

**27th M.C. CHAGLA MEMORIAL GOVERNMENT LAW COLLEGE NATIONAL
MOOT COURT COMPETITION, 2020**

ATKT CONSTRUCTIONS PRIVATE LIMITED

v.

NATIONAL LABOUR UNION AND ORS.

- 1) Pranraj was one of the youngest republics in the world, with a high concentration of young, dynamic entrepreneurs. Yet, these entrepreneurs were crippled by a business environment that took the longest time and highest cost (by world standards) to resolve any liquidity problems. As a result, Pranraj had some of the lowest credit ratings compared to the size of the economy. This was a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of Pranraj. Such dynamism necessarily warranted urgent reforms. Lending in Pranraj was concentrated in a few large companies that had a low probability of failure. Lenders overly emphasized on secured credit. The lack of lending without collateral, starved many of Pranraj's labour-intensive industries of credit facilities. It was observed that insolvency resolution suffered from the want of extended periods of time for resolution and high losses in the recovery processes for creditors.

- 2) It was in the light of this that the Insolvency and Bankruptcy Code, 2016 ("**Code**") had been passed by the legislature of Pranraj after great deliberation and pursuant to various committee reports. The Code sought to provide for the designation of a National Company Law Tribunal ("**NCLT**") as the adjudicating authority for an expeditious resolution of corporate insolvency. One of the most important objectives of the Code was to bring the insolvency laws in Pranraj under a single

unified umbrella with the object of speeding up the insolvency process. As per the data available with the World Bank in 2016, insolvency resolution in Pranraj took anywhere between 4 to 5 years on average which was much higher when compared with that of the United Kingdom (1 year), the United States of America (1.5 years) and even South Africa (2 years). The World Bank's Ease of Doing Business Index 2015 ranked Pranraj at a poor 135 out of 190 countries on the yardstick of ease of resolution of insolvency. Other countries had already marched way ahead of Pranraj. For example, United States of America had adopted bankruptcy reforms as far back as 1978. The United Kingdom had also promulgated its Insolvency Act in 1986. The Code was thus a radical measure necessitated in order to expedite fruitful resolution of insolvency and bankruptcy within the Republic of Pranraj.

- 3) ATKT Constructions Private Limited (“**Construction Company**”) was a reputed real estate development and construction company with construction activities spanning the length and breadth of the Republic of Pranraj. The Construction Company was in the process of developing two megacity projects, which were to house over 250 families in a state-of-the-art township being constructed in the metropolitan city of Jatshal in the state of Maharajya. The project started in 2013. Mr. Ajay Dallya was the promoter and Managing Director of the Construction Company.

- 4) Mr. Dallya was infamous for having an extravagant lifestyle, and was always spotted at all major parties, exclusive poker events and high stake derbys held in the city. Mr. Dallya also made heavy investments in several sporting events which he closely followed, including purchasing a cricket team – Jatshal Kings for a whopping amount of USD 150 million. A lesser known fact about Mr. Dallya was that he was a deeply religious and superstitious man, and would made heavy

- donations of 11 kgs of gold every year to a religious institution located in the southernmost tip of Pranraj. He was also involved in a lot of charities related to several causes including the upliftment of the labour force, women and children.
- 5) Since August 2015, owing to labour union problems and a sharp downturn in the real estate market as well as economic slowdown, the Construction Company began to suffer extensive losses. The Construction Company had sought financial assistance from certain banking and non-banking financial service entities (“**Financial Institutions**”). Due to the crippling losses which continued to mount, the Construction Company was not able to service the loans given to it by the Financial Institutions. The Construction Company itself when faced with an immense liquidity crunch, proposed a corporate debt restructuring scheme. The Financial Institutions formed a consortium led by the lead bank i.e. the People’s Bank of Elitism. The consortium at its joint meeting dated 23rd December, 2015 arrived at a decision that a corporate debt restructuring resolution plan ought to be approved. The consortium of financial institutions approved the corporate debt restructuring resolution plan (“**CDR Plan**”). Under the CDR Plan, a Master Restructuring Agreement was entered into on 13th January, 2016 according to which the Construction Company undertook to make payments within a period of 24 months. Funds were to be infused by the creditors and obligations were to be met by the Construction Company. While desperately attempting to keep the company afloat, the Construction Company had failed and neglected to pay the dues of its 1200 strong labour force.
- 6) The labour force that had been engaged by the Construction Company formed and constituted a labour union by the name of National Labour Union (“**Labour Union**”) to address their grievances and to agitate several issues relating to the work force, including non-payment of their wages/salaries since 1st January, 2016. On

28th August 2017, the Labour Union proposed revised terms for all workmen (including 5% increase in wages, better sanitization facilities and certain health and maternity benefits) and called for a complete strike of all the workers at the construction site, unless the management agreed to the revised terms. The strike prolonged for a week, with both sides refusing to budge and ultimately lead to certain violent clashes between the security guards and some workers. The site manager at the construction site at Jatshal sought to resolve the dispute with the Labour Union by writing to their leader that the revised terms of the workmen's wages would be accepted if the strike is called off and work is resumed. However, such communication was not confirmed by any of the senior management. The disputes between the Labour Union and Company landed up in the Industrial Tribunal at Jatshal on 30th October 2017, as per the provisions of the Industrial Disputes Act, 1970.

