ASC INSOLVENCY TIMES

Volume 52, March 2021

ASC TIMES-MARCH

Editorial

Supreme Court Holds Supremacy of COC once again

The Hon'ble Supreme Court has recently reiterated that the NCLT or NCLAT cannot interfere with the 'commercial wisdom' of the CoC, except within the limited scope under Sections 30 and 31 of the IBC, 2016 while setting aside an order of the NCLAT which had annulled the decision of CoC to accept a Resolution Plan. The Apex Court laid down that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving a resolution plan or rejecting the same.

It is not the first time that the Apex Court has upheld the supremacy of COC. In the Essar Steel Insolvency case, the Court set aside an NCLAT order upholding the resolution plan of Arcelor Mittal. Similarly, the Court set aside another order by the Appellate Adjudicating Authority in the case of Maharashtra Seamless Ltd, holding that there is no IBC provision that the Resolution Plan should match the Liquidation value.

Time and again, the judicial dictum of the Apex Court has echoed the view that the Adjudicating Authority shall not keep equitable perception above the commercial wisdom of COC while adjudicating on the matter. Such is the scheme of the Code.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

Anju Agarwal
Partner
ASC Insolvency Services LLP

1. Supreme Court (SC) appalled on arrest of IRP in Jaypee Infratech Limited

Court noted that the Police Official was not familiar with Provision of Privilege of an IRP appointed by Court under IBC

The Supreme Court was appalled over the arrest of court-appointed Interim Resolution Professional (IRP) for managing the affairs of debt-ridden Jaypee Infratech Limited in a criminal case by Uttar Pradesh police and ordered his release while issuing a show cause notice to an erring police officer. Mr. Anuj Jain was appointed IRP by the NCLT under IBC and was entrusted with the task to ensure functioning of Jaypee Infratech till the resolution process is decided. He was arrested from Mumbai by the Greater Noida Police in connection with an FIR alleging that the Jaypee Infratech, the operator of the 165 kilometre long Yamuna Expressway, and its IRP Anuj Jain have not taken up safety measures suggested by the IIT in its safety audit conducted in 2018 to reduce road accidents.

The Apex Court noticed, "It is seen that the police official dealing with the case is not familiar with the provision of privilege of interim resolution appointed under IBC in terms of Section 233 of the Insolvency and Bankruptcy Code." The Court referred to the actions of the Investigating Officer as being drastic, and accordingly he was instructed to issue a show cause notice as to why appropriate action shall not be taken against him for proceeding in such a manner against the said IRP.

Point 1 Source : https://indianexpress.com/article/opinion/columns/insolvency-and-bankruptcy-code-corporate-debt-resolution-process-7178980/

2. IBC allows the market to make the most efficient choice, Mr. Sahoo argues

The "invisible hands" of the market works towards the best outcome, which we should respect and accept

In an article by the IBBI Chairman Mr. MS Sahoo, he has applauded the role of IBC in resolution of stressed companies while dealing with the argument that by far only 25 % companies have been rescued through CIRP and the remaining have been liquidated.

He argued that CIRP enables the market to attempt to resolve stress through a resolution plan whereby the company could survive. When it concludes and there is no feasible resolution plan to rescue the company, the company proceeds for liquidation. While Citing examples, Mr. Sahoo conveyed that many of the companies are beyond rescue for a variety of reasons, including creative destruction and their continuation being a cost to the economy. In such cases, the code enables the provision of liquidation to release available resources to alternate uses.

He writes that the number of companies where the stress was resolved (before admission plus midway closure and resolution plans) as a percentage of the number of applications concluded, that is, 17,000/18,000, gives a rescue rate of 95 per cent. He says that the law is only an enabler giving choices and nudging a company towards value maximising outcomes. The stakeholders decide whether to seek resolution and, if so, the mode of resolution.

3. The Apex Court declines to grant Writ to a Homebuyer having alternative remedies under other legislative enactments including RERA, IBC

A Writ Petition was declined by the Supreme Court initiated at the instance of a homebuyer asking for refund of money, and in the alternative, handing over premises in reasonable time in an ongoing construction project. The Petition under Article 32 was filed by a singular home buyer without seeking to represent the entire class of home buyers. In the words of the Court, the petition proceeded on the implicit assumption that the interest of all the buyers are identical. There is no basis to make such an assumption.

