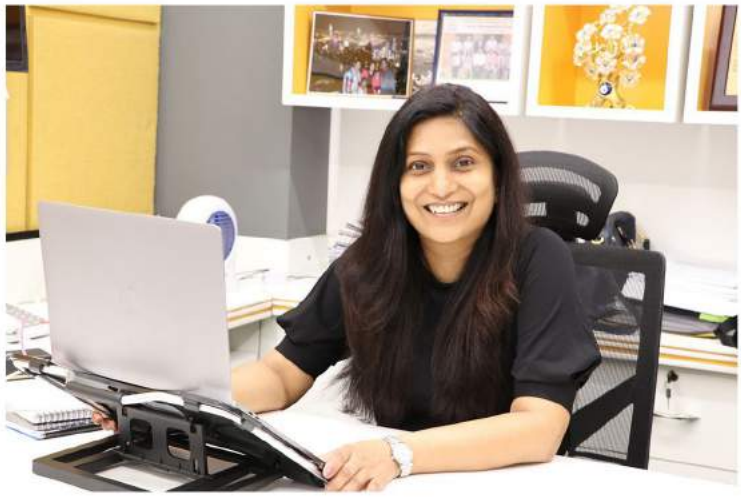
ASC

INSOLVENCY TIMES

Volume 55, June 2021

ASC TIMES - JUNE

Editorial



Personal Guarantees drying up for Corporate Loans

With Supreme Court clearing ways for enforcement of personal guarantees, the promoters now are wary and are not offering guarantees for loan to be taken by the companies. On the other hand, lenders are becoming over conscious and asking promoters to furnish a negative lien on assets owned by them for bank loans.

In the past, promoters have been secretly selling off their personal assets with a purpose to avoid banks actions, however, with a negative lien clause, they will not be able to dispose off the assets without permission of the lender and will remain trapped.

Banks seeking proper documentation have reasons to believe that several promoters have intentionally parked their assets in a Trustee Company or moved proceeds of sale to an international location after offering property investments and other physical assets as part of the personal guarantee.

The game is on to be watched interestingly.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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1. RBI not in favour of fresh Insolvency freeze

Due to the last round of freeze, several businesses managed to avoid reference to the NCLT, enabling Managements to stay in the saddle

As per reports, the Reserve Bank of India (RBI) has shot down suggestions of a fresh suspension of the Insolvency & Bankruptcy Code (IBC) due to the second wave of Covid-19, while making it clear that banks can still restructure distressed but viable loans, ensuring that their balance sheets remain transparent. During initial discussions with the government, RBI has indicated a freeze that it will not help anyone in the long run as it will only show lower level of non-performing assets (NPAs). The government has not finalized any decision yet, but it is apparent that the regulator is reluctant towards the imposition of another suspension on the management of distressed assets under the Code.

Last year, RBI went along with the government decision to suspend IBC provisions for six months, which was subsequently extended to a year, but it had reservations. Due to the last round of freeze, several businesses managed to avoid reference to the National Company Law Tribunal (NCLT), enabling managements to stay in the saddle. The moment a case against a company is admitted, the promoters lose control as an Insolvency Professional runs the show along with the Committee of Creditors until the resolution process is completed.

Separately, the Finance Ministry has also been working with the state-run lenders to see how best the loan restructuring scheme announced by RBI can be implemented at a time when many individuals may find it difficult to visit branches. Although the Centre had announced a Pre-packaged Insolvency Resolution window for micro, small and medium enterprises (MSMEs), which is in addition to the restructuring offered by RBI, it has so far seen limited response as large parts of the country started shutting down soon after the mechanism was put in place.

Point 1 Source: https://www.ksgindia.com/study-material/news-for-aspirants/29639-rbi-not-in-favour-of-fresh-insolvency

2. Delay in Insolvency Resolution continues to be cause of concern

Of the 12 cases pushed by RBI for insolvency proceedings in 2017, Resolution Plans for nine firms were approved while Liquidation orders were passed against two firms

As per our reports, the inordinate delay in the resolution process under the Insolvency and Bankruptcy Code, 2016 (IBC) remains a worrying factor for the for the market statistics and outcomes of resolution through the Code. Of the 1,723 ongoing Insolvency cases as of March-end, 79 per cent or over 1,361 cases have breached the outer limit of 270 days for resolution set out by IBC. Reports have indicated that the delay in resolution was due to the fact that National Company Law Tribunals (NCLT) have been functioning via virtual hearings since the lockdown last year.
Moreover, a large number of vacancies across Tribunals has been a major hindrance and the Supreme Court has already directed the government to fill up vacancies in two months. Experts have opined that following the strict timeline of 120 days is the only way to reduce the statutory delays in resolution processes.

The number of cases admitted for Insolvency last fiscal slowed to 499 against 1,978 in the financial year 2020 due to the suspension of fresh bankruptcy proceedings for Covid defaults which ended on March 24. However, there will be no sharp increase in number of fresh insolvency cases as the government has given a six-month moratorium for stressed borrowers followed by a one-time restructuring and emergency credit guarantee scheme.

