ASC

INSOLVENCY TIMES

Volume 54, May 2021

ASC TIMES-MAY

Editorial

PRE-PACKAGED INSOLVENCY- CONCEPT YET TO REACH MSMEs & BANKERS

Pre-packaged Insolvency Law was launched through an Ordinance dated 05th April, 2021, with much appreciation and hope that it will help struggling MSMEs to handle their financial stress, impacted due to first and second waves of COVID. Numerous conferences have been held in the top Insolvency and Legal circles and this fraternity by now is completely aware of nuances and the processes. However, two major stakeholders – MSMEs and Bankers (including NBFCs), who in fact will be the original initiators of the process are yet to be sensitized about the law.

The MSMEs must know the benefits they can draw from this law to overcome the distressed market sentiments and lack of demand of their products leading to their failure in serving their debt. The MSME promoters should be apprised of the process they have to follow and ways to construct their base plan for presenting to the Bankers. On the other hand, the Bankers /Financial Creditors must be made aware as to their role when stressed MSME borrowers approach them with their base plan and the level of efficiency they have to adopt to take decisions in the matter.

The concerned ministries of MSME and Financial Services at central government and concerned departments at the state level must rise to the occasion for educating the sufferers for a great legal remedy. Insolvency Professionals in any case must carry on their efforts to guide all the stakeholders and the beneficiaries.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

Anju Agarwal

1. Bad Loan Companies seek level playing field

ARCs have asked the RBI to let them sell assets of defaulting promoters back to them

The Association of Asset Reconstruction Companies (ARCs) in India has recently responded to the Reserve Bank of India's (RBI's) call for suggestions to overhaul their structure in the country. ARCs have asked the RBI to let them sell assets of defaulting promoters back to them. They have also asked the central bank to allow corporates and high net worth individuals to invest in troubled loans through the securities issued by ARCs.

This comes after RBI highlighted that the existing ARC industry has registered a lacklustre performance so far and called for views and suggestions from market participants and other stakeholders. The panel expected to review the existing legal and regulatory framework applicable to ARCs and recommend measures to improve efficacy of the same. It also intended to review the role of ARCs in resolution of stressed assets including those under IBC, and give suggestions for improving liquidity in and trading of security receipts. Business models of the ARCs were also intended to be revisited.

ARCs were created under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002 which allowed lenders to seize assets. The role of ARCs reduced after the Insolvency and Bankruptcy Code (IBC), 2016 which enabled banks to sell the defaulting business to a new promoter. To prevent defaulters from buying back their companies at a discount, Section 29A was incorporated which blacklisted defaulting promoters. After the IBC, RBI had asked the ARCs to stick to the principles of Section 29 and not sell loans to promoters even outside the bankruptcy process.

2. Supreme Court holds that NCLT has jurisdiction to decide on termination of Power Purchase Agreements (PPAs)

The Court however cautioned NCLT to be wary of setting aside valid contractual terminations while simultaneously ensuring continuity of the going concern status

There has been significant uncertainty regarding the status of power generators undergoing insolvency proceedings, and their ability to continue as going concerns during the resolution process. In the case of Gujarat Urja Vikas Nigam Ltd (GUVNL) v Amit Gupta & Ors , the Supreme Court addressed the key issues as to whether the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) had jurisdiction under the Insolvency and Bankruptcy Code, 2016 (IBC) in disputes involving PPAs, and whether the IBC regulated the right of GUVNL, which had contracted with the power generator, to terminate its PPA.

A clause in the PPA provided for the termination of the PPA in the event of insolvency. The NCLT held that such clauses in the PPA were inconsistent with the provisions of the IBC and, in accordance with section 238 of the IBC, were of no effect. In the appeal by GUVNL to the NCLAT, the appellate tribunal noted that the Corporate Debtor, the power generator, was to be maintained as a going concern in accordance with the objects of the IBC, and that termination of the PPA would render the corporate debtor defunct. Thus, GUVNL could not terminate the PPA solely on the ground of the initiation of CIRP in respect of the corporate debtor. GUVNL further appealed to the Supreme Court.