The Supreme Court declined relief by establishing that it is not within the domain of writ jurisdiction for the Court to grant such a relief. Moreover the Apex Court indicated that there are specific statutory provisions holding the field, including among them the Consumer Protection Act, 1986, The Real Estate (Regulation and Development) Act, 2016 (RERA) and the Insolvency and Bankruptcy Code, 2016 (IBC), each of which had been made by parliament with a specific purpose in view. Besides other suitable enactments for relief, the Court also held that entertaining a petition of this nature will involve the Court in virtually carrying out a day to day supervision of a building project, to step into the construction project and to ensure that it is duly completed. This would be beyond the remit and competence of the Court under Article 32.

Point 2 Source : https://economictimes.indiatimes.com/news/politics-and-nation/bankruptcy-court-admits-insolvency-proceedings-against-tops-security/articleshow/81157630.cms

4. Moratorium under Section 14 IBC covers proceedings under Section 138 NI Act against Corporate Debtor for Dishonour of Cheque, rules Supreme Court

Justice Nariman of Hon'ble Supreme Court has held that that proceedings under Section 138/141 NI Act are covered by moratorium under Section 14 of IBC. Section 14 of IBC inter alia provides for the prohibition as to the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor in any court of law, tribunal, arbitration panel or other authority. This is contrary to the judgment given by the Madras High Court, earlier.

5. NCLT admits Insolvency Proceedings against Tops Security

The Mumbai bench of the National Company Law Tribunal (NCLT) has admitted insolvency proceedings against Topsgrup Services and Solutions, popularly known as Tops Security. The bench has appointed Chartered Accountant Rajendra Karanmal Bhuta as the Interim Resolution Professional (IRP) to oversee the company's day-to-day affairs and revival plans.

As per reports, Shield Guarding Company had borrowed from Punjab National Bank (International) Ltd at various occasions between 2012 and 2015. Subsequently, the company defaulted on its dues in September 2015 and later it was declared NPA in November 2015.

PNB International had last year approached the NCLT seeking initiation of corporate insolvency resolution process against Topsgrup after its UK-based subsidiary, the Shield Guarding Company, allegedly defaulted on dues of over ₹136 crore. The Application was filed for a total outstanding debt of about ₹136 crore, which was due and payable by the corporate debtor to the financial creditor as of January 28, 2020.

6. Having Security Interest over the assets of the Corporate Debtor not enough to be a Financial Creditor under IBC: Supreme Court

The Supreme Court has laid down that if a Corporate Debtor has offered security by pledging shares, without undertaking to discharge Borrower's liability, then the creditor in such a case will not become 'financial creditor' as defined under the Insolvency and Bankruptcy Code (IBC). The Court held that such a creditor could be a secured creditor, but will not be a financial creditor under the IBC entitled to take part in the insolvency resolution process.

The question before the apex court was whether the appellant can be a "financial creditor" solely on the basis of the pledge agreement. The Court noted that the pledge agreement in the instant case did not amount to a 'guarantee' as defined under Section 126 of the Contract Act, 1872, since it did not contain an undertaking by the corporate debtor to discharge the liability of the borrower and/or the key words required under section 126.

LATEST JUDGMENTS

1. Pondicherry Extraction Industries Pvt. Ltd. Vs. Bank of Baroda

Rule 7 does not empower the Adjudicating Authority to examine Financial Statements annexed with the Application

The NCLAT has held that it was not within the purview of adjudicatory powers of NLCT to examine the financial statements annexed with an Application for corporate insolvency resolution process under Section 10 of IBC, 2016. An appeal was preferred by the appellant Pondicherry Extraction Industries Pvt. Ltd. (Corporate Applicant) against the order passed by the NCLT, Chennai whereby the application preferred by the appellant under section 10 of IBC had been rejected. The said Adjudicating Authority analyzed the financial statements of the corporate applicant and held that there are discrepancies in financial statements. "We are of the view that learned Adjudicating Authority exceeded its jurisdiction in analyzing the financial statements of the Corporate Applicant", the NCLAT said.

2. CoC of AMTEK Auto Limited Through Corporation Bank Vs. Dinkar T Venkatasubramanian & Ors

Failing to adhere to its obligations under the resolution plan by Resolution Applicant cannot per se be regarded as Contempt of Court

The Supreme Court while addressing the issue whether recourse to the contempt jurisdiction is valid in the case a resolution applicant fails to meet its obligations under the resolution plan and whether it should be exercised in the facts of the case. After noting down that the conduct of the resolution applicant undoubtedly lacked bona fides, the Apex Court held that nevertheless contempt proceedings cannot be initiated irrespective of such conduct.