Of the 4,376 cases registered for CIRP, 29 per cent or 1,269 cases have ended into liquidation while about 946 cases were that of BIFR/non-operational companies or their resolution value was less than the liquidation value. Interestingly, eight per cent of the cases under ₹1 crore default have been withdrawn under Section 12A.

3. NCLT approves Piramal Group's Resolution Plan for Bankrupt financier DHFL

Piramal's Plan offers to pay Rs 37,250 crore, with upfront cash of Rs 12,700 crore

The Mumbai Bench of the National Company Law Tribunal (NCLT) has approved the Piramal Group's Resolution Plan for Dewan Housing Finance Limited (DHFL). The order is subject to the outcome of the appeal in the Appellate Tribunal and the Supreme Court.

Piramal's Plan offers to pay Rs 37,250 crore, with upfront cash of Rs 12,700 crore; it has already been approved by the Committee of Creditors (CoC), the Reserve Bank of India (RBI), and the Competition Commission of India (CCI).

NCLT has asked the CoC to allocate more funds to the fixed deposit holders and small investors, but it has left the final decision to the CoC. It has also rejected the erstwhile Promoter's plea to get a copy of the Resolution Plan.

Point 2 Source t: https://www.thehindubusinessline.com/money-and-banking/delay-in-insolvency-resolution-continues-to-be-cause-for-concern/article34702597.ece

Kapil Wadhawan, the erstwhile promoter of DHFL, has moved the Supreme Court to get a stay on the National Company Law Appellate Tribunal's (NCLAT) order, which stayed an earlier order of the Mumbai Bench of NCLT asking the CoC to consider the settlement offer put forward by Wadhawan. DHFL became the first financial services company to be referred to the NCLT by RBI in November 2019 after it defaulted on its payments and the lenders failed to find a resolution under the June 7 circular of the RBI.

4. Supreme Court upholds the Insolvency and Bankruptcy Code regarding invocation of Insolvency against Personal Guarantors to Corporate Debtor

The Court reaffirmed that the Guarantor's liability will not be ipso facto discharged upon the conclusion of Insolvency proceedings

The Supreme Court has provided the creditors with great relief by allowing them to pursue insolvency proceedings against guarantors, while also reaffirming that the guarantor's liability will not be ipso facto discharged upon the conclusion of Insolvency proceedings. The ruling negates the judgment of the National Company Law Appellate Tribunal (NCLAT) wherein it had been held that while there would be no restriction in filing simultaneous applications under section 7 of the Code against the Corporate Debtor and Guarantor, once an application under Section 7 filed by a creditor is admitted, then another application with the same set of claims cannot be filed. Thus, the Adjudicating Authority will have to examine the terms and conditions in the guarantee as agreed between the creditor and the guarantor to determine the guarantor's liability.

In the instant case where a challenge to a notification by the Ministry of Corporate Affairs that applied certain provisions of the Code to personal guarantors of the Corporate Debtor was dismissed, the petitioners argued that an executive government cannot selectively bring certain provisions of the Code and then have it apply only to a certain class. It was also argued that a Guarantor's liability is co-extensive with that of the Corporate Debtor, by applying contract law. Therefore, when insolvency proceedings have finished, and the Corporate Debtor's liability has been extinguished to the extent as acknowledged in the insolvency process, the Guarantor's liability would be to such extent. If the Guarantor's liability is more than that of the principal debtor, it would lead to the unjust enrichment of creditors.

However, the Supreme Court recognized that there is no constitutional imperative that a law or policy should be implemented at once. Consequently, the Supreme Court concluded that the impugned notification does not amount to an impermissible and selective application of provisions to a sub-class. The petitioners did not establish any ground that the provisions should apply to all individuals or not at all.

Another question raised before the Supreme Court was whether a resolution plan would discharge the liabilities of a personal guarantor. The Court held that Section 31 of the Code does not per se lead to a discharge of the liabilities of a guarantor. Thus, a resolution plan does not ipso facto discharge a personal guarantor's liability in a contract for guarantee. One would be required to examine the terms of the specific guarantee to assess whether the guarantor's liability has been discharged.

Point 4 Source t: https://www.business-standard.com/article/companies/oyo-nclt-case-hotelier-to-withdraw-insolvency-plea-against-oyo-unit

5. Insolvency Proceedings against OYO sought to be withdrawn after mutual resolution

Petition for Withdrawal filed after the Operational Creditor acknowledged the receipt of Rs 16 lakhs under the Agreement

Gurugram-based hotelier Rakesh K Yadav, who filed a plea with the National Company Law Tribunal (NCLT) against a unit of hospitality firm Oyo, has withdrawn the case after resolving issues with the company.

