ASC

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Editorial

Luke warm response to Pre-packaged Insolvency Resolution Process (PPIRP)

It is almost a year now that PPIRP laws were introduced by the Government of India. It was anticipated that MSMEs would have taken a hit on their businesses consequent to impact of Covid -19. Not much initiative is seen either at MSMEs level or at Banks level. We have not heard any Base Resolution Plan submitted before the Financial Creditors. One or two isolated cases have been reported to have been admitted in NCLTs across India.

Has this all-important legislation lost its relevance or more efforts are required at the implementation level by explaining benefits available to the MSMEs!
The Insolvency Professionals are looking forward to work in this domain with some new found spirit. Will the concerned Ministries do the introspection?

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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No Scope for negotiation once the CoC has approved the Resolution Plan: NCLAT In DHFL Case

The Appellate Adjudicating Authority has set aside the order of NCLT which directed to consider Wadhwan's second offer

The National Company Law Appellate Tribunal (NCLAT) has set aside an earlier order of the National Company Law Tribunal, Mumbai Bench (NCLT), which had directed the Resolution Professional (RP) of the debt ridden DHFL to put the second settlement proposal by erstwhile promoter Kapil Wadhwan before its lenders for consideration. The Appellate Tribunal observed that NCLT has passed directions to consider the second proposal from Wadhwan, despite the fact that the Committee of Creditors (CoC) of DHFL had already by an overwhelming majority approved the Piramal Capital & Housing Finance's Resolution Plan and the administrator had applied before it for its approval. Citing a recent judgement passed by the Supreme Court in the case of Ebix Singapore, the NCLAT said "there was no scope for negotiations between the parties once the CoC has approved the Resolution Plan".

The NCLAT direction came over a batch of petitions filed by Union Bank of India on behalf of the CoC, DHFL's Administrator and Piramal Capital & Housing Finance - successful resolution applicant challenging NCLT order. Earlier, passing an order, the Hon'ble NCLT had directed the RP of Dewan Housing Finance Corporation Ltd (DHFL) to place the second offer by Wadhwan before CoC for consideration, decision, voting and to inform it within ten days.

According to the petitioners, throughout the Corporate Insolvency Resolution Process (CIRP) of DHFL, Wadhawan was sending various letters and proposals, including the first offer, all of which have been placed before the CoC. The CoC was of the view that such proposals cannot be considered.

Initiation of CIRP Not A Pre-Requisite to Initiate Insolvency Resolution Process against the Personal Guarantor: NCLAT

Section 60(2) in no way prohibit filing of proceedings under Section 95 of the Code even if no proceeding are pending before NCLT for CIRP

The Hon'ble NCLAT held that initiation of CIRP is not a pre-requisite to initiate Insolvency Resolution Process against the Personal Guarantor of the Corporate Debtor. The Hon'ble Appellate Tribunal analyzed the provisions of Section 60 of the Code and observed that Section 60 (1) provides that Adjudicating Authority for the corporate persons including corporate debtors and personal guarantors shall be the National Company Law Tribunal (NCLT) and Section 60(2) requires that where a CIRP or Liquidation Process of the Corporate Debtor is pending before an Adjudicating Authority the application relating to CIRP of the Corporate Guarantor or Personal Guarantor as the case may be of such Corporate Debtor shall be filed before 'such' NCLT. The purpose and object of the Section 60 (2) is that both proceedings be entertained by one and the same NCLT and avoid two different NCLTs to take up CIRP of Corporate Guarantor.

In the present case, State Bank of India, the Financial Creditor of the Corporate Debtor filed Appeal against the order of the NCLT which refused to admit an application for initiation of CIRP against the Respondent / Personal Guarantor under Section 95(1) of the Insolvency and Bankruptcy Code, 2016, being premature and non-compliant to the provisions of Section 60(2) of the Code.

The Bench clarified that Section 60(2) in no way prohibit filing of proceedings under Section 95 of the Code even if no proceeding are pending before NCLT as Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending, when CIRP or Liquidation Proceeding are not pending with regard to the Corporate Debtor there is no applicability of Section 60(2).

Approval of the CoC for extension of CIRP not mandatory when delay caused by Lockdown: NCLAT

The approval of the CoC under Section 12(2) of the Code is not mandatory for seeking exclusion of time when it is sought on grounds of lockdown/time lost during the period of any Stay/Status Quo /or for any other reason

The National Company Law Appellate Tribunal (NCLAT) has decided the question as to whether the approval of the Committee of Creditors (CoC) under Section 12(2) of the Code is mandatory for seeking 'exclusion of time' even if it is sought on grounds of lockdown/time lost during the period of any Stay, Status Quo or for any other reason. It was the case of the Appellant that be it exclusion or extension, approval of 66% of Voting Shares of the Members of the CoC is mandatory as per Section 12(2) of the Code and that the act of the Insolvency Resolution Professional (IRP) in going ahead with the filing of the Application before the Adjudicating Authority seeking exclusion of the period of 87 days, even if it is on the ground of lockdown, is against the provisions of the Code.

