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Editorial

A Dissenting Financial Creditor cannot oppose later what the Class of Creditors has approved with majority

Once the homebuyers as a class have voted in favour of approval of the Resolution Plan, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal, holds the Supreme Court in Jaypee Infratech Limited upholding the Resolution Plan of NBCC. The statute, that is IBC, has itself provided for estoppel against any such attempted opposition to the plan by a constituent of the class that had voted in favour of approval.

The Supreme Court has observed that there is no scope for any homebuyer suggesting himself to be a dissenting Financial Creditor merely because he was not with majority within the class. His dissatisfaction does not partake the legal character of a dissenting Financial Creditor. While turning down the request, the Court noted that the authorized representative having voted in accordance with the instructions given to him from the class of Financial Creditors i.e., homebuyers, every individual falling in this class remains bound by his vote and any association or homebuyer of JIL cannot be acceded the locus to stand differently and to project its/his own viewpoint or grievance by way of objections or by way of appeal. All such objections and appeals are required to be rejected on this ground alone.

Expect more vibrancy from Insolvency Resolution Process

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1. Corporate Insolvency Resolution Process under IBC cannot be allowed to lapse into an indefinite delay defeating the very object of law

While a reasonable effort to resolve corporate insolvencies is a preferred course, a Resolution Applicant must be fair in its dealings as well

In its recent Judgment in the case of Kridhan Infrastructure Pvt. Ltd. v. Venkestesan Sankaranarayan & Ors. the Hon'ble Supreme Court reflected upon the importance of timelines in the Insolvency Resolution Process. The Apex Court held that is essential to resolve Corporate Insolvencies and the Corporate Debtor's Liquidation should be the last resort in the broader public interest. However, the resolution of corporate insolvency could not suffer from an indefinite delay in complete abeyance of the fixed timelines.

In the instant case, the Appellant submitted a Resolution Plan for the Corporate Debtor which was approved by the CoC and thereafter the NCLT. However, after initial deposit of the requisite amount in the account of the Corporate Debtor, the Appellant did not fulfill its obligations under the Resolution Plan for over six months. Thereafter, the CoC with a majority vote decided that the Corporate Debtor should be liquidated and NCLT allowed the liquidation of the Corporate Debtor which was upheld by the NCLAT. In an appeal before the Supreme Court, the Hon'ble Court observing that liquidation should be the last resort, allowed the appellant to fulfil its obligations under the Resolution Plan and time was given to the Appellant. However, the Appellant still failed to adhere to its obligations and sought more time.

The Apex Court, while taking into account the fact that multiple opportunities were provided to the appellant to comply with the terms of the Resolution Plan, held that time is a crucial facet of the scheme under the IBC. To allow proceedings to lapse into an indefinite delay will plainly defeat the object of the statute. While a reasonable effort to resolve corporate insolvencies is a preferred course, a Resolution Applicant must be fair in its dealings as well. The Appellant, in the instant matter, had failed to abide by its obligations. In view of the same, the Hon'ble Supreme Court saw no reasons to entertain the instant appeal and ordered the management to revert to the liquidator for taking the necessary steps towards liquidation.

On one hand, it is a well-recognized principle that the Liquidation of the Corporate Debtor is the last resort. However, on the other hand, an indefinite delay in resolving Corporate Insolvency runs contrary to the very aim of the IBC. These two conflicting ideas that arise in Insolvency Proceedings are to be carefully considered and balanced by the Adjudicating Authorities in order to meet the intent and aspiration of IBC.

