



ASC

INSOLVENCY TIMES



Volume 61, December 2021

ASC TIMES - December

Editorial



BANKS SHOULD ASSESS TECHNICAL ABILITIES OF THE INSOLVENCY PROFESSIONAL FOR GIVING ASSIGNMENTS

How much fees should be paid to an Insolvency Professional (IP) by a Committee of Creditor (CoC) for any particular assignment of CIRP / Liquidation / PGRP be decided on the basis of Judicial Mix of technical and financial parameters. However, we have observed that some of the Financial Creditors are looking only towards minimizing the Professional Fees by calling quotations from different IP's and then decided on L1 criterion. Resultantly, the assessment of technical abilities of the IP's have been compromised leading to failures or not a happy situation.

State Bank of India has the most robust system of allocation of assignments to IP's by awarding marks on completed assignments, number of assignments in hand, successful resolutions, number of completed liquidations, capacity and infrastructure available with the IPE, etc, and, also taking cognizance of fees quoted by the IPs . This ensures smoother completion & expected results.

Expect more vibrancy from the Insolvency law.

Stay Alert!

Anju Agarwal

Partner

ASC Insolvency Services LLP



Supreme Court orders NCLT to complete Jaypee Infratech's Insolvency proceedings within two months

Hearings before the NCLT had been deferred time and again following which the homebuyers brought the matter to the notice of the SC.

The Hon'ble Supreme Court has directed the National Company Law Tribunal (NCLT) to complete the 'Jaypee Infratech' insolvency proceedings within a restricted timeline of two months. The order was passed by a two-judge bench on a petition filed by homebuyers in the Jaypee Kensington Boulevard project.

The learned counsel on behalf of the appellant homebuyers contended that repeated delays in the insolvency process are adversely affecting their rights as homebuyers. The Hon'ble Adjudicating Authority had previously decided to hear the pleas for the approval of the Suraksha Group's bid to acquire embattled real estate firm Jaypee Infratech. However, the hearing before the NCLT had been deferred time and again and aggrieved homebuyers presented the matter before Hon'ble Supreme Court.

The Appellant Homebuyers had submitted that "the NCLT is acting in a casual manner and that the "already existing structures of the unfinished towers are getting weakened and losing structural integrity owing to the weather conditions." They further stated that the condition of existing structures will only deteriorate with the passage of time which had created a fear on unreliable structures which could cause major structural damages in the passage of time. The financial creditors of Jaypee Infratech Ltd (JIL) had elected Mumbai-based Suraksha Group over state-owned NBCC for taking over the insolvent firm and finishing the project of 20,000 homes. After the CoC's approval, Suraksha Group's proposal had to be passed by the Hon'ble National Company Law Tribunal (NCLT).



Foreign Creditors to get a footing in the IBC passage

A new section will be legislated into the IBC to arm the foreign creditors against personal guarantors. The ministry of Corporate affairs has sought public comments till December 15 on granting certain rights to foreign creditors and bankruptcy officials.

The government is preparing to come out with a cross-border insolvency resolution framework based on the UNCITRAL model law and is to be made applicable for both corporate debtors as well as personal guarantors to such debtors.

The corporate affairs ministry, which is implementing the Insolvency and Bankruptcy Code (IBC), has sought comments on the draft framework till December 15. Broadly, the cross-border insolvency process pertains to those debtors having assets and creditors overseas.

According to the MCA, the need for having robust institutional arrangements to deal with cross-border insolvency issues has gained momentum in various jurisdictions, particularly under the aegis of UNCITRAL Model Law, during the last few decades. The UNCITRAL Model Law on Cross-Border Insolvency, 1997, is the most widely accepted legal framework to deal with cross-border insolvency issues. The law provides a legislative framework that can be adopted by countries with modifications to suit the domestic context of the enacting jurisdiction. This has been accepted in over 50 countries.

The ministry has proposed that the immediate application of the cross-border law for corporate debtors and personal guarantors to corporate debtors. In a notice dated November 24, the ministry said that cross-border issues may sparingly arise in the pre-pack process as it applies to small businesses in lines with the following statement which reads:

"...Further, since it has been introduced recently, jurisprudence and practice under the pre-pack mechanism are at a nascent stage. Given this, applying cross-border insolvency provisions to the pre-pack process may not be suitable at this stage," it noted.

