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POWER OF RESOLUTION PROFESSIONAL TO AMEND PRE-EXISTING CONTRACTS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016

Introduction of Insolvency and Bankruptcy Code, 2016 (In short, IBC, 2016) was the biggest reform in the Indian legal sector aimed to ameliorate the mechanism of financial failures and insolvency procedures in cases of individuals as well as companies. Four years down the line, IBC, 2016 has proved to be one of the most efficient Codes that has ever been implemented. It has made the process of insolvency smooth, speedy, and crystal clear. By providing a time-bound mechanism for winding up, payment of creditors, and other issues, it has proved to be a *modus Vivendi* for all the stakeholders.

IBC, 2016 is accorded a special status with overriding effect on other contrary laws. The Latin phrase “*leges posteriores priores contraries abrogant*” is truly applicable to the special status of the IBC, which means that, in the event where two special statutes contain a non-obstante clause, the non-obstante clause in the later special statute shall prevail.

IBC, 2016 is very comprehensive in nature and every aspect of the code is significant. Most prominent being the role of a resolution professional who is entrusted with large number of professional as well as ethical responsibilities. Successful, transparent, and unbiased insolvency and bankruptcy process completely depends upon the expertise, knowledge, and skill of a resolution professional. In the final report by the Bankruptcy Law Reform Committee, it is stated that “*Insolvency professional forms a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process*”.

A resolution professional is a licensed and qualified professional who is appointed by the Adjudicating authority, i.e. National Company Law Tribunal and is responsible for the management of the whole insolvency and bankruptcy process. The Insolvency and Bankruptcy Code, 2016 (IBC) defines Resolution Professional as “*An Insolvency Professional who conducts the insolvency resolution process and includes an interim resolution professional and takes necessary steps to revive the company.*”

It is to be noted that initially, an Interim Resolution Professional is appointed whose appointment is either confirmed by the Committee of Creditors or a new Resolution Professional is appointed. The major role of an Interim Resolution Professional is to manage the affairs of the insolvency process, conduct the first meeting of the Committee of Creditors, take all steps as per the IBC, 2016 till a resolution professional is appointed or his appointment confirmed.

As per the Code, the duties and functions of a Resolution Professional are several. Section 23 of the Code clearly states that the Resolution professional conducts the entire Corporate Insolvency Resolution Process and manages the operations of the corporate debtor during the corporate insolvency resolution process period. In nutshell, he is the management of the Corporate Debtor.

One of the most significant duties imposed upon the resolution professional, as laid down under section 20(2)(b) of the Code, is to “*enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process.*”

This gives a kick into the back of the mind of the readers that whether resolution professionals are empowered enough that they can unilaterally amend the pre-existing contracts made by the corporate debtor before the insolvency process was initiated and even without the consent of the opposite party. However, it is not so.

In *EIH Limited vs. Subodh Kumar Agarwal* (IA no. 73 of 2018 in CPI (IB) no. 248/7/HDB/2017), the NCLT Hyderabad dealing with the power of Resolution Professional under Section 20(2)(b) held that the management agreement is a legally binding agreement and it could not be unilaterally amended by the Resolution professional or even the committee of creditors, without the consent of both the parties.

The NCLT Mumbai also dealt with a similar situation in the case of *DBM Geotechnics and Constructions Private Limited vs. Dighi Port Limited*, (MA 529/2019, MA 761/2019 and MA 1147/2019 in CP 1382/I&BP/N-



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CLT/MAH/2017) where the resolution plan was submitted by the Jawaharlal Nehru Port Trust (JNPT) in which it was proposed to terminate the existing sub-lease contracts executed between Dighi Port Ltd and Veritas Group on the ground that this contract is under-valued and not in the interest of Dighi Port Ltd. The Ld. Tribunal opined that the resolution plan cannot unilaterally terminate a legally binding contract nor create a third party right, more so, when simultaneously, the NCLT was dealing with the matter on undervalued contract in a separate application.

In our view, the opinion given in both the above cases is justified and as per the intention of the drafter of the IBC 2016. No legislative code can give such wide power to a resolution professional to unilaterally amend the pre-existing contract which is completely valid and legally binding. If such wide power is given, it would cause unjust bias towards one party which is been adversely affected by any such amendment and shall invariably lead to exploitation by the Resolution professional in the grab of Corporate Insolvency resolution Process.

Even the Indian Contract Act, 1872 says that a validly executed contract is legally binding upon the parties and such contracts cannot be amended unilaterally by a party. Under the Contract Act, an existing contract can be amended under section 62 i.e. novation of contract. Novation means creating a new contract while the previous contract stands terminated. The essential ingredient of section 62 is the requirement of consent of both the parties to substitute, rescind or alter the contract and instead give rise to a new contract. In *Ramdayal vs. Ma-*

ji Devdiji, (AIR 1956 Raj 12) Hon'ble High Court held that novation connotes the introduction of new terms and conditions in the contract, it also includes adding new parties to the contract. The eminent condition for novation is that the parties agree to extinguish or discharge his obligation or debt. Unless and until this has been admitted, no novation can take place. Therefore, the test is whether the parties had an intention to enter into a new contract or not. This clearly stipulates that even the Indian Contract Act does not allow unilateral changes to the contract as this will cause injustice to one party over the other and shall also be absurd when one party can at its own will change, amend, alter the terms of the Contract.

If we take the plain reading of Section 20(2) of the Code, it can be interpreted that the code gives power to a resolution professional to unilaterally amend the pre-existing contracts, as nowhere in the section it is mentioned that prior approval or consent is required to be taken by the Resolution professional from the opposite party or from the Committee of Creditors. But allowing the unilateral amendment to a contract will hit the basic principles of natural justice. The intention of any law, including IBC, 2016 could never be to cause such agony to anyone, least interfere into the agreed terms and conditions of Contract between the Parties. Therefore, interpreting Section 20(2) in allowing the resolution professional to unilaterally amend the contract cannot be justified either in law or in equity. Having said that, A feasible, conclusive and perspicuous interpretation of section 20(2) is yet to arrive at by the Hon'ble Courts which balances the power of resolution professionals with the rights of the parties to a contract.