The apex court observed that, as the dispute had arisen solely on the ground of the insolvency of the corporate debtor, the NCLT did have power to adjudicate this dispute under section 60(5)(c) of the IBC. The court also held that the jurisdiction of the NCLT overrode the jurisdiction of the particular state electricity regulatory commission as to the application of the clauses of the PPA. The Court held that other regulatory bodies may have precedence over IBC and the NCLT if the pathway to termination of any particular contract or agreement is for a reason other than insolvency.

The court observed that, when a PPA was terminated a corporate debtor would no longer be a going concern. Thus, the continuation of the PPA assumes considerable significance if the CIRP is to be successfully completed. However, while arriving at this conclusion, the Supreme Court specifically indicated that in future cases, the NCLT would have to be wary of setting aside valid contractual terminations while simultaneously ensuring continuity of the going concern status.

3. Insolvency proceedings initiated against Ahluwalia Contracts sought to be withdrawn

The Company, which was dragged to Insolvency by the Operational Creditor for a default of more than 14 crores, has reached a settlement and the latter has filed for withdrawal

The National Company Law Tribunal (NCLT) had initiated insolvency proceedings against construction firm Ahluwalia Contracts India Ltd for defaulting on payments to an operational creditor. The New Delhi Bench had allowed the insolvency plea filed by A2 Interiors Products Pvt Ltd against Ahluwalia Contracts, claiming default of Rs 14.10 crore, and appointed an interim resolution professional.

However as per reports, Ahluwalia Contracts (India) Ltd has amicably resolved and settled the payment issues with its operational creditor A2 Interiors Products who has, in turn, filed for the withdrawal of the Corporate Insolvency Resolution Process (CIRP) with the Interim Resolution Professional (IRP) and NCLT.

In the application to initiate CIRP, the operational creditor had alleged payment defaults of ₹14.10 crore for various civil and electrical works done for the corporate debtor (Ahluwalia Contracts). The creditor also stated in its filing before NCLT that Ahluwalia Contracts had refused to clear the pending dues, despite having admitted the same on several occasions.

The prompt action on part of the Company to settle the enormous outstanding dues of the operational creditor within days of admission of CIRP by the NCLT illustrates the role of IBC in cases involving recovery of money from companies withholding outstanding dues despite being financially sound.

4. NCLT Kochi allows Promoter of Corporate Debtor MSME to file Resolution Plan in individual capacity

The EOI of the applicant was rejected by the Resolution Professional for not meeting the eligibility criterion for an individual to submit a Resolution Plan

The National Company Law Tribunal (NCLT), Kochi has held that the promoter of an MSME can submit a Resolution Plan Application in his individual capacity, and that the Plan would be eligible to be considered along with those of other prospective Resolution Applicants.

The Operational Creditor, sought the initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor Propyl Packaging Limited in February last year. K Satheesh Babu Rajesh, a promoter in Propyl Packaging, however, wished to restart Propyl's business operations and sought to submit a Resolution Plan. However, the eligibility criterion for an individual to submit Expression of Interest (EOI) prescribed a Minimum 'Tangible Net Worth of INR 10 Crores'. Citing this reason, the Resolution Professional rejected his EOI.

The Promoter argued before the NCLT that since the Corporate Debtor would now come under the purview of an MSME, he was eligible to apply as a prospective resolution applicant under Section 240A of IBC given that he was not a wilful defaulter. Reliance was placed by him on Saravana Global Holdings Ltd. v. Bafna Pharmaceuticals Limited and others wherein it was stated that it is not necessary for the promoters to compete with other Resolution Applicants to regain the control of the Corporate Debtor.

