

**WRIT JURISDICTION NCLT - A DEATH KNELL FOR THE INSOLVENCY
REGIME: COMMENT ON EMBASSY PROPERTY DEVELOPMENTS V. STATE
OF KARNATAKA**

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I Introduction

II Judicial overreach and activism

III Scope of article 226

IV Adjudicatory power of the tribunal

V Enforcing the moratorium

VI Error of jurisdiction and excessive exercise of jurisdiction

VII Opening a can of worms

I Introduction

THE INSOLVENCY and Bankruptcy Board of India published a record of 4452 cases with gross debt over 2 lakh crores where the borrowers repaid their unpaid debt even before initiation of the Corporate Insolvency Resolution Process or ('CIRP').¹ The government's flagship Insolvency and Bankruptcy Code or ('IBC') had successfully turned the tables by sending a resounding message to the errant promoters of erstwhile debt-ridden organizations. But, the law's mandate to transform the narrative from debtors in default to creditors in possession relied hugely on close monitoring and adjudication by the Adjudicating Authority under the Act. Under the IBC, The National Company Law Tribunal or ('NCLT') established by the Companies Act² was vested with the jurisdiction to oversee the daunting task of breathing life into the non-performing assets (NPA) of the financial system, in a time bound and expeditious manner. Several provisions in the Code including Section 14 were inserted to solidify the right of the tribunal to expeditiously dispose all matters related to the CIRP. The NCLT was intended to function as an independent body with the full jurisdiction to adjudicate all matters arising out of and incidental to the CIRP.³ However, The Supreme

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¹Associated Chambers of Commerce and Industry in India, Report: *Strengthening the Code* (May, 2019).

²S. 408 The Companies Act, 2013 (Act 18 of 2013).

³S. 60 The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016).

Court's decision in *Embassy Property Developments v. State of Karnataka*⁴ or ('Embassy Properties') has created a dangerous precedent empowering high courts to invoke their writ jurisdiction under article 226 and 227 to interfere with an ongoing insolvency process in the NCLT.

II Judicial overreach and activism

The higher judiciary has consistently demonstrated a trend to amass and concentrate greater power and authority after the series of judges transfer cases.⁵ Such concentration is often in derogation to the authority of the parliament, executive and other quasi-judicial bodies. As has been the matter of public knowledge, and has been documented⁶ that the writ jurisdiction has been historically exercised by courts in extremely rare cases. However, the constitutional courts in India have taken writ jurisdiction in a different light. Several scholars have argued⁷ on the constitutional validity of such judicial overreach, on several forums, and at different levels. However, in cases concerning bankruptcy and insolvency, time is of essence. This is so because the recoverable money from a depreciating asset, systematically declines due to depreciation over time. The average time for disposal of cases in high courts is much higher,⁸ than what is required for an efficient insolvency regime. The writ will obviously be dealt in ordinary course of business at the high courts. This will be very much counterproductive for the regime.

Facts of the case

*Embassy Properties*⁹ though specific, have created a broad spectrum for the high court to interfere with the CIRP on the pretext of 'public law'. The resolution professional filed an application before the NCLT, Chennai for the deemed extension of a mining lease granted to the corporate debtor under Mines and Minerals (Development and Regulation) Act, 1957 or ('MMDR Act'). The Director of Mines and Geology had not passed any termination order before initiation of the moratorium period under section 14(1). The NCLT passed an order against the Government of Karnataka to extend the lease of the corporate debtor. The Government of Karnataka approached the high court against the order of the NCLT ordering

⁴(2019) OnLine SCC 1542.

⁵ J. Cottrell, "The Indian Judges' Transfer Case" 33(4) *ICLQ* 1032-1045 (1984).

⁶E. Jenks, "The Prerogative Writs in English" 32(6) *YLJ* 523-534 (1923).

⁷Dam, Shubhankar, Is the Indian Supreme Court Beyond the Indian Constitution? *Public Law*, Summer 2005, available at: <https://ssrn.com/abstract=969976> (last visited on Dec. 10, 2019).

⁸Pradip Thakur, "High Court Judges Get Just 5-6 Minutes to Decide Cases, says Study" *The Times of India*, Apr. 7, 2016.

⁹*Supra* note 4.

extension of the mining leases contending the legality of the order for, *inter alia*, the NCLT's lack of jurisdiction to determine issues related to the MMDR Act. The high court ordered an interim stay on the operation of the NCLT's order. The high court's interim order was challenged before the Supreme Court under article 136.

Issues

For the purpose of this article, the first issue framed before the Supreme Court is discussed in light of the overall commercial and economic goals of the Code. The issue for consideration is, whether the high court ought to interfere with an order of the NCLT under article 226/227 in direct contravention of a statutory appeal mechanism under the IBC to the NCLAT.