2. Has the time come to implement the Pre-packaged Insolvency Resolution? : Opinion by IBBI Chairperson Mr. M.S. Sahoo

The displacement of the current management in the set process of CIRP disincentivizes companies to initiate the CIRP voluntarily in cases of stress

Now that the haze around moratorium has been cleared by the Supreme Court, the suspension of initiation of Insolvency proceedings has expired, and the trajectory of Covid-19 is fairly understood, it is the most opportune time to introduce pre-packs, which is a natural step in the evolution of insolvency regimes, within the Code, opines Mr. Sahoo. He says that multiple competing choices for resolution of stress makes an economy a great place to do business. The IBC-envisaged Corporate Insolvency Resolution Process (CIRP) critically depends on the availability of Resolution Applicants (RAs). When most companies, industries and economies are reeling under stress on account of the Covid pandemic, the likelihood of finding an RA to rescue a failing company is low.

The CIRP has a set process and, therefore, some amount of inflexibility, which may limit its use in certain circumstances. It shifts control of the company to an Interim Resolution Professional and then to a Resolution Professional and finally to the successful RA, which may cause business disruptions. The displacement of the current management disincentivizes companies to initiate the CIRP voluntarily in case of stress. This partly explains non-cooperation by the current promoters and management, leading to intense litigation in some cases. The market prefers a semi-formal process that side-steps the difficulties of a formal process but retains its benefits and sanctity. In a sense, the formal process and informal process are two ends of a spectrum and a variety of semi-formal processes, that blend elements from both, may exist to suit the convenience of the stakeholders.

Point 2 Source : https://www.thehindubusinessline.com/opinion/pre-packing-the-insolvency-resolution-process/article34172160.ece

As compared to the CIRP, pre-pack is typically more flexible, cost effective, time effective, less disruptive to business and devoid of stigma, and more conducive for group insolvency. It increases possibility of reorganization and entails a limited role of the courts and IPs. The proposed Pre-pack process has the features that make a CIRP sacrosanct, and has the rigor and discipline of the CIRP. It is informal up to a point and formal thereafter. It blends debtor-in-possession with creditor-in-control. It is neither a fully private nor a fully public process and it allows the company, if eligible under Section 29A, to submit the base resolution plan which is exposed to Swiss Challenge for value maximization. It safeguards rights of stakeholders as much as in the CIRP and has adequate checks and balances to prevent any potential misuse.

It will enrich the menu of options for resolution of stress and take the Indian Insolvency journey to the next level. It will also serve as one of the alternative methods of debt resolution envisaged in the last Budget, Mr. Sahoo wrote.

3. Supreme Court holds that NCLT can rule only on disputes which arise solely or relates to the Insolvency of a Corporate Debtor

The Court cautioned NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other Courts, Tribunals and Forums

The Supreme Court held that the NCLT has jurisdiction to adjudicate disputes, which arises solely or relates to the Insolvency of a Corporate Debtor, while cautioning the National Company Law Tribunal (NCLT) and the Appellate Tribunal (NCLAT) to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and forums, when the dispute is not related to the Insolvency of the Corporate Debtor.

The verdict came on an appeal filed by Gujarat Urja Vikas Nigam Ltd against a NCLAT order wherein it had upheld the decision of NCLT staying the termination of the Power Purchase Agreement (PPA) entered with a firm Astonfield Solar (Gujarat) Private Limited, which later went into Insolvency. Dismissing the appeal, the top court said that the institutional framework under the Insolvency and Bankruptcy Code (IBC) contemplated the establishment of a single forum to deal with matters of Insolvency, which were distributed earlier across multiple fora.

Justice Chandrachud, writing the judgement on behalf of the Bench, said that in the present case, the PPA was terminated solely on the ground of Insolvency and in the absence of the Insolvency of the Corporate Debtor, there would be no ground to terminate the PPA or invocation of the jurisdiction of NCLT. Therefore, it held that the RP (Resolution Professional) can approach the NCLT for adjudication of disputes that are related to the Insolvency resolution process. However, for adjudication of disputes that arise dehors the Insolvency of the Corporate Debtor, the RP must approach the relevant competent authority, the bench said.

However, the Apex Court also opined that the residuary jurisdiction of the NCLT under Section 60(5)(c) of IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the Insolvency Resolution proceedings. If the jurisdiction of the NCLT were to be confined to actions prohibited by Section 14 of the IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of the IBC.

