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INSOLVENCY TIMES





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Editorial



Preventing abuse of IBC

While the Insolvency and Bankruptcy Code (IBC) is a salutary legislation aimed towards the revival and rehabilitation of Companies under stress, the law ought not to be misused by entities by manipulating the process, even when they are not under any significant stress, just to avoid liabilities and enjoy benefits of moratorium under the umbrella protection of IBC, as has been recently held in a landmark judgment by the National Company Law Appellate Tribunal (NCLAT).

While laying emphasis on the power of the Appellate Tribunal to refuse Insolvency applications if there are signs of collusion and mala fide intent, the Bench pointed out that careful discretion is to be exercised to prevent companies from entering the Insolvency process with mala fides even if there is an admitted debt and default.

Henceforth, the Corporate Debtors aiming at avoiding financial obligations by resorting unethically to Insolvency may not be successful and their indiscrete action might also attract penalties under Section 65 of the IBC, more so when such action is initiated fraudulently or with malicious intent.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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1. NCLT orders Liquidation of Mehul Chowksi's company Nakshatra World

The ruling came on an insolvency petition ICICI Bank filed around two years ago against the company, which was also allegedly involved in a money laundering case

The Mumbai Bench of the National Company Law Tribunal (NCLT) ordered the liquidation of Nakshatra World, a subsidiary of Gitanjali Gems, one of the group companies promoted by fugitive businessman Mehul Choksi.

In 2019, ICICI Bank had filed an Insolvency petition against the company. The court appointed Santanu Ray, a partner from Delhi-based AAA Insolvency Professionals LLP, as the liquidator. "In view of the decision of the CoC, we are inclined... to initiate liquidation process against the Corporate Debtor," NCLT said.

Nakshatra World, engaged in the design and distribution of jewellery, was going through an insolvency resolution process since January 2019. But no resolution was found as all the assets were attached by the Enforcement Directorate under the Prevention of Money Laundering Act. Cases in respect of two other group companies, including Gitanjali Gems and Nakshatra Brands, are also pending with the Mumbai Bench of the NCLT as the Committee of Creditors (CoC) has filed applications for liquidating the said companies as well. A consortium of 31 banks has filed claims of Rs 5,280 crore on the Gitanjali group of companies.



2. CoC of Aircel moves the Supreme Court against NCLAT Order

NCLAT had ruled that Spectrum can be transferred as part of Insolvency Resolution Plan but only after clearing all Government Dues

The committee of creditors of Aircel and the successful bidder, UV Asset Reconstruction Company (UAVRCL), have challenged in the Supreme Court the order of the National Company Appellate Tribunal (NCLAT), which ruled that spectrum can be transferred as part of insolvency resolution plan but only after clearing all government dues. The CoC's petition has said that the Appellate Tribunal failed to consider that the provisions of Insolvency and Bankruptcy Code (IBC) overrides the universal access service licence conditions, tripartite agreement and the spectrum trading guidelines.

The NCLAT order had maintained that the Department of Telecommunications (DoT) in the Aircel Insolvency case is an operational creditor, but still the clauses relating to spectrum trading guidelines and licence agreement stipulate that government dues need to be cleared in full before spectrum is transferred and can be further used.

Challenging the order, the State Bank of India on behalf of CoC of Aircel entities has said in its petition that NCLAT's direction to settle DoT's dues first would amount to preferential treatment to the government department, which happens to be an operational creditor, and therefore, amounts to discrimination against other operational and financial creditors of the Aircel entities. The CoC has said that DoT being an operational creditor in this case cannot be paid in priority over other financial and operational creditors.

3. How much money is realized depends on a variety of factors and the Law is not for Recovery, but Resolution:Opinion by Mr. MS Sahoo

Recovery is neither an objective of the IBC nor even one of the intended benefits. It may be appropriate to talk about haircut in case of a law/policy which has recovery as a target, he said

Amid concerns over poor realisation from insolvency resolution, Mr. M.S. Sahoo, Chairman of the Insolvency and Bankruptcy Board of India (IBBI), said in an interview that how much money is realized depends on a variety of factors and the law is not for recovery, but resolution.

