



# ASC

## INSOLVENCY TIMES



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## Editorial



### AMENDMENTS SOUGHT IN IBC FOR FINE-TUNING THE JURISDICTION OF NCLT UNDER SECTION 7 OF THE CODE

The NCLT's scope and extent of enquiry in deciding an insolvency petition under Section 7 was limited to satisfying itself of the existence of a debt and whether a default has occurred and mandatorily admit the insolvency petition on fulfilment of these twin conditions. However, in Vidarbha Industries Power Limited v. Axis Bank Limited, the Supreme Court tweaked the rules of the game and armed the NCLT with the discretion to consider extraneous factors while deciding a Section 7 petition. This unsettled an otherwise settled position of law and caused discomfort amongst the financial creditors. As a consequence of this judgment, Section 7 petitions have been dismissed by the NCLT based on findings that the debtor appeared to be "reasonably healthy", or that a debtor was unable to repay a debt only because of a "liquidity crunch" and otherwise appeared to be solvent.

To get over this judgement, the MCA has proposed to restore the earlier position and make it mandatory for the NCLT to admit Section 7 petition upon satisfaction of the twin conditions. Additionally, it has also been proposed that the provision to decide a Section 7 petition within 14 days, which has been interpreted as only a directory provision, be amended to clarify that the NCLT is ought to decide the petitions within 14 days.

These amendments shall bring much needed clarity thereby preventing languishing before the Adjudicating Authority.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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## **NCLAT Extends Benefit Of Limitation Computation To Appeals Filed Between 01.11.2022 To 23.12.2022**

On 24.12.2022 the National Company Law Appellate Tribunal (“NCLAT”) had issued fresh directions for computation of limitation for filing of appeals before NCLAT. Earlier the benefit of order dated 24.12.2022 was only available to appeals filed on and after 24.12.2022. However, the NCLAT vide an Order dated 21.02.2023 has extended the benefit of Order dated 24.12.2022 to appeals which have been filed between 01.11.2022 to 23.12.2022. The conditions of limitation computation would remain same as given in Order dated 24.12.2022.

### **Directions For Computation Of Limitation –**

On 24.12.2022, the NCLAT had issued fresh directions for computation of limitation for filing of appeals before NCLAT. The directions are as follows:

- The Limitation shall be computed from the date of e-filing.
- The hard copy has to be filed within 7 days of e-filing. However, the Competent Authority is at liberty to notify to extend the period of filing hard copy in case of any unforeseen exigency.
- In a case where hard copy is filed after 7 days, the appeal will be placed before the Tribunal for appropriate order.
- The requirement of filing Appeals by electronic mode shall continue along with mandatory filing of the Appeals as per Rule 22 of the NCLAT Rules, 2016.

The NCLAT Order dated 24.12.2022 supersedes Order dated 21.10.2022 and had come into force with immediate effect. The directions were effective from 24.12.2022 onwards and now would also be applicable to appeals filed between 01.11.2022 to 23.12.2022. NCLAT has also recalled its previous circular dated 21.10.2022 bearing F.No.10/37/2018-NCLAT regarding computation of limitation.



## RCap insolvency: Torrent moves SC against NCLAT order allowing second e-auction

Torrent Group has moved the Supreme Court against the National Company Law Appellate Tribunal's (NCLAT) order that permitted holding of an extended auction for Reliance Capital, which is undergoing insolvency proceedings. In its filing, the Gujarat-based firm has termed the administrator's decision to hold another round of challenge process "illegal", even as it sought a faster and time-bound conclusion of the bankruptcy process, sources close to the development said.

The committee of creditors (CoC) of RCap had decided to hold the second round of e-auction, following the NCLAT order, on March 20. The extended challenge mechanism is being conducted to maximise the value through the insolvency process as the results of the first challenge mechanism, according to the administrator and the CoC, were "suboptimal and unsatisfactory".

On March 2, overturning a lower court's order, NCLAT permitted holding a second e-auction as sought by lenders and the administrator in an attempt to maximise value from the insolvency process. The appellate tribunal had also told the CoC to take steps for further negotiations with resolution applicants as per the relevant clauses of the resolution plan. The order enabled the CoC to negotiate and call for higher bids.