4. Supreme Court remits Jaypee Infratech's Resolution Plan to CoC For Approval

The Apex Court said that no new Expression of Interest will be entertained for taking over the Firm and only State-owned NBCC and Suraksha Realty may file revised proposals

The Supreme Court has remitted to the Committee of Creditors the issue of approval of Resolution Plan for debt-ridden Jaypee Infratech Limited, saying no new expression of interest will be entertained for taking over the firm and only state-owned NBCC and Suraksha Realty may file revised proposals. The apex court also directed that the resolution process be extended by 45 days.

Since August 2017, when Jaypee Infratech Limited went into the Insolvency process after the National Company Law Tribunal admitted the application by an IDBI Bank-led consortium, this is the fourth round of litigation which has been decided by the top court. It added that the IRP shall take all further steps in the manner that the processes of voting by the CoC and his submission of report to the Adjudicating Authority are accomplished in all respects within the extended period of 45 days from the date of the judgment i.e. March 24, 2021 and the Adjudicating Authority shall take final decision in terms of Section 31 of the Code expeditiously upon submission of report by the IRP.

The bench said that its directions, particularly for enlargement of time to complete the process of CIRP, are being issued in exceptional circumstances of the present case and shall not be treated as a precedent. It further said that the proceedings contemplated in its verdict shall be taken up by the Principal Bench of the NCLT at New Delhi. On Aug. 6 last year, the top court had transferred to itself the appeals pending before the NCLAT against the NBCC plan to acquire JIL and construct over 20,000 pending flats.

5. NCLAT directs Liquidation of KS Oils, Pulls up NCLT for lapse of 981 Days

The NCLT had rejected the RP's plea, after 981 days from the date of filing, terming it as not maintainable and being infructuous

The National Company Law Appellate Tribunal (NCLAT) has directed to initiate Liquidation process of leading integrated edible oil company KS Oils Limited and set aside a National Company Law Tribunal (NCLT) order passed against it. Terming it "unfortunate", the Appellate Tribunal observed that even after the lapse of 981 days and repeated compliance by the Resolution Professional to initiate the liquidation process, the NCLT had not considered it. NCLAT allowed the appeal filed by the Resolution Professional saying fitness of situation allows to initiate liquidation of the Corporate Debtor K S Oils.

Earlier, the Indore Bench of the NCLT had dismissed the application filed by the RP of the debt-ridden company to initiate Liquidation against KS Oils after it could not attract a buyer within the permissible time frame. The NCLT had rejected the RP's plea, after 981 days from the date of filing, terming it as not maintainable and being infructuous. This was challenged by RP Kuldeep Verma before the NCLAT. According to RP, NCLT after commencing 31 hearings over its application to initiate Liquidation from, dismissed it despite the mandatory 270 days for completing Insolvency had lapsed.

"Section 12 of the Code has already laid down a period of 330 days on the outer side, although it is directory in nature. This also suggests that the need for giving multiple opportunities to the sole Resolution Applicant is not warranted to defeat the very purpose of the Act", NCLAT said.

6. NCLAT closes Insolvency Proceedings against Jyoti Limited after Settlement with Financial Creditors

The Bench allowed the plea of the company after observing that it has already paid Rs 16.5 crore as per the compromise proposal

The National Company Law Appellate Tribunal (NCLAT) has shut the Insolvency proceedings initiated against motor and generator manufacturing company Jyoti Limited after settlement of claims raised by Financial Creditors.

A two-member Bench, including Acting Chairperson Justice B Lal Bhat, allowed the plea of the company after observing that it has already paid Rs 16.5 crore as per the compromise proposal. State Bank of India, the Financial Creditor of the company, has also filed an affidavit before the Appellate Tribunal stating therein that the entire settlement amount of Rs 16.50 crore stands received from Jyoti.