Ruling that the Corporate Debtor could be registered as an MSME in terms of Saravana and the Circular by Board, the Kochi Bench directed the Resolution Professional to consider the Resolution Plan if the promoter submitted a "viable and feasible" Resolution Plan that "maximizes the value of assets of the Corporate Debtor in a way that prevents liquidation". However, the Tribunal agreed with the Resolution Professional that a Corporate Debtor could not submit a resolution as per the IBBI regulations, at which the promoter agreed to submit the Resolution in his individual capacity.

5. NCLAT says Lenders cannot treat Telecom Spectrum as 'Security Interest' under Insolvency Proceedings

The decision came in cases related to Dishnet Wireless Ltd and Aircel Cellular Ltd, which are undergoing insolvency proceedings

In what could be a landmark judgement amid multiple telecom players undergoing proceedings under IBC, a three-member Bench of the Appellate Tribunal has held that a spectrum cannot be treated as a security interest by the lenders. Also, debt-ridden telecom companies undergoing insolvency proceedings cannot claim rights to their spectrum, which is a natural resource, unless requisite spectrum usage payments have been made to the government.

Though a telecom service provider has the right to use spectrum under the license granted to them, they cannot be said to be the owners in possession but only in occupation of the right to use spectrum, the Bench noted. The spectrum cannot be utilised without payment of requisite dues which cannot be wiped off by triggering CIRP under the Code.

Earlier, the Supreme Court had asked NCLAT to decide whether lenders can sell spectrum of Aircel Group under the insolvency resolution process to recover dues. NCLAT while rendering the Judgment also made it clear that a license can be transferred as an intangible asset of the telecom service provider under insolvency proceedings in ordinary circumstances. However, if the seller is in default, then it would not qualify for transfer of license under the insolvency proceedings.

6. Aascar Film's plea to dissolve insolvency proceedings rejected

Case pertains to non-payment of dues to the tune of ₹116.2 crore

The National Company Law Tribunal (NCLT) has rejected a plea by film producer V. Ravichandran to dissolve the insolvency proceedings against Aascar Film Private Limited. It also dismissed another plea, seeking to stay the decision of the committee of lenders to go for liquidation.

In September 2019, the NCLT had ordered insolvency proceedings against Aascar Film in a case filed by Indian Overseas Bank for alleged non-payment of dues of about ₹116.2 crore. The loans were availed for making a movie and commitments under a one-time settlement agreement were not fulfilled, the bank said.

NCLT said the relief sought by Mr. Ravichandran was beyond the scope of the Insolvency and Bankruptcy Code. Also, the directions of the NCLAT, to settle the pending dues under the one-time settlement were not fulfilled, it added.

The NCLT noted that really the erstwhile Board of Directors were seeking for cancellation of the admission order passed by this Adjudicating Authority and revert the company back to the original status, which was beyond the scope of the IBC. Also, the Bench declined to review the order holding that the NCLT cannot review an order as there is no such scope under Rule 11 of the NCLT Rules.

7. NCLAT dismisses Deccan Value Investors' plea against Amtek Auto resolution plan

The Bench observed the appeal was yet another effort to wriggle out of its obligations and seek withdrawal of the resolution plan in a different garb

The National Company law Appellate Tribunal (NCLAT) dismissed Deccan Value Investors' (DVI) appeal against the implementation of its resolution plan for debt-ridden auto parts-maker Amtek Auto, while imposing Rs. 1 Lakh cost. Amtek Auto, which owed lenders Rs 12,700 crore, was among the first cases referred by the Reserve Bank of India to the National Company Law Tribunal (NCLT) in 2017.

The key point of contention in DVI's appeal with the NCLAT was that the mortgage on a part of factory land of Amtek Auto with private equity company KKR could create problems in future and will impede the resolution plan. The Three-Judge Bench headed by acting chairperson, however, ruled that there was no impediment as DVI had contemplated such a situation in the resolution plan. Moreover, the respondents in the case, including the CoC and the Corporate Debtor's Resolution Professional have sent communications to DVI to implement the resolution plan.