The pre-pack process is a simpler resolution process for MSME (Micro, Small and Medium Enterprises). Another proposal is to exclude financial service providers from the applicability of cross-border insolvency provisions. Such exclusion is in line with the design of the Code as financial service providers are subject to a special insolvency process that has been notified under Section 227, it added.

RBI's Insolvency move against Reliance Capital may face hiccups

Lenders hope that the Central Bank of India does not direct a consolidated resolution of all three financial services companies which will mean all the work carried out so far to find a buyer for RCFL and RHFL will go down the drain.

Even as the Reserve Bank of India has started the Insolvency process against Reliance Capital, the pending resolution of two of its subsidiaries - Reliance Home Finance Ltd (RHFL) and Reliance Commercial Finance Limited (RCFL) - is set to cast a shadow on the process with the market regulator's diktat and the Insolvency rules working against each other. The Lenders selected the preferred bidder almost six months ago, but the debt resolution for the two subsidiaries is still hanging as Securities and



Exchange Board of India (SEBI) rules direct 100% debenture holders have to approve the resolution plan for a company, contrary to the trust deed signed by investors which expects only 75% to vote. The matter is sub-judice before the National Company Law Tribunal (NCLT).

In June, 'Authum Investment & Infrastructure' was declared the preferred bidder by lenders to take over RHFL with 91% of the creditors voting in favour of Authum which offered ₹1,724 crore in cash and another ₹300 crore through 8% non-convertible debentures payable within a year in favour of the company which owed creditors ₹11,200 crore in a deal brokered by BoB Capital Markets. This has not yet been approved by COC as there is no clarity on the new SEBI rule.

The situation is more complex in RCFL, which owed creditors more than ₹9,000 crore. In July, Authum again was selected as the preferred bidder to take over the company with a ₹1,240 crore offer, which meant an 86% write-off for the creditors.

Later, the Bombay High Court, responding to a plea by lenders, directed Vistra ITCL, the trustee for bond holders in RCFL, to call a meeting of the bond holders within 30 days to vote on the resolution plan, overriding Vistra's contention of going by SEBI rules. Bond holders own more than 90% of the debt in RCFL. A majority of the bonds are held by banks and financial institutions.

The RBI move earlier this week to refer Reliance Capital to the NCLT has complicated the situation even more and the lenders hope that the central bank does not direct a consolidated resolution of all three financial services companies which will mean all the work carried out so far to find a buyer for RCFL and RHFL will go down the drain.

NCLAT quashes CoC constitution of Value Infratech, asks NCLT to remove RP

A two-member bench of the NCLAT has also directed the claims of various financial creditors including home buyers should be appropriately fixed against Value Infratech India for its project Skywalk RNE.

A two-member bench of the NCLAT has recently quashed the constitution of the Committee of Creditors of Value Infratech India and removed the Resolution Professional with a direction to IBBI to conduct an investigation and take appropriate action. They have also directed the claims of various financial creditors including those of home buyers should be appropriately fixed against Value Infratech India for its project Skywalk RNE. The Hon'ble

Appellate Adjudicating Authority remanded the matter back to the National Company Law Tribunal (NCLT) for taking action as directed and in accordance with the provisions of the Insolvency & Bankruptcy Code (IBC).

Earlier, the Delhi bench of the NCLT had ordered liquidation of Realty Firm Value Infratech India, which was developing project Skywalk RNE. This was challenged by 25 homebuyers of Skywalk RNE and it was alleged that Capri Global Capital Limited, a financial creditor was given undue advantage of a much higher voting share than was permissible in the constitution of the CoC. Moreover, RP had shown undue favour to Capri Global Capital by adding up all the loans provided by it to its subsidiaries also. The RP did not follow the procedure prescribed in the IBC for inviting Expression of Interest for submission of



Resolution Plan and submitted a proposal for liquidation of Value Infratech before the CoC in its second meeting only.