In February, the National Company Law Tribunal's (NCLT) Mumbai bench had declared the proposed second e-auction a violation of bankruptcy rules. Further, the bankruptcy tribunal had also named Torrent Group the highest bidder under the first challenge mechanism and directed the administrator to take the process to its "logical conclusion". In the first round of the challenge mechanism, Torrent had emerged as the highest bidder with a bid amount of Rs 8,640 crore and IIHL came in second with a Rs 8,110-crore bid.

The first round of the auction led to a legal tangle after IIHL made an all-cash bid of Rs 9,000 crore, which was challenged by Torrent before the NCLT's Mumbai bench. Torrent later revised its bid of Rs 8,640 crore by offering the entire amount in upfront cash against Rs 3,750 crore offered earlier in the auction.

## NCLT Ahmedabad Approves GAIL India's Resolution Plan For JBF Petrochemicals

NCLT Ahmedabad has approved a 2079 crore resolution plan of GAIL(India) Limited ("GAIL") for JBF Petrochemicals under section 31 (1) of the Insolvency and Bankruptcy Code, 2016 ("IBC"). This is the second instance of a state-owned company acquiring a private sector bankrupt company, with the first being Indian Oil Corporation acquiring Mercator under IBC.

JBF Petrochemicals was admitted into Corporate Insolvency Resolution Process ("CIRP") vide an order dated 28.01.2022. The consortium, led by IDBI bank, claimed 7918 crores from JBF Petrochemical, out of which the NCLT admitted a claim of 5628 crores. The Secured Financial Lenders claimed an amount of 4684 crores but the NCLT admitted a claim of 4662crores, out of which the resolution plan by GAIL offered the Secured Lenders 2015 crores, which is a 43.23% recovery. The Unsecured Financial Creditors claimed an amount of 1329 crores and the NCLT admitted a claim of 252 crores, out of which the resolution plan offered 14 crores, which is only a 5.7% recovery. Lastly, the Operational Creditors claimed an amount of 1904 crores and the tribunal admitted a claim of 712 crores, out of which the resolution plan offered 49 crores which is a 6.92% recovery.



The NCLT being satisfied approved the resolution plan and ordered that GAIL has to obtain the necessary approvals under the law of India within 1 year from the date of approval of the resolution plan under section 31 of IBC or within such period as provided by the law, whichever is later.

The Secured Financial Lenders of the Debtor included, inter alia, IDBI Bank, Union Bank of India, Indian Overseas Bank, Union Bank of India. The consortium had received Resolution Plans from 3 applicants i.e. Consortium of Indian Oil Corporation and ONGC limited, MPCIL Private Limited and GAIL. The Committee of Creditors had approved the resolution plan by GAIL with 100% voting share.

## **NCLT directs Sebi to give information to RP of Pancard Clubs**

National Company Law Tribunal (NCLT) has directed market regulator Securities and Exchange Board of India (SEBI) to provide information such as details of attached properties of insolvent Pancard Clubs Limited to the company's resolution professional (RP) Rajesh Sheth. The order also directs Sebi to transfer sums realized from the sale of attached properties of the company to the RP. Pancard Clubs had raised Rs. 7000 crore from 50 lakh individuals before the company went bust.

Sebi is investigating the company for running an unregistered collective investment scheme (CIS). The scheme was allegedly an investment scheme in the disguise of a club membership program allowing access to members to use the company's resort properties for vacationing.

The market regulator has also challenged the insolvency proceedings of the company at national company law appellate tribunal (NCLAT) arguing that this would hinder its efforts to sell the properties that are in its custody and realize money for the 50 lakh affected individuals. NCLT had ruled that the investors had a right to invoke insolvency against the company irrespective of other ongoing investigations by regulators as long as it was evident that the nature of their subscription to Pancard Clubs membership program was such that it could qualify as a financial debt.

Pancard Clubs' investors had argued at NCLT that the membership had embedded clauses that stated that they would get a fixed return on the money invested. This gave it the character of a debt instrument.