"In view of the above the claim of the Financial Creditors having been satisfied, the appeal is allowed to be withdrawn as no issue survives for consideration," said NCLAT. It further said: "The proceeding pending before Adjudicating Authority (NCLT) shall stand closed. The Corporate Debtor (Jyoti) is released from the rigor of CIRP." NCLAT has directed this order to be communicated to the Adjudicating Authority.

The Ahmedabad bench of NCLT had last year in November admitted an insolvency plea filed against the BSE-listed company by State Bank of India.

LATEST JUDGMENTS

1. Arun Kumar Jagatramka vs. Jindal Steel and Power Ltd

Person Ineligible U/s 29A IBC to submit a Resolution Plan cannot propose a Scheme of Compromise & Arrangement U/s 230 Companies Act 2013

The Supreme Court held that a person who is ineligible under Section 29A of the Insolvency Bankruptcy Code to submit a resolution plan, cannot propose a scheme of compromise and arrangement under Section 230 of the Companies Act, 2013. The Division Bench, while dismissing the appeals against NCLAT order and also a Writ Petition challenging constitutional validity of Regulation 2B Of Liquidation Process Regulations, upheld the constitutional validity of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, which stipulate that a person who is not eligible under the IBC to submit a resolution plan for insolvency resolution of the corporate debtor shall not be a party in any manner to such compromise or arrangement.

The Apex Court rejected the following contentions:

i. That attaching the ineligibilities under Section 29A and Section 39(1)(f) of the IBC to a scheme of compromise and arrangement under Section 230 of Companies Act would be violative of Article 14 of the Constitution as the Appellant would be "deemed ineligible" to submit a proposal under Section 230 of the said Act.

ii. That Section 35(1)(f) applies only to a liquidator who conducts a sale of the property of the Corporate Debtor in liquidation but not to the NCLT, acting as the Tribunal, when it exercises its powers under Section 230 of the Companies Act, 2013.

Concluding the Judgment, the Court said "We find that the prohibition placed by the Parliament in Section 29A and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the Act of 2013, when the company is undergoing liquidation under the auspices of the IBC. As such, Regulation 2B of the Liquidation Process Regulations, specifically the proviso to Regulation 2B (1), is also constitutionally valid."

Citation point 1 : Civil Appeal 9664 of 2019

2. Indus Biotech Private Limited vs. Kotak India Venture (Offshore) Fund

Adjudicating Authority is duty bound to first decide the Application under Section 7 of the IBC even if the Application under Section 8 of Arbitration and Conciliation Act, 1996 is kept along for consideration

The Supreme Court observed that in any proceeding which is pending before the Adjudicating Authority under Section 7 of Insolvency and Bankruptcy Code, if such Petition is admitted upon the Adjudicating Authority recording the satisfaction with regard to the default and the debt being due from the Corporate Debtor, any Application seeking reference to arbitration under Section 8 of the Arbitration and Conciliation Act made thereafter will not be maintainable.

The Court noted that in a situation where the petition under Section 7 of IBC is yet to be admitted and, in such proceedings, if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority is duty bound to first decide the application under Section 7 of the IBC by recording a satisfaction with regard to there being default or not, even if the application under Section 8 of Act, 1996 is kept along for consideration. In such event, the natural consequence of the consideration made therein on Section 7 of IB Code application would befall on the application under Section 8 of the Act, 1996.

In this case, the appellant filed a petition under Section 7 of IB Code before the NCLT seeking appointment of Resolution Professional. In the said proceedings, the respondent, filed a Miscellaneous Application under Section 8 of the Arbitration Act seeking a direction to refer the parties to arbitration. NCLT allowed the said application and also dismissed the petition under Section 7 IBC observing that that there is no default. Before the Apex Court, it was contended that the NCLT erred in entertaining an application under Section 8 of the Arbitration Act in the backdrop of the legal duty cast on NCLT to proceed strictly in accordance with the procedure contemplated under Section 7 of IB Code.