The NCLAT said from the minutes of the second meeting of the CoC, it is clear that the RP "has resorted to a very novel and ingenious way of circumventing the duties imposed upon him in the IBC for preparation of information memorandum, exclusion of time to extend CIRP period and inviting expression of Interest for Resolution Plan for the Corporate Debtor". It further said that "These are actions of omissions and commissions, which we cannot absolve the Resolution Professional from, his conduct should be investigated by Insolvency and Bankruptcy Board of India (IBBI) and action as appropriate may be taken against the present Resolution Professional". NCLAT further said: "*He should, therefore, be replaced with immediate effect and a suitable Resolution Professional be appointed in the CIRP of Value Infratech India by the Adjudicating Authority (NCLT)*".

Kerala HC: Borrower Cannot Bring Another Purchaser With Higher Offer Once Bid Is Confirmed

According to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, once a bid is confirmed, the borrower cannot bring in another purchaser with a higher offer.

Justice Bechu Kurian observed that after the borrowers lost their right to redeem the property, the Debts Recovery Tribunal could not have allowed the borrowers to bring in another person to purchase the property by offering to pay an amount marginally higher than what the petitioner bid at.

While the arguments were going on, the Supreme Court decision in Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd and Ors was cited: "If it is held that every confirmed sale can be set aside, no auction-sale will ever be complete because someone will always come after the auction or its confirmation offering a higher amount." The case involved three parties: the petitioner, the auction purchaser, and the respondents, the borrowers and the asset reconstruction company (ARC), respectively.

The Borrowers' loan account was declared NPA and a decree was obtained for Rs.19 crores. The property was taken into possession and on the first two occasions of sale, there were no bidders. The Petitioner submitted its bid for Rs.7.51 Crores on the third occasion, when the auction notice was published. Borrowers suggested 16 days after the sale that there is another purchaser for Rs.7.60 Crores, the quantum of which is only a meagre sum of Rs.9 lakhs more than what was bid at the auction sale.

The Court observed that if the said bid is accepted behind the Petitioner's back, the Petitioner will undoubtedly suffer harm, and the Act's scheme will be violated. As a result, the petitioner had the right to participate in the securitisation proceedings challenging the sale notice. The Debts Recovery Tribunal denied the petitioner's request to intervene in the proceedings.

The High Court ruled that order of the Debt Recovery Tribunal (DRT) denying the Petitioner's request to



intervene in the proceedings was perverse and that the jurisdiction was exercised improperly, as intervention was necessitated and accordingly set aside the order exercising its powers under Article 227 of the Constitution of India.

Department of Telecommunications moves NCLAT against resolution of Videocon

DoT has requested the Appellate Tribunal to set aside the order of Adjudicating Authority which had allowed the 2,962 crore takeover bid by Twin Star Technologies

The Department of Telecommunications (DoT) has moved the National Company Law Appellate Tribunal (NCLAT) against the order passed by the National Company Law Tribunal (NCLT) approving the consolidated resolution plan for 13 companies of Videocon Group, including Videocon Telecommunications. The DoT in its petition has requested the Appellate Tribunal to set aside the order passed by the Mumbai Bench of the National Company Law Tribunal (NCLT) allowing the 2,962 crore takeover bid by Anil Agarwal's Twin Star Technologies. The DoT submitted before NCLAT that defaulting telecom companies cannot be permitted to wriggle out of their liability by triggering the corporate insolvency resolution process (CIRP).

The Appellate Bench has already stayed the NCLT order by granting a 'status quo ante' (present condition) to be maintained and Resolution Professional to continue to manage the affairs of Videocon Industries as per the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC).

Videocon Telecommunications in order to carry on business and as per the License agreement for unified license had secured the dues with as many as 131 bank guarantees from State Bank of India (SBI) in favour of DoT to the tune of 881.92 crores. DoT had submitted that the said bank guaranteed have however "illegally" not allowed to be invoked due to pending proceedings before the NCLT. The DoT has further alleged that IBC cannot be invoked for the resolution of fraudulent and malicious intent of withholding huge arrears payable to the government and others. DoT is hardly going to get a meagre 0.12 per cent of its total claim, it added.



LATEST JUDGMENTS

Bhatpara Municipality Through its Chairperson Vs. Nicco Eastern Pvt. Ltd., NCLAT

The outstanding dues of the property tax relating to period prior to sale confirmation are dues that are akin to claim of an unsecured creditor and should be discharged in terms of the properties regarding distribution of assets given in section 53 of IBC.

