

Mercurial Decisions

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SC does U-turn, validates JSW takeover of Bhushan Steel

New Delhi: In a decision that could have a salutary bearing on the Insolvency and Bankruptcy Code (IBC), Supreme Court on Friday reversed its eyebrow-raising May 2 verdict, directing liquidation of bankrupt Bhushan Power and Steel Limited, to put back in place the National Company Law Appellate Tribunal's Feb 2020 decision to allow Sajjan-Jindal-led JSW Steel revive the failed entity, **reports Dhananjay Mahapatra.**

A bench of Chief Justice BR Gavai and Justices Satish Chandra Sharma and K Vinod Chandran reversed the decision of a two-judge bench led by Justice Bela M Trivedi, since retired, accepting arguments of solicitor general Tushar Mehta, who appeared for the Committee of Creditors, and senior advocate Neeraj Kishan Kaul for JSW, which invested Rs 20,000 crore to revive BPSL and make it a profit-making company.

► **Clock can't be... P 10**

Clock can't be put back to penalise JSW, says SC

► Continued from P 1

The two-judge Supreme Court bench had rejected the Committee of Creditors-approved resolution plan of JSW, which was concurrently found to be sound by both National Company Law Tribunal (NCLT) and NCLAT. Using exclusive powers under Article 142 of the Constitution, SC had directed NCLT to initiate liquidation proceedings of BPSL while deciding an appeal by one of the promoters of BPSL challenging the resolution plan.

Writing the 136-page judgment on operation of various IBC provisions, CJI Gavai said, "The legislature purposefully did not include a means to challenge the commercial wisdom exercised by the CoC. This makes a challenge to the same non-justiciable... Any interference in the paramount objective of the CoC of exercising its commercial wisdom would amount to the court rewriting the law and going against the very objectives of the IBC." Referring to takeover of BPSL by JSW, the CJI-led bench said that since the



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B R GAVAI
Chief Justice of India

IBC's objective of ensuring corporate debtor continues as a going concern has been achieved and loss-making BPSL has been transformed to a profit-making entity, the clock cannot be put back to penalise JSW by ordering BPSL's liquidation. "This will defeat the very purpose of IBC to confer sanctity to the finality of duly approved resolution plan," SC said.

The court rejected the COC's late-in-the-day argument for distribution of earnings before interest, taxes, depreciation and amortisation (EBITDA) amongst creditors. SC said since the request for resolution plan (RfRP) issued by the resolution professional for the corporate insolvency resolution process did not provide for distribution of EBITDA among creditors, the COC cannot demand it now.

SC said sans a specific provision in RfRP regarding distribution of EBITDA, it is impermissible for CoC to raise such a plea five years after approval of the resolution plan.

"A successful resolution applicant (JSW in this case) cannot be faced with undecided claims after its resolution plan has been accepted. That would amount to 'hydra heads popping up' which would throw into uncertainty the amounts payable by a prospective resolution applicant who would take over the business of the corporate debtor," it said.

RBI, in 2017, had issued a circular identifying 12 large-scale corporate defaulters, with outstanding debts valued at Rs 5,000 crore and above, infamously known as the "dirty dozen", which included BPSL.

When the original decision was rendered in JSW case, most of us in legal fraternity wondered why the corporate wisdom was overruled by the Hon'ble Supreme Court. But as the saying goes, better late than never. The Court has corrected its mistake in a brief time. However, it

leaves open a wider question – are Supreme Court's decisions good for a fortnight or a month or at the most a year? No one knows when the Hon'ble Court will take a U-turn. That is dangerous from jurisprudential point of view. It is more dangerous in a volatile

political situation presently prevailing in India.

The law ought to be stable and predictable. Consider, after how many decades, the U.S. Supreme Court modified *Roe v. Wade* – it was about five decades. There is at least one incident in U.S. Supreme Court when it held that even if its judgment was wrong, it would not change on its own though the legislature could do it if it so desired. The underlying thinking was that law laid down by the highest court should remain stable and predictable. It is not so in India.

The problem lies in the Bench system in the Supreme Court. It is a top heavy court. More than 30 Judges sit in Benches. If one Bench has a different view, it tries to tweak the decision of earlier Bench. This is happening despite lofty principle of law that the earlier precedent is binding in a subsequent case, and principle of *stare decisis* should be followed. On the other hand, all the nine Judges in U.S. Supreme Court sit as a single Bench.

The Bench system prevails to a limited extent in U.K. Supreme

Court also but there also, the judgments do not change as quickly as it often happens in India.

I have personal experience of feeling difficulty in citing conflicting decisions of the Supreme Court as precedents before the High Courts. Ironically, in one case SLP is dismissed in *limine* by one Bench but in an almost similar case, notice is issued by the other Bench!

Why the Hon'ble Supreme Court needs to lay down stable and predictable law is for the reason that politics will enter into law if this is not done. Judicial politics will emerge parallel to political power game. It is for this reason that law declared by the Supreme Court is farsighted and should be based on long term public policy.