Earlier, DVI had invoked the force majeure clause, citing the ongoing pandemic that had damped industrial activity and worsened Amtek Auto's performance. But later, the lenders moved the Supreme Court claiming that DVI was trying to wriggle out of the deal and pleaded for contempt of court proceedings against it. Rejecting the contempt plea the Supreme Court directed NCLAT to decide on the matter and the NCLAT turned down DVI's plea while imposing costs.

LATEST JUDGMENTS

1. Sirpur Paper Mills Limited v. I.K. Merchants Pvt. Ltd.

Arbitral Award Holder's claim, in absence of participation in CIRP, will be extinguished on approval of Resolution Plan in respect of the Award Debtor

The Calcutta High Court settled whether an arbitral award-holder's claim would stand extinguished upon the approval of a Resolution Plan for the award-debtor's revival, when it was not pressed during the Corporate Insolvency Resolution Process (CIRP). Relying on Supreme Court rulings from 2020, the Court ruled that the claim would get extinguished once the Resolution Plan was accepted by the National Company Law Tribunal (NCLT). In the words of the Court *"This can be seen as a necessary and an inevitable fallout of the IBC in order to prevent, in the words of the Supreme Court, a "hydra head popping up" and rendering uncertain the running of the business of a corporate debtor by a successful resolution applicant. In essence, an operational creditor who fails to lodge a claim in the CIRP literally missed boarding the claims-bus for chasing the fruits of an Award even where a challenge to the Award is pending in a Civil Court."*

The Court observed on the instant case that from the date of the admission of the application of initiation of the CIRP against the petitioner until approval of the resolution plan the respondent, as an Award-holder had sufficient opportunity to approach the NCLT for appropriate relief. The Award Holder was obligated to take active steps under the IBC instead of waiting for the adjudication of the application under Section 34 of the Arbitration and Conciliation Act, 1996.

2. R Ghanashyam Mishra And Sons Private Limited v. Edelweiss Asset Reconstruction

Once Resolution Plan Is approved, no Creditor can initiate proceedings to recover Claims not part of Resolution Plan: Supreme Court

The Hon'ble Apex Court, while hearing a batch of Petitions has upheld the 'clean slate theory' and held that once a resolution plan is duly approved by the Adjudicating Authority under Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the creditors (including statutory authorities, employees and guarantors). All such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.

Citation point 1 : A.P. No.550 of 2008

The creditors in these batch matters included statutory authorities like the State commercial tax department, State mining department, income tax department etc. in respect of their respective outstanding demands against the Corporate Debtor.

The Apex Court said that all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.

3. Syndicate Bank v. Him Steel Pvt Ltd

Once the Claim is dealt with under IBC, the ratio decided in respect to operation of other laws is not applicable to the cases falling within IBC

The NCLAT held that any person including a statutory authority cannot make any further demand on the Corporate Debtor or the auction purchaser on the same claim already admitted by the Liquidator. Therefore, a statutory authority shall not raise a right of claim of outstanding dues under some other enactment, the Bench said after conveying due regard to the overriding nature of IBC.

The Successful Bidder of the Corporate Debtor filed the application before NCLAT seeking directions against Himachal Pradesh State Electricity Board Ltd. (HPSEBL) to hold that the bidder is not liable to pay the outstanding dues payable to the Corporate Debtor and to keep the factory of the Corporate Debtor as going concern, and the Electricity Board shall forthwith restore the electricity connection of the Corporate Debtor. HPSEBL claimed the amount against the Corporate Debtor during the CIRP as well as during the liquidation period, and in pursuance thereof, the Liquidator admitted the claim and made it as part of the dues payable by the Corporate Debtor.

HPSEBL submitted that the electricity dues are statutory in character governed by the Electricity Act cannot be waived and cannot partake the character of dues of purely contractual nature. However, the Appellate Tribunal held, "no doubt it is true when the statutory dues are dealt with under other enactments, for there being no overriding provision under the respective laws, it could be right to ask for payment of those dues by the Company or by the auction purchaser as stated u/s 50 of the Electricity Act, 2003. But with regard to the claims falling within the ambit of IBC, Section 238 prevails over other enactments which are inconsistent with the provisions of IBC. Therefore, once the claim is dealt with under IBC, the ratio decided in respect to operation of other laws is not applicable to the cases falling within IBC."

