



ASC

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INSOLVENT?





From the Editor's Desk



Dear Insolvency Professionals,

IBC, 2016 has taken corporate governance to new heights

The IBC endeavors to save the life of a company in distress. It empowers creditors, represented by a committee of creditors (CoCs), to rescue a company when it experiences a serious threat to its life. Further, the resolution plan can provide for any measure that rescues the company. It mandates consideration of only feasible and viable resolution plans, that too, from capable and credible persons, to ensure sustained life of the company. This releases the company from the clutches of promoters and management, putting it in the hands of a credible, capable management to avoid liquidation.

The IBC safeguards and maximizes the value of the company, and, consequently, value for all its stakeholders. It enables initiation of a resolution process at the earliest to preserve the value. It mandates resolution in a time-bound manner to prevent decline in the value. Liquidation process commences only on failure of resolution process to revive the company.

The IBC shifted the focus of creditors from the possibility of recovery to the possibility of resolution, in case of default. A company prefers to keep itself resolvable all the time, should a need arise, and the market prefers to deal with a company which is resolvable.

Expect more vibrancy from Insolvency Resolution Process.

Stay Alert!

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NEWS FLASH FROM THE LAST MONTH

NCLAT Hauls Unitech Ltd for Defaulting Payment to Deposit Holders

The National Company Law Appellate Tribunal has directed Unitech Limited, to repay the amount(s) to its deposit holders *pendent lite* along with future interest @ 12.5% p.a. from the date of maturity of the respective FDRs. Cost of Rs. 50,000/- has also been imposed to each of the deposit holders, setting aside the order of National Company Law Tribunal, New Delhi.

The NCLAT bench observed that: “We should have no sympathy with the defaulting company and its directors. NCLT has reduced the rate of interest for which no justification has been given and also for not awarding interest from the maturity date to the filing of the petition”.

Auditor Cannot Be Debarred For 5 Years under Section 140 (5) of the Companies Act 2013 in Absence of Evidence: NCLAT

The NCLAT has set aside an order passed by the NCLT in a matter relating to debarring of an auditor for a period of 5 years. It was held by the court while allowing the appeal that though he was negligent, there was no material on record to infer that the auditor had acted fraudulently or misused his position as a statutory auditor.

Issue is, if an action taken by a Financial Institution under **Section 13(4)** of the SARFAESI Act, 2002 qualifies as a “proceeding before a Court of Law” for the purpose of excluding its duration under **Section 14(2)** of the Limitation Act, 1963 for an insolvency proceeding.

The Bench held that: It was the duty of the statutory auditor to bring forth the frauds committed by the company and its directors, there was no material on record to infer that the auditor had acted fraudulently and/or colluded with the directors in relation to the affairs of the company or misused his position as statutory auditor.

Jaypee Infra will get back 858 acres: Supreme Court

The land was “fraudulently and wrongfully mortgaged in a “preferential transaction” to secure a loan for parent Jaiprakash Associates Limited (JAL). It was ruled by NCLT that the transactions were “preferential, fraudulent, and undervalued as defined by certain provisions of the Insolvency and Bankruptcy Code, 2016. The order was subsequently quashed by NCLT on a petition by JAL lender’s such as ICICI Bank, and Axis Bank, which stood to lose. As a result, India Infrastructure Finance Company, IRP and some home buyers approached the Apex Court against the NCLAT hearing

In the matter of NBCC’s bid for Jaypee Infratech, the Supreme Court has ruled that 858- acres belonging to the bankruptcy-hit company was wrongfully mortgaged by its parent company, Jaiprakash Associates Limited (JAL) and its was a “preferential” transaction.



NCLAT allows consolidation of Lavasa Corporation’s subsidiaries for faster resolution

The bankruptcy court has approved the request of the lenders to Lavasa Corporation to consolidate the township developer and its wholly owned subsidiaries Warasgaon Assets Maintenance and Dasve Convention Centre as one.

The NCLT bench said that: “the interlinkages and synergies between Warasgaon Assets Maintenance & Dasve Convention Centre, to keep Lavasa Corporation as a running township cannot be overemphasized, and therefore, to achieve a more value maximization deal, it becomes imperative that a bidder bids for these inter-linked good companies by way of a single offering which would result in achievement of higher value.”