It was reported that Serious Fraud Investigation Office has also moved NCLT to freeze the assets of the company. This could set the stage for a three-way fight between regulators, investigation agencies and the aggrieved investors over how their claims should be recovered. Mumbai-headquartered Pancard Clubs founder and promoter passed away in 2017. The company's other directors are senior citizens and are said to be absconding.

## **NCLAT Delhi Upholds Remitting Of Resolution Plan Back To COC For Compliance Of Sec 30(2) IBC**

The NCLAT, Principal Bench, while adjudicating an appeal filed in Noble Marine Metals Co WLL v Kotak Mahindra Bank Limited & Ors., has upheld the order of Adjudicating Authority whereby a Resolution Plan was remitted back to the Committee of Creditors.



The Adjudicating Authority vide order 30-03-2022, held that if the majority of the CoC has taken a view that matter should go back for reconsideration before the CoC, no impediment will be caused to allow the CoC to have a relook and it is open to the CoC to deliberate the plan in accordance with law.

Aggrieved by impugned order passed by the Adjudicating Authority, an appeal was preferred before the NCLAT by the appellant, Successful Resolution Applicant (SRA) challenging the same. The appellant contended that the Adjudicating Authority has no jurisdiction to send back the Resolution Plan for reconsideration at the request of Financial Creditor. Relying on *Ebix Singapore (P) Ltd. v. CoC of Educomp Solutions Ltd.*, the appellant contended that an approved Resolution Plan is binding on the CoC and can neither be withdrawn nor sent back for modification. The respondent contended that the entire Plan, need not to be reconsidered but only a clause which provide for mandatory release of the personal guarantee given by the promoters because the clause is contrary to S. 128 of the Contract Act, therefore, is liable to be deleted from the Plan. Moreover, the Resolution Plan has to be in compliance with S. 30(2)(e) IBC. The respondent further contended that the Order was passed on the consent of the SRA, therefore the Adjudicating Authority sent the Plan back without expressing any opinion on the stand taken by the CoC. Moreover, the SRA has no right to appeal in this particular matter.

The Tribunal observed that it is well settled law that once a Resolution Plan is approved by the CoC, it is binding between the CoC and SRA. The Tribunal referred to *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, where the Supreme Court considered the scope of judicial review of the Adjudicating Authority in the context of Resolution Plan approved by the CoC and held that –

*“...while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters.”*

The Tribunal opined that if the Adjudicating Authority finds on given set of facts that parameters under S. 30(2)(e) IBC have not been kept in view, the Resolution Plan can be sent back to the CoC to review such plan after satisfying the parameters. The Tribunal observed that the SRA cannot challenge the order in this appeal as SRA himself consented that the matter be sent back to the CoC for consideration. The Tribunal opined that present is a case where COC is not asking to withdraw from the plan or asking for reviewing the entire Resolution Plan rather COC has asked for leave of the court for deleting clause in the plan which sought to release the promoters from personal guarantee given to the financial Creditors.

On not finding any grounds to interfere with the impugned order of the Adjudicating Authority, the Tribunal upheld the order of the Adjudicating Authority. The Tribunal directed the CoC to complete its process within four weeks of the date of order and asked the SRA to file an application with the Resolution Plan before the Adjudicating Authority within a further period of two weeks.





# RECENT JUDGMENTS

## **M.K. Rajagopalan v. Rajendran & Anr.**

### ***Unsuccessful Resolution Applicant has No Locus Standi to challenge the Approved Resolution Plan: NCLAT Chennai***

The Bench opined that the CIRP of the Corporate Debtor has ended, hence, the Appellant's attempt to rewind the entire process and to vote on its Resolution Plan again is impermissible. On the issue of locus standi, it was observed as under:

*"On a careful consideration of the respective contentions advanced on either side, this `Tribunal', keeping in mind of a vital fact that the `Petitioner/ Appellant', being an `Unsuccessful Resolution Applicant', has no `Locus', to `assail' a `Resolution Plan' or its `implementation', coupled with a candid fact that he is not a `Stakeholder', as per Section 31 (1) of the I & B Code, 2016, in relation to the `Corporate Debtor', this `Tribunal', without any `haziness', holds that the `Petitioner / Appellant', is not an `Aggrieved Person', coming within the ambit of Section 61 (1) of the I & B Code, 2016, especially, when he is not a `Privy', to the `Resolution Plan'."*

The Bench held that the Unsuccessful Resolution Applicant has no Locus standi to assail a Resolution Plan or its implementation since it is not a stakeholder as per Section 31(1) of IBC and hence not an aggrieved party.