- 7) All settlement discussions between the Labour Union and management were in vain. Ultimately, the Industrial Tribunal passed an award dated November 11, 2018 in favour of the workers, *interalia* awarding back wages from 1st January 2016 at the earlier rate, and revised wages from 28th August 2017 onwards, along with other health benefits, totalling to an amount of INR 4.5 crores. The decision was carried up in appeal to the Industrial Disputes Appellate Tribunal, and the matter is currently pending.
- 8) The downward spiral of the Construction Company continued, and finally a financial creditor, Bank of Eureka filed an application for initiating corporate insolvency resolution process (CIRP) against the Construction Company, before the National Company Law Tribunal, Jatshal Bench under Section 7 of the Code. The application was admitted on August 25, 2019 and the CIRP process was initiated and Mr. Anshuman Roy was appointed as the interim resolution professional (IRP).

A moratorium under Section 14 of the Code was imposed against the institution of suits or continuation of pending suits or proceedings against the Construction Company, including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority. Thus, the moratorium applied to the labour union proceedings before the Industrial Disputes Appellate Tribunal.

- 9) While the insolvency application filed by the Bank of Eureka was pending before the NCLT, the Labour Union filed an application therein stating that they ought to be treated at par with the financial creditors of the Construction Company and considered to be a part of the Committee of Creditors, particularly on account of the award obtained from the Industrial Tribunal. The company refuted this claim on the grounds that the Labour Union was not a financial or an operational creditor of the company, and in any event, the claim was *sub-judice* and disputed.

- 10) The Labour Union also preferred an application under Section 47 of the Code highlighting that the promoter Mr. Dallya had siphoned off approximately INR 30 crores during the period of 2013-2018, from the Construction Company, in the name of making charitable donations to an NGO called “*Sabka Nirmaan*”, which supposedly worked towards providing food, education and health benefits to the poor labour force. The Labour Union also provided an affidavit from the erstwhile accountant of the NGO, revealing details of the financial fraud that was done at the behest of Mr. Dallya, and prayed that the NLCT direct Mr. Dallya to return the said amount of INR 30 crores back to the Company – which amounts can then be used to pay the workers dues. The Labour Union contended that they had brought this information to the attention of the IRP, who had failed to pay any attention to these facts. The Construction Company contended that the Labour Union had no locus to prefer an application before the NCLT and as such, the present application filed by the Labour Union was not maintainable in law.

- 11) The NCLT, by an order dated October 15, 2019, held that the Labour Union is to be considered at par with home-buyers, and therefore, ought to be considered as financial creditors to be included in the Committee of Creditors. As regards the application on the avoidable transaction, the NCLT held that the Labour Union had no locus to file the said application under Section 47 of the Code. Only the resolution professional could file an application challenging such transaction. In any event, the transaction was beyond the look back period prescribed by the Code. This decision was upheld by the National Company Law Appellate Tribunal (“NCLAT”).

- 12) In the interregnum during the pendency of the proceedings preferred by the Bank of Eureka, pursuant to a report prepared by the insolvency law committee dated 10th September 2018 the Code was amended. The amendment so made deemed allottees / flat purchasers of real estate projects to be “Financial Creditors”, so that they were at liberty to trigger the Code as more particularly set out therein and entitled to be represented in the Committee of Creditors. At this stage, taking advantage of the amendment which had come into effect, two sets of allottees i.e. (i) the Affluent Flat Purchasers Association and (ii) the Office Goers Association invested in ATK T Constructions decided to invoke the provisions of the Code. The flat purchasers filed separate proceedings before the NCLT on the grounds that they had in fact invested monies in the ATK T GoBlanca Project of the Construction Company. The Construction Company had failed and neglected to adhere to the timelines in providing them with their residential premises.

- 13) The flat purchasers had invested monies for purchase of flats and were promised possession in May of 2016. The Construction Company had assured the flat purchasers / allottees that it would provide them with their respective units on or

before 31st December 2018. However, till date, the project had not gone past plinth level construction. In these circumstances, while appending all of the aforesaid data and highlighting the poor financial condition of the Construction Company, 25 flat purchasers jointly preferred an application before the NCLT on June 1, 2019. On a consideration of the facts and the data placed before it, the NCLT by its Order dated August 1, 2019 rejected the application on the grounds of maintainability since the purchasers did not satisfy the threshold requirement of a minimum of 100 buyers or 10 percent home buyers, whichever is less (introduced by an amendment to the Code on July 1, 2019). The flat purchasers filed an appeal before the NCLAT on the ground that such a restriction is arbitrary and discriminatory, and in any event cannot be applied retrospectively. The NCLAT upheld the decision of the NCLT.

- 14) In these compelling circumstances, two distinct appeals lay before the Supreme Court of Pranraj and considering the commonality of the corporate debtor, the Supreme Court agreed to hear them together. The appeals raise the following seminal questions of law and issues regarding the constitutional validity of the provisions challenged in the said appeals:
- a Whether the Labour Union can be considered as a financial creditor at par with the home-buyers and be made a part of the Committee of Creditors? Whether the workmen would be entitled to their entire dues in priority under Section 53 of the Code, as per the increased rates awarded by the Industrial Tribunal prior to the imposition of the moratorium?
 - b Whether the Labour Union has the locus to file an application in relation to an avoidable transaction pertaining to the alleged siphoning of funds by Mr. Dallya? Whether the ability of a creditor to independently challenge a transaction under Section 47 ought to be applied to all types of avoidable transactions?

- c Whether the amendment made in the Insolvency and Bankruptcy Code which prescribe a threshold for deemed allottees of real estate projects to be able to maintain an application is arbitrary and discriminatory? Whether the amendment is clarificatory in nature and therefore retrospective in operation?

The matter is up for final hearing in October 2020.

NOTE:

- 1) Please note that the laws of Pranraj are *pari-materia* with the laws of the Republic of India.
- 2) The laws of Maharajya are *pari-materia* with the laws of the State of Maharashtra.