Supreme Court allows an Aggrieved Creditor to revive IBC plea after a settlement plea between the Corporate Debtor and another financial creditor

The Supreme Court in its recent order allowed an aggrieved creditor to allow its Section 7 petition under the IBC, 2016 after a settlement between the corporate debtor and another financial creditor. The NCLT order for the initiation of resolution proceedings was set-aside by the NCLAT in light of settlement leaving the appellant aggrieved. The Supreme Court said that: “It will be open to the appellant to proceed against the Respondent No. 1 before the NCLT for revival of its application”.

A Reverse CIRP can be followed in the cases of real estate infrastructure companies in the interest of the allottees & survival of the real estate companies & to ensure completion of projects, according to the NCLAT

NCLAT held that the infrastructure constructed for the allottees by Corporate Debtor (Infrastructure Company) is an asset of the Corporate Debtor. The assets of the Corporate Debtor as per the Code cannot be distributed, which are secured for ‘Secured Creditors.’ Whereas, on the contrary to this, allottees/ (homebuyers) who are ‘Unsecured Creditors,’ the assets of the Corporate Debtor which is the infrastructure, is to be transferred in their favor, i.e., (Unsecured Creditors and not the ‘Secured Creditors’ such as Banks/Financial Institutions/NBFCs. Normally, the banks/financial institutions/NBFCs also would not like to take the flats/ apartments in lieu of the money disbursed by them. Whereas, on the other hand, the ‘unsecured creditors’ have a right over the assets of the Corporate Debtor, i.e., flats/ apartment/ assets of the company. NCLAT also held that CIRP against a real estate company (Corporate Debtor) is limited to a project as per the approved plan by the Competent Authority and no other projects which are separate at other places for which separate plans are approved.



Lease Rent Dues of an Immovable Property Not an ‘Operational Debt’ under the Insolvency & Bankruptcy Code, 2016, National Company Law Appellate Tribunal

It has been held by the National Company Law Appellate Tribunal (NCLAT) that the lease rent dues of an immovable property does not falls within the purview of ‘Operational Debt’ under the Insolvency & Bankruptcy Code, 2016 (IBC).

The Government should open IBC back door for black money investment in companies facing liquidation

The Narendra Modi government, which has been engaged in quietly easing its aggressive anti-tax evasion stance, should look at opening one more no- questions-asked investment avenue: bidding for the assets stuck at the National Company Law Tribunal. It is good to adopt the IBC Route to make our banks more solvent by allowing back money in the county.

Rules for Winding up of Companies are must to Ease Burden on NCLT

The government has notified rules for the winding up of companies under the company law in order to lessen the burden on the National Company Law Tribunal (NCLT). The Ministry of Corporate Affairs has notified the Companies (Winding Up) Rules, 2020, which would be effective from 1st April, 2020.

‘Reverse CIRP’: Realty cos’ insolvency to be project-wise, not across group, rules NCLAT

It has been held by the National Company Law Appellate Tribunal that insolvency initiated by a home-buyer/ (or investor) or a bank or any other financial institution against a real estate company will be limited to a particular project, and not extend to other projects of the group.

Once a CIRP has been initiated against a real estate company, no home-buyer can knock the doors of the National Company Law Tribunal (NCLT) or the National Company Law Appellate Tribunal (NCLAT) to seeks refunds for the real estate project, according to the NCLAT which termed the process as “Reverse [Corporate Insolvency Resolution Process](#)”.



LATEST JUDGEMENTS

Anuj Jain (Interim Resolution Professional) v. Axis Bank Ltd- Supreme Court (Civil Appeal)

On the application moved by Anup Jain (IRP) in the Corporate Insolvency Resolution Process (IRP) concerning the Corporate Debtor company i.e., Jaypee Infratech seeking avoidance of certain transactions, whereby the corporate debtor had mortgaged its properties as collateral securities for loans and advances made by the lender banks and financial institutions to Jaiprakash Associates Limited, the holding company of JIL as being “preferential, undervalued, and fraudulent” in terms of Section 43, 45 and 66 of the Insolvency and Bankruptcy Code, 2016. The issues in the case were:

1. The CIRP concerning the corporate debtor JIL has already undergone several rounds and circles of proceedings in NCLT, NCLAT and at least twice over in this Court.
2. Two major issues would arise in these appeals. One, as to whether the transactions in question deserve to be avoided as being preferential, undervalued and fraudulent, in terms of Sections 43, 45 and 66 of the Code; and second, as to whether the respondents (lender of JAL) could be recognized as financial creditors of the corporate debtor JIL on the strength of the mortgage created.
3. During CIRP, two of the respondent banks namely, ICICI Bank Limited and Axis Bank Limited, sought inclusion in the category of financial creditors of JIL but IRP did not agree and declined to recognize them as such. Being aggrieved by the decisions so taken by IRP, the banks preferred separate applications under Section 60(5) of the Code before NCLT while asserting their claim to be recognized as financial creditors of the corporate debtor JIL, on account of the securities provided by JIL for the facilities granted to JAL. The NCLT rejected the applications so filed by the banks.