The Bench noted that under regulation 40C of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2020, the period of lockdown (imposed by the Central Government in the wake of COVID-19 outbreak), can be excluded for the purpose of timeline for any activity that could not be completed during such lockdown.

The Hon'ble NCLAT has held that the Adjudicating Authority was right in extending the time, as the fact that had this period not been excluded, the Company would have gone into Liquidation, which stage of 'Corporate Death' should be the last resort as envisaged by the Hon'ble Supreme Court in a catena of Judgements; that keeping in view the scope, spirit and objective of the Code and reading Section 12 together with Regulation 40C and also the unforeseen pandemic in mind, the Adjudicating Authority has rightly 'excluded' the period of 87 days from the CIRP period. Therefore, it was held that the approval of CoC shall not be mandatory in unforeseen circumstances, for seeking exclusion of time.

Insolvency proceedings against HCL Tech stayed by the NCLAT

Case against HCL Tech was filed with NCLT in 2019 by Sahaj Bharti Travels, which claimed HCL Tech had continued to default on its payment under minimum guarantee clause of the agreement.

The National Company Law Appellate Tribunal (NCLAT) has put a stay on the Insolvency proceedings against India's third largest IT services player HCL Technologies. The National Company Law Tribunal (NCLT) had on January 17, 2022 initiated insolvency resolution proceedings against the company.

The NCLAT in its hearing said that the dispute was genuine between the parties but the Insolvency resolutions proceedings (IRP) should not have been initiated. The Adjudicating Authority proceeded to decide the dispute between the parties like a civil court which ought not to have been done, said the NCLAT. The Insolvency proceedings against HCL Tech were initiated on the instance of Sahaj Bharti Travels. Sahaj claimed that HCL Tech had continued to default on its payment under the minimum guarantee clause of the agreement amounting to Rs 3.54 crore.

HCL Tech denied the claim and submitted before the Adjudicating Authority that the minimum Guarantee claim was not sustainable because there was a breach of conditions and penalty was also imposed on the cab operator. It was further submitted that entire payments pertaining to invoices issued by Operational Creditor had already been made.

"We have looked into the reply by which notice of dispute was given, which indicate that a genuine dispute was raised by the Corporate Debtor. Learned Counsel also referred to the email exchanged between the parties before issuance of Demand Notice, which clearly indicates that there was genuine dispute between the parties", The NCLAT observed.

NCLAT upholds Liquidation of Siva Industries

The Bench disregarded the Settlement Offer put forth by RCK Vallal, father of the Founder of SIVA Group

The Appellate Tribunal has upheld an order passed by the Chennai Bench of the National Company Law Tribunal (NCLT) to liquidate Siva Industries and Holdings while rejecting a settlement proposal endorsed by a majority of the lenders. In its judgement, the Hon'ble Appellate Bench held that as the mandatory deadline of 330 days as per the Insolvency and Bankruptcy Code, 2016 (IBC) is breached, the Liquidation of the company can go ahead. Timely liquidation is preferred over fruitless and endless resolution proceedings, the Bench added.

A settlement proposal was put forth by RCK Vallal, who is the father of the founder of the Siva Group. Nine Financial Creditors of the company led by the IDBI Bank had agreed to receive a settlement amount of Rs. 328.21 crores from Vallal, as against the total admitted claims of Rs. 4,864 crores- which amounted to 93 per cent haircut for the lenders. This settlement proposal was, however, rejected by the Hon'ble NCLT, Chennai which slammed the lenders for the huge haircut saying it would rather go by its "judicial wisdom" rather than approving the "commercial wisdom" of the CoC and sent the company for liquidation.

As per reports, SIVA Industries bidder RCK Vallal is set to move the Hon'ble Supreme Court against the impugned order passed by the NCLAT rejecting his proposal.

LANDMARK JUDGMENTS

Consolidated Construction Consortium Limited vs Hitro Energy Solutions Private Limited: Supreme Court

Limitation does not Commence when the Debt becomes due but only when a Default occurs

The Supreme Court has held that limitation does not commence when the debt becomes due but only when a default occurs. The Apex Court held that that the default is defined in Insolvency and Bankruptcy Code, 2016 (IBC) as the non-payment of the debt by the Corporate Debtor when it has become due.

Referring to B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates (2019) 11 SCC 633, the Apex Court said: "Limitation does not commence when the debt becomes due but only when a default occurs. As noted earlier in the judgment, default is defined under Section 3(12) of the IBC as the non-payment of the debt by the CD when it has become due."

The court noted that both the parties were in negotiation in relation to the re-payment and the minutes of meeting showed that the Respondent was willing to make the re-payment if the Appellant issued a letter stating that they will not pursue a claim in the future or if the applicant provided a bank guarantee for the amount.