## **Victory Iron Works Ltd. v Jitendra Lohia & Anr.**

### ***IBC- Resolution Professional entitled to take control of Corporate Debtor's Rights in Assets licensed to Third Parties: Supreme Court***

The Supreme Court Bench comprising of Justice V. Ramasubramanian and Justice Pankaj Mithal, has held that a resolution professional is entitled to take control of the rights of a corporate debtor in assets which are licensed to third parties. Such an action of the RP will come within the ambit of Section 25 of IBC. Further, the assets owned by a third-party, but in the possession of the Corporate Debtor held under contractual arrangements, are excluded from the definition of "assets" in Section 18 of IBC, however, the said exclusion does not extend to Section 25 of IBC. Therefore, the Explanation to Section 18 is inapplicable to Section 25 of IBC.

## **Ajay Kumar Radheyshyam Goenka v Tourism Finance Corporation of India Ltd.**

***Insolvency Resolution Of Company Will Not Extinguish Director's Liability Under Section 138 NI Act: Supreme Court***

The Supreme Court bench comprising Justices Sanjay Kishan Kaul, Abhay S Oka and JB Pardiwala has held that approval of resolution plan of a corporate debtor under the IBC will not extinguish the criminal liability of its erstwhile director under Section 138 of the Negotiable Instruments Act 1881. The company's director cannot seek discharge from N.I. Act proceedings on the ground that creditor's debt stood settled in the proceedings under IBC.

## **Mr. P. Eswaramoorthy v. The Deputy Commissioner of Income Tax (Benami Prohibition)**

***NCLT Cannot Decide Controversies Relating To Attachment Of Property Under Benami Prohibition Act: NCLAT Chennai***

The NCLAT, Chennai Bench, comprising of Justice M. Venugopal (Judicial Member) and Shri Naresh Salecha (Technical Member), has held that NCLT is not the proper Fora to determine the controversies revolving around the Attachment of Property under the Prohibition of Benami Property Transactions Act, 1988 ("PBPT Act"). The Section 60(5) of IBC does not confer jurisdiction upon NCLT to determine any questions relating to the Corporate Debtor and no remedy can be sought under the same with regards to the PBPT Act. Further, Moratorium imposed under Section 14 of IBC does not affect a Provisional Attachment Order issued under the PBPT Act.

## **Noble Resource International Pvt. Ltd. v Sona Alloys Pvt. Ltd.,**

***When Financial Creditors Have Not Been Paid In Full, Operational Creditors Cannot Claim A Higher Amount: NCLT Ahmedabad***

The National Company Law Tribunal ("NCLT"), Ahmedabad Bench, comprising of Dr. Deepti Mukesh (Judicial Member) and Shri Ajai Das Mehrotra (Technical Member), has held that when Financial Creditors have not been paid in full in the Resolution Plan, the Operational Creditors cannot claim a higher amount under the same. The Bench observed that a conjoint reading of Section 30 and Section 53 of IBC shows that the Financial Creditors are placed at a higher priority than Operational Creditors. The Secured Financial Creditors are covered by Section 53(1)(b)(ii), the Unsecured Financial Creditors are covered by Section 53(1)(d). The Operational Creditors are to be considered thereafter having lower priority and are covered by Section 53(1)(f).