The appeals allowed by NCLAT held that:

1. The appeals preferred before NCLAT against the order dated 16.05.2018, as passed by NCLT on the application filed by IRP, are dismissed; and consequently, the order dated 16.05.2018 so passed by NCLT is upheld in regard to the findings that the transactions in question are preferential within the meaning of Section 43 of the Code.
2. The directions by NCLT for avoidance of such transactions are also upheld accordingly.
3. The appeals preferred before NCLAT against the orders passed by NCLT on the applications filed by the lender banks are also dismissed and the respective orders passed by NCLT are restored with the findings that the applicants are not the financial creditors of the corporate debtor Jaypee Infratech Limited.



JSW Steel Ltd. v. Mahender Kumar Khandelwal & Anr. (Company Appeal)- NCLAT, New Delhi

'JSW Steel Limited' is 'Successful Resolution Applicant', in its appeal has sought for setting aside/ modification of conditions and raised objection and challenged the jurisdiction of Directorate of Enforcement to attach the properties of the 'Bhushan Power & Steel Limited'- ('Corporate Debtor'), after change of hands. It is held that: the appeal preferred by 'JSW Steel Limited' is allowed.

Neeraj Jain v. Cloudwalker Streaming (Company Appeal) - NCLAT, New Delhi

The Company Petition is filed by M/s Cloudwalker Streaming Technologies Pvt. Ltd., under Section 9 of Insolvency & Bankruptcy Code, 2016 against the Corporate Debtor' M/s Flipkart India Private Limited on the ground that it has committed default for an amount of Rs.26,95,00,000/- (Rupees twenty-six crore ninety-five lacs only).

Issues raised are as under:

1. Whether it is the discretion of the Operational Creditor, or the nature of the Operational Debt, that determines the issuance of notice in Form 3 or Form 4 under Sec 8 (1) of the Insolvency and Bankruptcy Code, 2016?
2. Whether or not for filing an application, u/s 9 of the Code in Form 5 under [sub-rule (1) of Rule 6] Insolvency and Bankruptcy (Adjudicating to Authority) Rules 2016, the submission of a copy of the invoice is a mandatory requirement, although the demand notice is served in Form 3?

It is held that: Set aside the impugned order passed by the Adjudicating Authority and the application filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 by the Operational Creditor Cloudwalker Streaming Technologies Pvt Ltd., company petition is rejected. The Flipkart India Pvt Ltd ('Corporate Debtor') is released from the [Corporate Insolvency Resolution Process](#)'. The Appeal is allowed.

Sesh Nath Singh v. Debi Fabtech Pvt. Ltd.- NCLAT

It has been held as per Section 14(2) of the Limitation Act, 1963 that in computing the period of limitation the time during which the respondent has been prosecuting with due diligence, another civil proceedings against the corporate debtor for the same relief shall be excluded. The period from the date of notice under Section 13(2) of the SARFAESI Act, 2002 to when the Kolkata High Court has passed the order against the Respondent will be excluded and if this period of 3 years and 6 months is excluded then the application is to be filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 falls within the limitation period.



Orbit Lifescience Pvt. Ltd. v. PwC Professional Services LLP (Company Appeal)- NCLAT

It has been held by NCLAT that after due analysis of the provisions of Sections 14 & 18 of the Insolvency & Bankruptcy Code, 2016, it has been found that there were goods owned by the Appellant lying at the plant of Corporate Debtor but at the same time it has also been found that there were dues payable by the Appellant. Lien can be exercised on the goods which were available with the Corporate Debtor, and thus according to the Learned Counsel, the Adjudicating Authority has rightly protected the interest of the Appellant as well as of the Corporate Debtor by directing him that while returning the goods, side-by-side the dues which are to be paid by the Appellant should come to the Corporate Debtor. It has also been found by the Committee of Creditors that the outstanding dues of the Corporate Debtors should be cleared by the Appellant before the goods could be returned.



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- Fresh Start Process,
- Hearing of Cases or any other enquiries

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