"However lacking in bona fides the conduct of the respondent was, we must be circumspect about invoking the contempt jurisdiction as setting up an untenable plea should not in and by itself invite the penal consequences which emanate from the exercise of the contempt jurisdiction. Likewise, the default of the respondent in fulfilling the terms of the resolution plan may invite consequences as envisaged in law. On the balance, we are of the considered view that it would not be appropriate to exercise the contempt jurisdiction of this Court", the Court said.

Citation point 1 : Company Appeal (AT) (Ins) No. 471 of 2020

Citation point 2 : Civil Appeal No. 6707 of 2019

3. Sodexo India Services Pvt. Ltd. Vs. Chemizol Additives Pvt. Ltd

Existence of dispute regarding debt and default cannot be justified merely on the strength of an Arbitration Agreement

The NCLAT, New Delhi held that the Adjudicating Authority would not be justified in drawing a conclusion in respect of there being dispute as regards debt and default merely on the strength of an Arbitration Agreement. The Appellate Bench laid down that on a plain reading of provisions of section 9(5) of the Code, it is abundantly clear that the Adjudicating Authority has only two options, either to admit Application or to reject the same. No third option or course is postulated by law. The NCLAT further said that Section 238 of IBC, which has an overriding effect over the existing laws or any other law or contract, would not admit of the alternative remedy for the Corporate Debtor for evasion of CIRP by evidencing existence of dispute on the basis of an arbitration agreement. Such a disabling provision for the Operational Creditor to seek resolution of a dispute in regard to operational debt claimed against the Corporate Debtor by triggering the CIRP cannot be availed. It is immaterial whether Corporate Debtor is solvent or insolvent qua other creditors, ease of doing business being the only objective of the legislation, along with other objectives specified in the preamble, which are sought to be achieved through CIRP process.

4. Rajkumar Brothers and Production Private Limited v. Harish Amilineni

The Corporate Debtor cannot be saddled with cost of CIRP and fees of IRP after the order of initiation of CIRP has been set aside by Appellate Adjudicating Authority

The Hon'ble Supreme Court, while hearing an appeal under Section 62 of IBC ordered the Applicant Operational Creditor to bear the cost of CIRP and the fees of the Interim Resolution Professional (IRP) as the application initiated at the behest of the operational creditor under Section 9 was dismissed by the NCLAT.

The NCLAT had set aside the impugned order of NCLT and dismissed the application of the appellant under Section 9 of IBC. However, the Appellant Operational Creditor challenged the impugned order before the Supreme Court only to the extent of the direction which read as – "The IRP/RP will place particulars regarding CIRP costs and fees before the Adjudicating Authority and the Adjudicating Authority after examining the correctness of the same will direct the Operational Creditor to pay the same in time to be specified by the Adjudicating Authority".

The Apex Court noted that the Respondent Corporate Debtor having succeeded, cannot be saddled with the costs of the CIRP or with the fees of IRP and accordingly held that the order of NCLAT warrants no interference.

Citation point 3 : Appeal No. 1094/2020, NCLAT

Citation point 4 : Civil Appeal No. 4044 of 2020

5. Kotak Mahindra Bank Ltd. v. Indian Specialty Fats Ltd.

Existence of Execution and Recovery Proceedings at the time of filing Application not a ground to admit, if Application is barred by Limitation

2016 on the grounds that Article 137 of the Limitations Act governs the filing of an application under Section 7 and the same stands 'barred by limitation'. It was observed that default had occurred over three years prior to filing of the application and while on the date of filing application under the Code, 2016 execution proceeding and recovery proceedings were subsisting. Hence, the appeal was dismissed stating that the said dismissal shall not affect the right of the appellant to pursue recovery proceedings and seek execution of the decree before the Competent Court.

6. Jalesh Kumar Grover v. Committee of Creditors of Akme Projects Ltd.

Hon'ble NCLAT in the aforementioned case, observed that exclusion of time period while computing the CIRP period should be seen from the prism of realism and pragmatic approach. Herein the said case, the period of 112 days was excluded while computing the CIRP period even when 270 days of exclusion was granted on earlier occasions. As per the Hon'ble NCLAT, it was stated that since the current CIRP relates to Real Estate Projects and involves legitimate interests of various stakeholders, it is just and reasonable to grant an additional extension.