## **Aypols Polymers Private Limited Vs Suvarna Fibrotech Pvt. Ltd.**

***Petition U/S 9 IBC Can Only Be Filed After Expiry Of 10 Day Period Under Section 8(2) IBC: NCLT Mumbai***

The NCLT, Mumbai Bench, comprising of Shri Kishore Vemulapalli (Judicial Member) and Shri Prabhat Kumar (Technical Member), has held that Petition under Section 9 of IBC can only be filed after expiry of



10 days period mentioned under Section 8 (2) of IBC. The Tribunal observed that the proof of service of Demand Notice was not annexed to the petition and it was unclear how was the Demand Notice served. The Tribunal noted that the Corporate Debtor has 10 days to respond to the Demand Notice under Section 8(2) of IBC. A petition under Section 9 of IBC can only be filed after expiry of 10 days provided under Section 8(2). Since the petition was filed on the very next day on which the Demand Notice was sent, the petition was not in accordance with Section 9(1) of IBC.

## **Trimurti Associates Private Limited Vs BKM Industries Limited**

### ***Dissenting Secured Creditor Can't Be Treated Higher Than Other Creditors U/S 53 Just Because They Enjoy Security Interest: NCLT Kolkata***

The NCLT, Kolkata Bench, comprising of Shri Rohit Kapoor (Judicial Member) and Shri. Balraj Joshi (Technical Member), has reiterated that just because a creditor enjoys security interest, it cannot be treated higher than other creditors who have financed the Corporate Debtor. The other creditors don't not enjoy the protection of a security interest and thus run the risk of not getting paid their dues from realization of security. If such creditors are treated differently, then all secured creditors would dissent in the CoC. This will not lead to maximization of value of the Corporate Debtor and will defeat the very purpose of resolution under IBC.

## **Shri Guru Containers v Jitendra Palande**

### ***Shifting Entire Blame On IRP Not Justified; Creditors Must Also Play Catalytic Role In CIRP: NCLAT Delhi***

The NCLAT, Principal Bench comprising of Justice Ashok Bhushan (Judicial Member) and Shri Barun Mitra (Technical Member), while adjudicating an appeal filed in Shri Guru Containers v Jitendra Palande, has held that creditors must not shift the entire blame on the IRP on grounds of non-performance of duty and make him the scapegoat. It is equally important for the creditors to play a catalytic role in the insolvency resolution process given the creditor-driven regime of IBC. The rigours of similar standards of discipline should also apply on the creditors.

## **A J Buildcon Private Limited v Patel Engineering Limited**

### ***Debt Arising Out Of Different Work Orders Can Be Clubbed To Meet Minimum Threshold Of Rs. 1 Crore: NCLT Mumbai***

The National Company Law Tribunal ("NCLT"), Mumbai Bench, comprising of Shri Kishore Vemulapalli (Judicial Member) and Shri Prabhat Kumar (Technical Member), has reiterated that debts arising from different work order(s) can be clubbed to satisfy the minimum threshold limit of Rs. 1 Crore under IBC. The Bench has initiated CIRP against Patel Engineering Ltd. and appointed Ms. Neeraja Kartik as the Interim Resolution Professional.



## Jammu Kashmir Bank Limited vs Ace Engineering (India) Pvt. Ltd.

### *Discharge Of Liability Of The Principal Borrower Or Guarantor Does Not Automatically Discharge The Other In A Contract Of Guarantee*

The Tribunal relying on the judgment of the Hon'ble Supreme Court in Lalit Kumar Jain vs UOI & Ors observed that the contract with the principal borrower and the contract with the surety/guarantor stand on a completely different footing under the provisions of the Indian Contract Act, 1872. It was further observed that even though a civil suit has been filed between the parties, it would not affect the Corporate Insolvency Resolution Process ("CIRP") in view of the Decision of the NCLAT in Harkirat S. Bedi vs. Oriental Bank of Commerce, and Karan Goel vs. M/s. Pashupati Jewellers & Anr.

The Tribunal further held that the liability of the principal borrower and guarantor is joint and several in a contract of guarantee. Hence even if either of them has been discharged, the other party doesn't stand automatically discharged till the liability is met out or discharged.



## For enquiries related to:

- Insolvency Process,
- Bankruptcy Process,
- Filing petition with NCLT/DRT,
- Appointment of Insolvency Professionals,
- Assets Management of the Company,
- Hearing of Cases or any other enquiries



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