76 of 2020.
8. The Ld. NCLAT vide order dated 22.05.2020, affirmed the view of the Ld. NCLT and held that the RP being an Independent Umpire is bound to act fairly qua the discharge of his statutory obligation under the IBC. Moreover, Ld. NCLAT further remarked that SBI should not have been aggrieved by the order passed by the Ld. NCLT, since the same did not cause any prejudice to SBI.
9. SBI further aggrieved, approached the Hon’ble Supreme Court via filing of the said Civil Appeal No. 2570 of 2020 assailing the order passed by the Ld. NCLAT.
10. On 19.08.2020, the Hon’ble Supreme Court while taking into the consideration the statement of SBI with regard to appointment of new RP though dismissed the Appeal

Unsettling of the stand by the Hon’ble Supreme Court of India

1. However, recently, the controversy with regard to the independency of ex-employee of the Financial Creditor, who was proposed to be appointed as the RP reached the Hon’ble Supreme Court in the Civil Appeal being No. 2570 of 2020 titled as “State Bank of India-vs.-M/s Metenere Limited”.
2. The controversy pertains to the Insolvency Petition filed under section 7 of IBC by the State Bank of India (for short “SBI”) against Mentre Limited (for short “Corporate Debtor”).



Abinash Agarwal

Senior Associate, MCO Legals

B.Com (Hons)

Zakir Husain College

Delhi University

LL.B, Faculty of Law

Delhi University

Expertise:

Corporate Litigation &
Corporate/Commercial Arbitration

✉ abinash.a@mcolegals.co.in

because SBI agreed to appoint another RP.

- 11 The Order of NCLAT was not set aside. However, the Hon'ble Supreme Court observed that it was prima facie not satisfied with the approach adopted by the Ld. NCLAT and stated that the Judgment passed by Ld. NCLAT not be treated as a precedent.

Conclusion

- 1 The Order of the Supreme Court leaves a grey area and law unsettled. Supreme Court cautioning that the order of NCLAT not be taken as a precedence, implies that the Order of NCLAT is subsisting and in operation. Further SBI agreeing to appoint a new RP, adds more to the grey area. Supreme Court should have set aside the order of NCLAT but chose not to do so. Hence, it appears that the impartiality of RP when being ex-employee of the Financial Creditor is and shall be open to questions.

- 2 The observation of the Supreme Court cannot be taken as law of land.

- 3 The observation by the Hon'ble Supreme Court without dealing with the merits in detail shall only further enable the Financial Creditors to appoint its own Resolution Professional, which shall likely hamper the trust of the people/other creditors/ interested party/ resolution applicant/etc. in the CIRP process.

- 4 Infact the requirement to ensure fairness and independency of the Resolution Professional can be also inferred from the fact that Sections 7(5), 8(5), 10(4) and 16(2) of the IBC makes it is imperative that no disciplinary proceedings are pending against the proposed RP.

- 5 The trust bestowed upon the Resolution Professional by the IBC is paramount for the effective completion of the CIRP process and the SBI judgment to a certain extent jolts the valid apprehension of biasness against the Resolution Professional by the creditors/ interested parties, etc.