The Hon'ble NCLAT held that the outstanding dues of the property tax relating to period prior to sale confirmation are thus dues that are akin to claim of an unsecured creditor (Bhatpara Municipality in the present case) and should be discharged in terms of the properties regarding distribution of assets given in section 53 of IBC, that talks about the sequential distribution of proceeds from the sale of the liquidation assets.

The auction-purchaser cannot be held liable to pay any such dues relating to period prior confirmation of sale as has been held by the Hon'ble Supreme Court in the matter of Al Champdany Industries Ltd. vs. The Official Liquidator & Anr. (supra). In the above mentioned situation, the NCLAT said that they are unable to accept the plea made by the Appellant that auction purchaser should not be absolved from paying outstanding dues relating to the property as were also stated in the demand notice amounting to Rs.68,09,123.61. The NCLAT also quashed the demand notice. Thereafter, the appeal was set aside and the Impugned Order was upheld.

Electrosteel Castings Ltd. Vs. UV Asset Reconstruction Company Ltd. & Ors.- Supreme Court

Assignment of loan to an Asset Reconstruction Companies after approval of Resolution Plan by NCLT

In this case, the financial creditor assigned the loan after approval of resolution plan under the IBC. Thereafter the assignee had issued a notice to the guarantor of the Corporate Debtor under SARFAESI Act, 2002. The notice of the SARFAESI Act was responded by the Guarantor stating that pursuant to repayment of amount in terms of the approved resolution plan, all the claims of Assigner stand extinguished and consequently no claim can be made by the assignee for the same default with no pending dues payable to the assignee.

Thereafter the Appellant instituted a Civil Suit before the High Court of Madras and the same was dismissed by the Hon'ble High Court observing that the civil court's jurisdiction is barred in view of Section 34 of the SARFAESI Act and only DRT had competence to decide the matter. The matter was sent in second appeal to the Supreme Court, whereby the appeal was dismissed. However, the judges granted the appellant Electrosteel Casting Ltd. liberty to initiate appropriate proceedings before the DRT under section 17 of the SARFAESI act against the initiation of the proceedings by the assignee.



Jai Balaji Industries Ltd. Vs. BST Infratech Ltd., NCLT Kolkata Bench

The Operational Creditor has right to institute fresh proceedings if Corporate Debtor has failed to comply with the terms and conditions fixed in the settlement agreement

In this case, terms of the settlement agreement contained that the Operational Creditor shall be entitled to issue fresh notice and initiate fresh proceedings. The Adjudicating authority held that specific use of selected words such as “fresh notice” and “fresh proceedings” should visibly and clearly expose the design of the Corporate Debtor intending to put the Operational Creditor back on the long track and frustrate the claim/proceedings pending before this Adjudicating Authority, which however cannot be allowed to happen in these proceedings.

The Adjudicating Authority observed that none of the Judgments cited by the Corporate Debtor helped it in any way, either as regards its claim of pre-existing disputes or as regards seeking permission from the Adjudicating Authority for filing an application in case of failure of the Settlement, because it was not a “withdrawal simpliciter” but had been allowed on the joint request of counsel for the parties pursuant to the Settlement Agreement.

The Adjudicating Authority directed re-initiation of CIRP against the Corporate Debtor and an IRP was appointed who was directed to convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors in turn identifying the prospective Resolution Applicant within 105 days from the insolvency commencement date.

Joint Commissioner of Commercial Taxes & GST, Odisha Vs. Mr. Manish Jain RP of Krishna Ferro Products Ltd., NCLT Cuttack Bench

NCLT allows belated claim of GST condoning a delay of around 452 days of submitting the claim

In this case, the Applicant had lodged its claim with the RP, when there was a delay of around 452 days of submitting the claim, the Respondent/RP has refused to consider the same on the grounds of delay as the same was submitted beyond the cut-off date. The Adjudicating Authority held that in view of the facts and circumstances of the case along with Covid-19 pandemic and corresponding lockdowns etc. In the interest of revenue of the Exchequer, as a special case this Adjudicating Authority is inclined to allow this appeal and condoned the delay of 452 days in lodging the claim by the Applicant.