When asked about ousted promoters trying to get entry through people they know, Mr Sahoo made it clear that there is no prohibition on promoters to retain their company through a competitive resolution plan. The prohibition is on a person, whether a promoter or not, who does not have credible antecedents. Any person who is connected or related to the prohibited person is also prohibited. Therefore, backdoor entry is not possible. Mr Sahoo assured that there has not been a single instance where a prohibited person has gained control of the company through a resolution plan.



Addressing concerns about haircut and that why IBC yields zero haircut in one case and a 100% in another, Mr. Sahoo said that it depends on the nature of business, health of the economy, marketing efforts etc. It critically depends upon at what stage of stress, the company enters IBC process, as much as at what stage a patient arrives at the hospital. The IBC maximizes the value of the existing assets, not of the assets which do not exist. If the company has been sick for years, and the assets have been depleted significantly, the process may yield huge haircut or even liquidation.

4. High Courts to refrain from interfering with Corporate Insolvency Resolution Process: Kerala High Court

The Court cited the reason that Insolvency and Bankruptcy Code, 2016 is a self-contained Code and warrant no interference by the High Courts

The Kerala High Court has ruled that the High Courts should refrain from interfering with Corporate Insolvency Resolution Process (CIRP) as Insolvency and Bankruptcy Code, 2016 (“IBC”) is a self-contained Code. The petitioners, who are operational creditors of the Corporate Debtor, challenged an approved Resolution Plan (under sections 30 and 31 of the IBC) by filing a writ petition under Article 226 of the Constitution of India. The petitioners also preferred appeals before the National Company Law Appellate Tribunal (NCLAT).

The Court noted that the Writ Petitions were filed on the premise that the appeals and stay petitions were not being taken up by the NCLAT. While admitting the Writ Petition, the court was apprised of the fact that three different benches of the Kerala High Court had granted interim stay against the order approving the Resolution Plan and thereby the implementation of the approved plan was affected. The Respondents challenged the maintainability of the Writ Petitions on the ground that the Petitioners have an effective alternative remedy of appeal under Section 61 of IBC. The Counsels for the Operational Creditors and the Promoters argued in support of the Writ Petition. They submitted that their appeals have been accepted by the NCLAT but are yet to be numbered and posted for admission.

The concern of the Petitioners was that meanwhile, if the approved Resolution Plan is implemented, the appeals will be rendered infructuous. In such circumstances, the High Court can, in the interest of justice, exercise its jurisdiction under Article 226 to safeguard the Petitioners’ interest till the appeals are taken up for consideration by NCLAT.

The Single Bench, in view of the exposition of the Supreme Court regarding the objective of the Code and the authoritative pronouncement of the Division Bench of High Court of Kerala, held that the IBC, 2016 being a self-contained Code, the High Courts should refrain from interfering with the Resolution Process.



5. NCLT gives nod to Resolution Plan in respect of Aeon Manufacturing Pvt Ltd

The Plan provides for a total payment of 9.4 crores out of an admitted debt of 145.8 crores suggesting that the Creditors will have to take a massive haircut of 62 %

The NCLT, Kolkata Bench approved the Resolution Plan submitted by Indo Polysacks Pvt Ltd, the Successful Resolution Applicant, in the Corporate Insolvency Resolution Process (CIRP) of Aeon Manufacturing Private Limited, the Corporate Debtor. The Bench had admitted the Company Petition filed by the Financial Creditor, i.e., Bank of India under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) and ordered for initiation of the CIRP of Aeon Manufacturing Pvt Ltd.

Thereafter, Resolution Plans were received and after numerous revisions of the Resolution Plan, Committee of Creditors (CoC) in its 16th meeting, after detailed discussions, approved the revised Resolution Plan submitted by Indo Polysacks Pvt Ltd by 100% voting share.

The Resolution Plan by Indo Polysacks Pvt Ltd provides for a total payment of INR 9.41 crore against an admitted debt of INR 145.80 crore. A perusal of the same suggests that the creditors will have to take a massive haircut of 62.02%. The NCLT while approving this Plan stated that waivers and concessions with regard to the claims of the Creditors and other stakeholders shall be waived off considering that the same have been dealt with during the CIRP of the Corporate Debtor and have been approved by the majority of the CoC. However, any concessions or waivers claimed by Indo Polysacks Pvt Ltd regarding any statutory dues or penalty shall only be granted after Indo Polysacks Pvt Ltd has approached the competent authority of Government/Semi Government/Central or Local Authority for such relief/claim or waiver.