However, the appeal was allowed and the order was passed taking into account the peculiar circumstances of the case and the NCLAT recorded that the same shall not be considered to be a precedent for other cases.

7. Vekas Kumar Garg v. DMI Finance Pvt. Ltd. and Anr.

Hon'ble NCLAT held that in an application under Section 7 of the Code, 2016, the Financial Creditor and the Corporate Debtor alone are the necessary parties and no third-party intervention is contemplated at that stage. The Hon'ble Tribunal further stated that the Adjudicating Authority, at the pre-admission stage, is only required to satisfy itself that there is a financial debt in respect whereof the Corporate Debtor who has committed a default, so as to pass an order of admission or rejection on merit. In the meanwhile, no lengthy hearing must be warranted at the pre-admission stage nor any dispute in regard to shareholding or inter se directorial issue is to be entertained. On the basis of aforementioned grounds, the appeal was dismissed.

Citation point 5 : Company Appeal (AT) (Insolvency) No. 100 of 2021

Citation point 6 : Company Appeal (AT) (Insolvency) No. 96 of 2021

Citation point 7 : Company Appeal (AT) (Insolvency) No. 113 of 2021

8. Mani Kumar Singh v. Alchemist Asset Reconstruction Company Ltd.

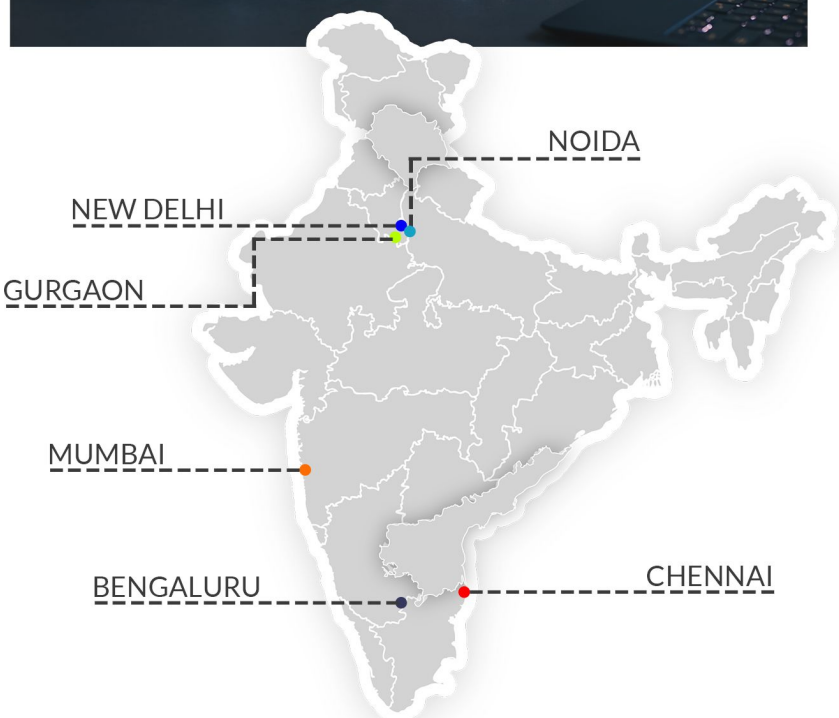
Hon'ble NCLAT in the said matter observed that the Adjudicating Authority on a time bound CIRP process must limit its exercise of adjudicating at the pre-admission stage such that it does not warrant a prolonged hearing. The Adjudicating Authority in the said scenario dealt with all aspects concerning debt and default as required for deriving satisfaction that the application was complete in the very initial stage and also considered the effect of amendment introduced by Section 10A of IBC to ensure that the default has occurred before the cut-off date.

However, since the said appeal was preferred by a suspended Director of the Corporate Debtor against the admission of application under Section 7 on the grounds that impugned order was passed without hearing the Corporate Debtor, Hon'ble Tribunal on analyzing the facts and circumstances held that no rules of natural justice have been breached. Accordingly, the appeal was disposed off.

Citation point 8 : Company Appeal (AT) (Insolvency) No. 111 of 2021

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
Sagartech Plaza,
B- Wing, Office No. 605,
Andheri Kurla Road,
Sakinaka, Andheri (East),
Mumbai – 400 072, Maharashtra (India)
Phone No: 022-67413369/70/71

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

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
Mobile No: +1437-774-4488
www.ascventures.ca,
info@ascventures.ca

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