3. Laxmi Pat Surana vs. Union Bank of India

Insolvency process maintainable against Corporate Guarantor even if Principal Borrower is not a 'Corporate Person'

The Supreme Court has held that the Principal Borrower need not be a "corporate person" for Insolvency process to be initiated against a company which stood as its Guarantor. Corporate Insolvency Resolution Process under Section 7 of the IBC can be initiated by a Financial Creditor against a corporate person in respect of guarantee to the loan amount secured by person not being a corporate person, in case of default in payment of such a debt.

Citation point 2 : Arb. Petition (Civil) 48/2019

Citation point 4 : Civil Appeal 2734 OF 2020

The bench observed that the principal borrower may or may not be a corporate person, but if a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression "Corporate Debtor" in Section 3(8) of the Code. In words of the Apex Court, "In law, the status of the guarantor, who is a corporate person, metamorphoses into Corporate Debtor, the moment principal borrower (regardless of not being a corporate person) commits default in payment of debt which had become due and payable."

4. Sesh Nath Singh Vs. Baidyabati Sheoraphuli Co-operative Bank Ltd

Section 14 of the Limitation Act applies to an Application under Section 7 of IBC

The Supreme Court has held that in an application under Section 7 of the Insolvency and Bankruptcy Code, the applicant can claim the benefit of Section 14 of the Limitation Act, in respect of proceedings under the SARFAESI Act. Section 14 of the Limitation Act 1963 allows for exclusion from the limitation period the time spent litigating before wrong forum. The Bench also held that SAFAESI proceedings are 'civil proceedings' for the purposes of Section 14 of the Limitation Act and that there is no rule that the exclusion of time under Section 14 is available, only after the proceedings before the wrong forum terminate.

The Apex Court held that IBC does not exclude the application of Section 6 or 14 or 18 or any other provision of the Limitation Act to proceedings under the IBC in the NCLT/NCLAT. All the provisions of the Limitation Act are applicable to proceedings in the NCLT/NCLAT, to the extent feasible. The bench further observed that substantive provisions of Sub-sections (1), (2) and (3) of Section 14 do not say that Section 14 can only be invoked on termination of the earlier proceedings, prosecuted in good faith.

5. Gautam Mittal, RP Sanwaria Consumer Ltd Vs. MP Warehousing and Logistics Corporation

Adjudicating Authority is not a recovery forum, for the arrears of lease rental from the Respondent

The NCLAT has upheld the NCLT order which held that the amount claimed as arrears of lease rent due has nothing to do with CIRP of the Respondent/Corporate Debtor. Appellant said to be in the business of leasing out its godowns, may be entitled to recover the arrears of lease rental from the Respondent but Adjudicating Authority is not the recovery forum.

Citation point 4 : Civil Appeal 9198 OF 2019

An Application was filed by the Resolution Professional under Section 60(5) of the IBC before the NCLT, Indore Bench for recovery of amount due on account of lease rent. The Bench turned down the said Application and the impugned order was appealed against by the RP of the Corporate Debtor before the National Company Law Appellate Tribunal alleging that the Adjudicating Authority did not consider the merits of the matter.

6. Om Prakash Agrawal, Liquidator S.Kumars Nationwide Limited Vs. CIT

NCLAT in this landmark judgment has held that any buyer of property from a Liquidator under Insolvency and Bankruptcy Code, 2016 shall not deduct and pay 1% TDS from the sale consideration under section 194-IA of the Income tax Act, 1961. It was also held that TDS once deducted cannot be claimed as refund during Liquidation Process because the Liquidator is not required to prepare Audited Financial Statements during Liquidation Process and filing of Income-tax return is not possible under the law without preparing an auditing annual financial statements and other documents. Since the TDS is not refundable during Liquidation Process, it is a clear inconsistency with Section 53(1)(e) of the IBC and therefore, section 238 of IBC would prevail and IBC would have an over-riding effect.

Citation point 6 : Company Appeal (AT) (Insolvency) No. 624 of 2020

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