6. NCLAT has allowed withdrawal of OYO Insolvency case

The Appellate Adjudicating Authority disallowed the intervention of Hoteliers who had filed claims, in effect closing the case against Hospitality Firm

The National Company Law Appellate Tribunal has disallowed Hotelier's intervention, who had filed claims against Soft Banks backed OYO Hotelier's subsidiary following an insolvency petition against the Company, in effect closing the case against the Hospitality Firm. The Order was passed in the matter concerning OYO and hotelier Rakesh Yadav. OYO had reached an out of court settlement with Yadav but scores of Hoteliers had approached NCLT with claims against the company that were said to be upwards of Rs 200 crores.

However, it provided a little breather to the creditors by reserving their right to approach the Corporate Debtor (OYO) to enter into a settlement. Even though it will completely be the prerogative of the Company whether it wants to settle the case with the hoteliers or not. The Ahmedabad Bench of the NCLT had ordered commencement of the Corporate Insolvency Resolution Process (CIRP) against Oyo Hotels & Homes based on the application filed by Yadav. The proceedings were initiated under the Insolvency and Bankruptcy Code (IBC). While Oyo appealed against the NCLT order in NCLAT, and NCLAT granted a stay on the formation of the Committee of Creditors, the process of filing claims against the company had been allowed previously.



LATEST JUDGMENTS

1. ABRJ Foods Pvt Ltd versus Supriyo Kumar Chaudhuri, Liquidator JVL Agro Industries Limited & Ors.

Jurisdiction pertaining to timelines of Sale of Assets under Liquidation vests with the Court having exclusive jurisdiction under the E-Auction Process Document

The High Court of Delhi declined to entertain a Writ Petition by a potential buyer aggrieved by the alleged restrictive and limiting timelines laid down by the Liquidator for the e-auction in such a way that it was allegedly impossible for the Petitioner to effectively participate in the Bid.

A Writ Petition was filed by the Petitioner praying for an appropriate Writ against the Liquidator to revise/ extend the timelines prescribed for the e-auction sale of Old Edible Oil Stock of JVL Agro Industries Ltd (under Liquidation). It was further prayed by the Petitioner to issue of necessary guidelines / regulations for Liquidators under Section 196(1) of the Insolvency and Bankruptcy Code, 2016 for regulating the process of sale of assets during Liquidation process so as to deter the Liquidators from issuing unreasonable terms, conditions and timelines of sale.

The Petitioner submitted that the stock was stored at Haldia, West Bengal and no realistic time was provided to bidders to travel to Haldia and inspect the stock. However, the Respondent argued that the present court had no jurisdiction to decide on the issue as the E-Auction Process Information Document stipulated that any disputed arising out of the same shall be subject to the exclusive jurisdiction of the Adjudicating Authority, Courts and Tribunals at Allahabad, India. Relying on the said submission by the Respondent, the Court dismissed the Petition.

2. Union of India & Ors versus M/S Ruchi Soya Industries Limited

Claims of Central, State Governments and statutory bodies get extinguished after approval of the Resolution Plan if they do not form part of the said Plan

The High Court of Karnataka turned down an Appeal by the Union for dues in the form of custom duty on imported goods holding that the said claim being in the nature of operational debt will get extinguished if it does not form part of the Resolution plan approved by the Hon'ble National Company Law Tribunal, Mumbai.

Citation point 1 : W.P.(C) 5991/2021, CM APPL. 18941/2021-STAY, CM APPL. 18942/2021-EX.

Citation point 2 : Writ Appeal No. 2575/2018 (T-TAR)



Relying on the Supreme Court judgment in Ghanshyam Mishra, the Court said that crown debts do not take precedence over secured creditors, who are private persons. Therefore, if the departments of Central or State Governments do not file an Application or participate in the Resolution Process, their Claims automatically get extinguished.

The Court, emphasizing on Section 238 of IBC providing for an overriding effect of IBC notwithstanding anything inconsistent contained in other laws, ruled that the matter does not require to be remanded back to the NCLT Mumbai, before which forum the plan was approved primarily because the appellants did not produce any material on record to demonstrate that the claim in the instant case was part of the Resolution Plan.