BANK OF BARODA & ANR. vs MBL INFRASTRUCTURES LTD. & ORS.: Supreme Court

Guarantor shall be Barred From being a Resolution Applicant under Section 29A(h) of IBC if Guarantee invoked and Insolvency proceedings initiated by similarly situated creditors

The Hon'ble Supreme Court observed that Section 29A of the Insolvency and Bankruptcy Code, 2016 (IBC) was one of many facets of the IBC and therefore, the provision had to be read with the main objective enshrined thereunder. The objective behind Section 29A of the IBC was to avoid unwarranted and unscrupulous elements to get into the resolution process and preventing their personal interests to step in. Secondly, Section 29A consciously seeks to prevent certain categories of persons who may not be in a position to lend credence to the resolution process by virtue of their disqualification.

The Apex Court then emphasized on the need for adopting a purposive interpretation with the primary aim to revive and restart the Corporate Debtor, with liquidation being the last resort. The Apex Court then turned to the scope of Section 29A(h). It was observed that once a person executed a guarantee in favour of a creditor for credit facilities availed by the corporate debtor, and in case where the application for insolvency was admitted and the guarantee was invoked, the bar qua ineligibility would certainly come into play.

The Hon'ble Supreme Court noted that the provision requires a guarantee in favour of a creditor. Once an application for insolvency resolution was admitted on behalf of 'a creditor' then the process would be one of rem, and therefore, all creditors of the same class would have their respective rights at par with each other.

Association of aggrieved Workmen of Jet Airways (India) Limited v Jet Airways (India) Ltd. and Ors.: NCLAT, Delhi.

A Resolution Plan, after being approved by the Adjudicating Authority, still continues to be a confidential document

The National Company Law Appellate Tribunal (NCLAT) was dealing with an appeal filed by aggrieved workmen of Jet Airways (Appellant) who were operational creditors and had filed their claim before the Resolution Professional. The Resolution Plan offered them an amount of ₹52 Crores. However, they challenged the order of the Appellate Adjudicating Authority approving the said plan.

The Appellant submitted that confidentiality in the CIRP proceeding as mentioned in Insolvency and Bankruptcy Code, 2016 is very limited and where confidentiality is required to be maintained, the Code and Regulation clearly provides for them. The limited circumstances that confidentiality is provided for is at the stage of CIRP, and the rationale for the provisions are to enable maximization of bids; and prevent competitors from posing as applicants to surreptitiously use information for their own gain. In terms of Section 31(3)(b) of the Code, once the Plan is approved, the RP is obligated to forward the entire records of the CIRP along with the Resolution Plan to Insolvency and Bankruptcy Board of India to be recorded in its database. Thus, clearly, the information is not meant to be confidential after the CIRP has concluded.

The NCLAT the Resolution Plan, while being in the CIRP cannot be accessed by any other party other than the CoC and the Resolution Professional and shall be categorized as a confidential document, but after the approval of the same by the Adjudicating Authority, the same becomes a document of public domain, however, the same shall only be delivered to the parties that have a substantial interest.

CBRE South Asia Pvt. Ltd. Vs. M/s. United Concepts and Solutions Pvt. Ltd.,NCLT Delhi

Whether the Principal and Interest amounts can be clubbed together to reach the minimum threshold of Rs. 1 Crore as stipulated under Section 4 of IBC, 2016

The National Company Law Tribunal (NCLT), New Delhi has observed that the claim amount was the sum of the principal amount and the interest thereon. The NCLT held that the "interest can be claimed as the Financial Debt, but neither there is any provision nor there is any scope to include the interest to constitute as the Operational Debt"

There is a marked difference between the definition of the term 'financial debt' and the 'operational debt'. Under Section 5(8) the term 'financial debt' means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and that is an inclusive definition. In the definition of the term 'operational debt' under section 5(21) the word 'interest' has not been mentioned.

Therefore, after clarifying that there is no scope to include the Interest with the Principal sum to constitute the Operational Debt, the NCLT concluded that since the Principal amount of Operational Debt claimed by the Applicant was less than One Crore, the Petition under Section 9 of the IBC was not maintainable.

Amit Goel vs RP, Piyush Shelters India Pvt Ltd

NCLAT overturns a Resolution Plan approved by the Adjudicating Authority

The National Company Law Appellate Tribunal (NCLAT) has set aside the order passed by the National Company Law Tribunal (NCLT) which approved a Resolution Plan in respect of the Corporate Debtor and has ordered the process to be started afresh with claims of homebuyers/ allottees accepted by the Resolution Professional by giving them realistic time limit for submission of claims.

It was observed by the Appellate Adjudicating Authority that though the claims that were filed belatedly were admitted and considered but thereafter the 'claimants' and 'non-claimants' have been accorded different treatment under the Resolution Plan. Moreover, the Bench observed that the Resolution Professional (RP) had called for and appropriated the claims in such a manner that more than 53% of homebuyers/ allottees are left out, we cannot consider the resolution of the Corporate Debtor to be done in the spirit of the IBC.

With the above findings, the Appellate Bench has directed the RP to start afresh the process of submission of claims, leading to a revised information memorandum, which should then be used for inviting expression of interest. Thereafter, the CoC shall consider the resolution plans received, if any in accordance with the provisions laid down under law. The Appellate Adjudicating Authority allowed a period of 90 days to the CoC from the date of the order.

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,
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