ATE Projects Pvt. Ltd. V. Rajasthan Drugs and Pharmaceuticals Ltd.

Adjudicating Authority allowed section 9 application against a PSU, which has not been carrying out any functions since 2017

The National Company Law Tribunal, Jaipur Bench (NCLT) has allowed an application for initiation of corporate insolvency resolution process (CIRP) in the matter of a Government Company/ Public Sector Undertaking after observing that the Corporate Debtor has not been carrying out any functions since 2017 and therefore, it can be safely inferred that no government or sovereign functions of the State have been performed by the Corporate Debtor since 2017. The application was filed on behalf of the operational creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC).



Anshu Agrawal Vs. State of U.P. and Another

Bank is obligated to hand over physical possession of the secured asset to the auction purchaser, pursuant to the auction sale concluded in her favour

The High Court of Allahabad has held that once an auction of secured assets under the SARFAESI Act is concluded, it is obligatory on the Bank/ Financial Creditor to hand over physical possession of the secured asset to the auction purchaser after a valid and undisputed sale certificate is issued to her. The Hon'ble High Court was hearing a Writ Petition filed by the auction purchaser whose bid had been accepted and the sale certificate was issued to her. However, physical possession of the asset/ immovable property could not be handed over because the bank itself did not have the physical possession of the same.

The Petitioner/ auction purchaser had contended that refund of the sale amount be granted to her for the misrepresentation by the Bank in concealing that it did not have the physical possession of the secured asset at the time of auction. Even though her right to physical possession was upheld by the court, however the Court denied the argument of misrepresentation by the bank as the sale was made on an "as is where is whatever there is and without recourse" basis and the sale certificate issued to the auction purchaser was not disputed by her.

The Court also noted that the Bank has not committed any illegality or impropriety in conducting the sale of the secured asset while having the constructive/ symbolic possession thereof. The right of taking over physical possession of the asset after conclusion of auction sale still subsists with the Bank/ Secured Creditor for which the Bank had initiated steps as per law, the High Court noted.



For enquiries related to:

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



Delhi Head Office

73, National Park, Lajpat Nagar IV,
New Delhi - 110024 (India)
Phone: +91-11-41729056-57, 41601289
www.ascgroup.in, info@ascgroup.in

Noida Corporate Office

C-100, Sector-2, Noida- 201301
Uttar Pradesh (India)
Phone No: +91-120-4729400

Gurgaon Office

605, Suncity Business Tower
Golf Course Road, Sector-54,
Gurugram - 122002, Haryana (India)
Phone No.: +91-124-4245110/116

Mumbai Office

MBAI SAGAR TECH PLAZA, A WING, OFFICE NO.
315-316, ANDHERI KURLA ROAD, SAKINAKA,
ANDHERI (E), MUMBAI - 400037, INDIA.
022-6741 3369/70/7171

Bengaluru Office

0420, Second Floor,
20th Main, 6th Block, Koramangala,
Bangalore - 560095, Karnataka (India)
Phone No.: 80-42139271

Chennai Office

Level2 – 78/132,
Dr RK Salai Mylapore
Chennai - 600004, Tamil Nadu (India)
Mobile No: +91-8860774980

Pune Office

UNE OFFICE NO. 4, 1ST FLOOR SILVER OAK,
SN NAGAR ROAD, WADGAON SHERI,
PUNE- MH – 411014
LANDMARK: NEAR INORBIT MALL

Singapore Office

11 Woodlands Close, #04-36 H,
Woodlands 11, Singapore -737853
Mobile No: +65-31632191
www.ascgroup.sg,
info@ascgroup.sg

Canada Office

885 Progress Ave Toronto
Ontario M1H 3G3 Canada

Please write us at: anju@insolvencyservices.in, mahima@insolvencyservices.in

Disclaimer:

This e-bulletin is for private circulation only. Views expressed herein are of the editorial team. ASC or any of its employees do not accept any liability whatsoever direct or indirect that may arise from the use of the information contained herein. No matter contained herein may be reproduced without prior consent of ASC. While this e-bulletin has been prepared on the basis of published/other publicly available information considered reliable, we do not accept any liability for the accuracy of its contents.

© ASC Group 2015. All rights reserved.