III Scope of article 226

The legislative competence of parliament to exclude the jurisdiction of high courts by establishment of tribunals is widely accepted. Contrary to popular view, *Chandra Kumar v. Union of India*¹⁰ only vests the high courts with the power of judicial review, not a parallel jurisdiction. The law provides for very specific exceptions to invoke writ jurisdiction in derogation of the existing alternate statutory remedy. The Supreme Court carefully warned all high courts to abstain from embarking on judicial adventurism by passing whimsical orders granting wrongful and unwarranted relief to the parties.¹¹ The Supreme Court in *Authorized Officer, State Bank of Travancore v. Mathew K.C*¹² has summarized the exceptions to invoke writ jurisdiction as discussed in *Baburan Prakash Chandra Maheshwari v. Antarim Zila Parishad*,¹³ *Whirlpool Corporation V. Registrar of Trade Marks*¹⁴ and *Harbanslal Sahnia v. Indian Oil Corporation*.¹⁵ These exceptions can be broadly classified as (i) act of the tribunal being *ultra vires* (ii) violation of the principles of natural justice. Additionally, *ABL International Ltd v. Export Credit Guarantee Corporation of India Ltd.*,¹⁶ summarised as under:

....this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14.

¹⁰ (1997) 3 SCC 261.

¹¹ *Dwarikesh Sugar Industries Ltd v. Prem Heavy Engineering Works P. Ltd* (1997) 6 SCC 450.

¹² (2018) 2 SCC 41.

¹³ AIR 1969 SC 556.

¹⁴ (1998) 8 SCC 1.

¹⁵ AIR 2003 SC 2120.

¹⁶ (2005) 10 SCC 495.

Unless a specific constitutional remedy is sought, the high court cannot assume jurisdiction under article 226. Wherever any the legislature provides for statutory adjudication of rights and dispensation of claims through specific enactments, the courts cannot invoke writ jurisdiction as that shall be tantamount to defeating the legislative intent and shall impede the parliament's legislative competence.¹⁷ Intervention of the high court with the orders of the NCLT is very similar to the exercise of article 226/227 against the orders of the Appellate Authority for Industrial and Financial Reconstruction under SICA, even though the Act provided for a statutory appeal mechanism to the Supreme Court. Frequent recourse to the high court was often sought by errant debtors and creditors which ultimately lead to a serious dilution of the powers of the Board of Industrial and Financial Reconstruction under the Act. A similar fate may befall the National Company Law tribunal that ultimately frustrates the commercial objects of the IBC. Therefore, the high court's being bound by article 141 are obliged to dismiss all cases seeking relief under article 226/227 in direct contravention to an available statutory remedy.

IV Adjudicatory power of the tribunal

There is growing jurisprudence over the expansion of the tribunal's exclusive jurisdiction to determine issues arising out of and incidental to administration of a company's affairs, including the matters whose jurisdiction before statutory inclusion was initially vested in civil courts.¹⁸ The Insolvency Bankruptcy Code is an exhaustive code that supersedes all other statutes by virtue of the non-obstante the Code.¹⁹ In *Sampath Kumar v. Union of India*²⁰ the court held that 'the tribunal should be a real substitute of the high court not only in form and *de jure*, but in content and *de facto*. The court, while deciding *Sampath Kumar* relied upon the decision in *Minerva Mills v. Union of India*²¹ wherein it was observed that:

..it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court.

¹⁷*Commissioner of Income Tax v. Chhabil Das Agarwal* (2014) 1 SCC 603.

¹⁸*Shashi Prakash Khemka v. NPEC Micon*(2019) OnLine SCC 233.

¹⁹*Innoventive Industries Ltd.v. ICICI Bank* (2018) 1 SCC 407.

²⁰(1985) 4 SCC 458

²¹AIR 1980 SC 1789

Additionally, as a general rule, the statutory remedy should be exhausted before approaching the writ court.²² The Supreme Court in *Harbanslal Sahnia v. Indian Oil Corporation*²³ held that the rule of exclusion due to statutory jurisdiction, though is a rule of discretion, should be sparingly used only when special circumstances like violation of principles of natural justice exist. There is emerging jurisprudence to empower tribunals to conclusively determine matters by excluding the jurisdiction of high courts. Section 60(5) (c) of the IBC empowers the tribunal to determine all matters arising out of and incidental to the Insolvency proceedings. The Supreme Court while determining the scope of this section failed to consider the commercial rational and legislative intent behind such an enabling provision. Instead, the Supreme Court relegated itself to placing reliance on an misinformed example to justify a narrow interpretation of 60(5) (c) and also failed to delineate the contours of public law for future cases.²⁴ The IBC is an exhaustive code that provides the Adjudicating Authority with adequate jurisdiction to determine the CIRP within the mandated 180 day deadline. If the ability to decide matters incidental to the CIRP is stripped away from the NCLT, the tribunal shall become a mere paper tiger without the means to resolve complicated insolvency cases. Therefore, the high court ought to sparingly exercise its discretion to intervene with the NCLT's orders to ensure the aims and objectives of the Code are achieved.