4. Sandeep Khaitan, RP for National Plywood Industries Ltd v. JSVM Plywood Industries

Inherent Powers of a High Court under Section 482 of CrPC cannot be exercised in conflict with Sections 14 and 17 under IBC, Supreme Court holds

The Supreme Court has ruled that the inherent power of High Court under Section 482 of the Code of Criminal Procedure (CrPC) should not be used to undermine statutory dictate under Sections 14 and 17 of the Insolvency and Bankruptcy Code.

The Resolution Professional in the instant case contended that the former Managing Director of the Corporate Debtor in conspiracy with the respondent engaged in an illegal transaction without authority from the Resolution Professional and in violation of Section 14 of the IBC. A cyber complaint was filed followed by an application under Section 19 read with Section 23 (2) of the IBC alleging non corporation by the previous management of the Corporate Debtor. Consequently, the ICICI Bank created a lien upon the bank account of the Corporate Debtor based on the allegedly illegal transaction. The Corporate Debtor challenged the FIR by way of a criminal petition under Section 482 of CrPC. High Court allowed this application leading to the present appeal by appellant Resolution Professional.

The Supreme Court observed that the words 'to secure the ends of justice' in Section 482 cannot mean to overlook the undermining of a statutory dictate, which in this case was the provisions of Section 14, and Section 17 of the IBC. It would appear that having regard to the orders passed by NCLT admitting the application, under Section 7, and also the ordering of moratorium under Section 14 of the IBC and the orders which had been passed by Tribunal otherwise, the impugned order of the High Court resulting in the respondent being allowed to operate the account without making good the amount of Rs 32.50 lakhs to be placed in the account of the Corporate Debtor could not be sustained.

5. Tek Travels Private Limited Vs. Altius Travels Private Limited

Whether Authorisation for filing a Petition under Section 9 before the commencement of the Code can be treated as a valid authorisation?

The Adjudicating Authority had dismissed the Petition filed u/s 9 of the IBC because the authorisation to file the Petition was of 2013, whereas IBC came into existence in 2016. The Appellant contended that the Adjudicating Authority should have granted the liberty to the Appellant to rectify the defects if any. It was also contended that neither the Code nor any Rules and Regulations made thereunder mandate the authorisation post the enactment of the IBC.

Citation point 4 : Company Appeal (AT) (Insolvency) No. 172 of 2020

NCLAT set aside the order and held that the Adjudicating Authority noticed that the authorisation was much before the commencement of IBC, and only on this basis, the Application under Section 9 of the Code was rejected without allowing the Applicant to rectify the mistakes. This was found by the NCLAT to be against the statutory provision of the Code. The Bench further observed that the Adjudicating Authority has erred in dismissing the Application for want of authorisation, without even providing an opportunity to rectify the defects in compliance with Section 9(5)(ii)(a) of the Code.

6. New Okhla Industrial Development Authority v. Anand Sonbhadra, Resolution Professional

NCLAT declines to consider NOIDA as a Financial Creditor

In the CIRP of the Corporate Debtor, the Appellant (Noida), a Statutory Authority, filed Form B as Operational Creditor for outstanding dues. The Representative of the Appellant even attended meeting of the Committee of Creditors (COC) as an Operational Creditor. Later, the Appellant filed claim in Form 'C' seeking status of NOIDA as Financial Creditor.

After elaborately considering the lease deed in question in the instant case, the NCLAT decided that the lease was not a finance lease as alleged by the Appellant and thereby declined to consider the Appellant (Noida) as a Financial Creditor. The Bench declined to consider the submission that when land is leased out, if premium is fixed and instalments are given, it should be treated as a financial lease.

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

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