3. Vivekanand Jha (Suspended Management of Mithilanchal Industries Pvt. Ltd.) versus Punjab National Bank

A One Time Settlement (OTS) amounts to an acknowledgement of debt for the purpose of Limitation even if such OTS failed in its execution

The National Company Law Appellate Tribunal (NCLAT), New Delhi upheld the decision of the Adjudicating Authority admitting the Corporate Debtor into Corporate Insolvency Resolution Process (CIRP). The Adjudicating Authority found that there was debt due and default occurred, hence the Application filed by the Bank was complete and that the same deserved to be admitted.

“What appears is that there was earlier an Offer of Settlement and a One Time Settlement (OTS) was entered into by the Corporate Debtor to pay Rs.1200 Lacs. Such OTS would amount to an acknowledgment. The OTS had been accepted and signed by the Directors for the Corporate Debtor- ‘Mithilanchal Industries Pvt. Ltd.’ as well as ‘Telstar Industries (P) Ltd.’ When acknowledgment is there the Application filed was within limitation. It appears that even such OTS failed in further execution.” The Adjudicatory Authority had noticed.

Keeping in view the Judgment of the Hon’ble Supreme Court of India in Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Co-operative Bank Ltd. & Anr., the NCLAT ruled that it did not find that the Adjudicating Authority committed any error when it admitted the Application by not accepting the claim of the Appellant that the Application was time barred.

4. Binay Kumar Singhania, RP of Genegrow Commercial Pvt. Ltd. Versus ABC

A Stay by the Appellate Court on an Order of Rejection of Application does not ipso facto lead to revival of the Company Petition

The Hon’ble NCLAT sided with the decision of the Adjudicating Authority which declined the prayer of the Applicant for exclusion of time during the pendency of the case before the Hon’ble Supreme Court on the ground that the Apex Court had granted a stay on the order of rejection of Application by the NCLAT which did not have effect of reversing the order and revival of the Company Petition.



In the words of the NCLAT, “the stay granted does not lead to automatic revival of the Company Petition which has been already closed by the Adjudicating Authority”.

The Corporate Insolvency Resolution Process (CIRP) in respect of M/s Genegrow Commercial Private Limited, the Corporate Debtor was initiated on admission of Application by the NCLT, Kolkata Bench. However, one of the Ex-Directors of the Corporate Debtor moved the Appellate Tribunal in Appeal against admission of the application under Section 7 of IBC, which set aside the admission order and thereby closed the CIRP of the Corporate Debtor. The Financial Creditor State Bank of India moved the Hon’ble Supreme Court against the said rejection of admission by the NCLAT and the Apex Court passed orders staying the orders of the Appellate Adjudicating Authority till the next date of hearing.

5. Knight Riders Pvt Ltd versus Global Fragrances Pvt Ltd

Whether Guaranteed Minimum Royalties in lieu of license to use the Trademark of the Applicant can be considered to be an operational debt?

The National Company Law Tribunal (NCLT), New Delhi has taken the view that incorporeal rights like trademarks, copyrights, patents and rights in personam capable of transfer or transmission are included in the ambit of “goods” and for a claim to fall within the definition of ‘operational debt’, the Operational Creditor must establish that it has a “right of payment” in respect of the provision of “goods or services” and also that Corporate Debtor has committed a “default” towards its liability or obligation in respect of such outstanding claim.

The Corporate Debtor submitted that the term Operational Debt as defined under Section 5 (21) of the IBC requires that claim should be in respect of goods and services to be an operational debt. The Applicant’s claim had arisen out of failure to pay the Minimum Guaranteed Royalties which is to be paid regardless of the sales, therefore, reflecting that the payment due cannot be said to be an operational debt for the purpose of proceedings under IBC.

In Contrast, the Operational Creditor submitted that the term “goods and services” are not defined under IBC and for such reasons, these terms should be given a meaning which are ordinarily understood. Therefore, such activities or transactions under the Agreement fall within the scope of words “services” under Section 5(21) of IBC. The NCLT observed in the present case that the Minimum Guaranteed Royalties was a fixed payment due and payable by the Corporate Debtor under the Agreement and the non-payment of the same amounted to an “operational debt” under IBC.



For enquiries related to:

- Insolvency Process,
- Bankruptcy Process,
- Filing petition with NCLT/DRT,
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