V Enforcing the moratorium

Section 14(1) (a) bars the insinuation of or continuation of any proceeding including passing of any orders by any authority after declaration of moratorium. The order of the Department of Mines and Geology terminating the lease is squarely within the definition of Section 14(1)(a). Even though the NCLT may not have the jurisdiction to conclusively determine the subject matter of the dispute, the NCLT has sufficient jurisdiction to enforce the moratorium. Therefore, any act by any authority in contravention of Section 14(1)(a) shall empower the NCLT to assume jurisdiction to enforce the moratorium owing to overriding non-obstinate clause in the Code.²⁵ The Supreme Court in *Solidaire India Ltd v. Fairgrowth Financial Services*²⁶ reiterated the canons of statutory interpretation, concluding that, in case of a

²²Law Commission of India, 272th Report on Assessment of Statutory Framework of Tribunals in India (Oct, 2017).

²³AIR 2003 SC 2120.

²⁴*Supra* note 4.

²⁵S. 238 The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016).

²⁶(2001) 3 SCC 71.

conflict between the non-obstante clauses of two special legislations, the one passed later in time shall prevail. The IBC, passed after the MMDR Act, shall prevail and empower the NCLT to adequately enforce the moratorium period in accordance with section 14(1)(a).

VI Error of jurisdiction and excessive exercise of jurisdiction

The English landmark case of *Anisminic Ltd., v. Foreign Compensation*²⁷ commission has been discussed at length in the *Embassy Properties* case to distinguish between jurisdictional error and excessive exercise of jurisdiction. The effect of the *Anisminic* case has been to reduce the distinction between jurisdictional error and error of law to a vanishing point.²⁸ However the *Anisminic* case was evaluated in light of the Supreme Court's decision in the *Official Trustee* case.²⁹ Interestingly, both these cases were discussed in the context of (i) jurisdiction of superior court being questioned on the basis of an ouster clause and, (ii) challenge to exercise of jurisdiction by a superior court despite availability of an alternative remedy. *Embassy Properties* judgement discusses the distinction between the two at length without considering the fundamental question of the high court's superiority over the NCLAT. In determination of the legality of the NCLT's order, the high court fails to consider why it is better equipped than the NCLAT, the statutory appeal mechanism. Even if the NCLT's order is illegal for want of jurisdiction, the NCLAT is the appropriate body to issue a stay of operation instead of the high court.

In a factually similar case of *Edelweiss Asset Reconstruction Company v. Vijay Kumar V. Iyer RP of Murli Industries Ltd.*,³⁰ the NCLAT revised the NCLT's order giving directions to the Department of Geology to extend the mining lease of the corporate debtor. The Resolution Plan sought directions from the NCLT for the Department of Geology to extend the mining lease of the corporate debtor as a mandatory stipulation of the resolution plan. The NCLT accepted the resolution plan making the direction binding on the Department of Geology under section 31 of the Code. However, the NCLAT exercising its appellate jurisdiction approved the resolution omitting the stipulation directing the department of geology to extend the mining leases. Therefore, the desired objective was achieved within the

²⁷(1969) 2 A.C 147.

²⁸*M.L Sethi v. R.P Kapur* (1972) 2 SCC 427.

²⁹*Official Trustee, West Bengal v. Sachindra Nath Chatterjee*, AIR 1969 SC 823.

³⁰(2019) OnLine NCLAT 374

statutory appeal mechanism without an unwarranted interference by the high court. the high court's supervisory jurisdiction over the NCLT cannot be exercised in derogation with the jurisdiction of the NCLAT.

VII Opening a can of worms

Empowering the high court to interfere with the NCLT's order on account of infringement of a broad concept of 'public law' shall be tantamount to opening a can of worms. These errant judicial pronouncements have the effect of diluting specially drafted commercial legislations. Subjecting the NCLT's order to the high court's scrutiny shall lead the IBC to a similar fate as its predecessor, the Sick Industrial Corporation Act³¹ and its inefficient BIFR mechanism.³² The Courts while taking certain actions, departing from the statute's mandate, fail to consider the far reaching consequences these cases have on adjudication of all future cases. In, *Embassy Properties*,³³ the resolution applicant misused the liberty sought while withdrawing the initial writ petition before the high court by filing the subsequent petition before the NCLT without directions from the high court. Thus, though departure may be equitable due to certain peculiar facts in a particular case, these cases provide all future litigants to right to claim similar exemptions under the doctrine of *stare decisis* regardless of similar equitable circumstances justifying the special consideration. The number of NCLT orders being challenged in high courts will immensely increase and reliance shall be placed on the Embassy Properties judgement to compel high courts to admit them. Embassy Properties fails to clearly demarcate the contours of public law. The high courts shall be tasked with the determination of whether a particular issue falls within public law's domain. In absence of strict guidelines of the Supreme Court, the interpretation by various high courts shall further lead to further uncertainty over the CIRP undermining investor sentiment.³⁴

³¹The Sick Industrial Companies (Special Provisions) Act, 1985 (Act 1 of 1986).

³²Lalit Kumar, "Our Bankruptcy Laws are a Mess" *The Hindu Business Line*, Mar. 8, 2015.

³³*Supra* note 4.

³⁴Price Waterhouse Cooper, Report: *Decoding the Code- Survey on 21 months of IBC in India*. (Aug. 2018)