"After open discussion with teams from Oyo and its subsidiaries, I fully withdraw the case and confirm that all issues are resolved. I also acknowledge the receipt of Rs 16 lakh under the MSA (master service agreement) with MTH. I have observed in my interactions that Oyo and its employees are always committed to professional conduct and business practices. I am thankful for Oyo's innovative business model and technology that has enabled the growth of small and medium hotels of India," Yadav said.

IBC proceedings started for Oyo's subsidiary Oyo Hotels and Homes Private Limited (OHHPL) due to a case led by Yadav at NCLT Ahmedabad. Oyo had argued that the petition should have been filed against its unit My Preferred Transformation and Hospitality Private Ltd (MTH). MTH and Yadav subsequently considered a mutual resolution, and reached a settlement. Yadav has filed for the withdrawal of the IBC case against OYO subsidiary OHHPL.

6. NCLT issues Insolvency Resolution Process against Wizcraft

Case pertains to failure to pay dues to the tune of ₹ 60 crore as a guarantor of the original loan borrower Great Indian Nautanki Company Private Limited

The National Company Law Tribunal (NCLT) on Monday admitted a petition filed by IDBI Bank Ltd. seeking to invoke Insolvency and Bankruptcy proceedings against Wizcraft International Entertainment Private Limited for failing to pay around Rs 60 crore, an amount, which the original loan borrower - Great Indian Nautanki Company Private Limited (GINCL) failed to pay.

The bank alleged that Wizcraft being the Corporate Guarantor to the loan it granted to GINCL had issued an "unconditional and unrecoverable" Corporate Guarantee by which it undertook to pay forthwith upon demand without any demur all amounts payable by the borrower (GINCL). The bank even issued proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, in this matter.

However, Wizcraft contended that it wasn't liable to pay any amounts as GINCL along with the bank had entered into an agreement with the Haryana Shahari Vikas Pradhikaran (HSVP) also known as Haryana Urban Development Authority, without it's (Wizcraft) consent. It claimed that the bank by a no-objection certificate in July 2019, freeing GINCL and making the new bidder (HSVP) responsible for the discharge of the said loan.

Point 5 Source t: https://economictimes.indiatimes.com/industry/media/entertainment/nclt-admits-insolvency-plea-against-wizcraft/articleshow/82891980.cms?from=mdr

Wizcraft alleged that the guarantor's liability was discharged in view of the fresh execution of NOC and arrangement between the Bank, GINCL and HSVP and the bank has deliberately concealed this fact before the Adjudicating Authority.
The NCLT, after noting that Wizcraft had admitted and acknowledged its liability by responding to a letter of demand by the bank and seeking time for the same, admitted the Insolvency plea and imposed moratorium as prescribed under the Code.

7. Suraksha ARC Plan considered viable by the Lenders after turning down NBCC's Proposal in Jaypee Infratech

NBBC's Plan non-compliant with rules as it does not have legal rights to enforce promoter guarantee and issue securities against the Yamuna Expressway project: RP

As per reports, financial creditors to Jaypee Infratech Ltd. deemed a resolution plan by government owned NBCC Ltd. as non-compliant with the provisions of the Insolvency and Bankruptcy Code (IBC). The Committee of Creditors (CoC) followed advice by the Resolution Professional Anuj Jain to come to a decision on the two bidders and will now only move ahead with a vote on a rival plan submitted by Suraksha Asset Reconstruction Company Ltd. Suraksha ARC's plan had scored higher in the evaluation matrix while the NBCC's plan was deemed non-compliant due to the way it had structured payments to the dissenting creditors.

As part of its plan, NBCC had proposed to allow dissenting creditors to enforce securities to the extent of liquidation value owed to them. But if the enforcement of security did not cover the liquidation value, NBCC proposed to issue non-convertible debentures (NCD) with a 21-year tenor. The NCDs would be issued by a special purpose vehicle which holds the Yamuna Expressway, as per the plan. The proposal also included promoter guarantees provided by Jaiprakash Associates Ltd. as securities, which could be enforced by the dissenting Financial Creditors. The Resolution Professional, in a recommendation note, said that these proposals are not in compliance with existing rules as NBCC does not have legal rights to enforce promoter guarantee and issue securities against the Yamuna Expressway project.

In comparison, Suraksha ARC's plan allowed dissenting financial creditors to enforce securities up to the liquidation value owed to them, without any conditions. It, however, sought relief on multiple claims filed by the Yamuna Expressway Industrial Development Authority and compensation to farmers who were impacted by the construction of the expressway. The Resolution Professional found that the ARC's Resolution Plan was in compliance with the IBC. In terms of the reliefs sought by the bidder, the Resolution Professional found that the plan promises to implement the resolution scheme, whether the relief is given or not.

LATEST JUDGMENTS

1. Technology Development Board v. Anil Goel & Ors

Whether there can be no sub-classification inter-se the Secured Creditors in the distribution mechanism adopted in distribution of assets in terms of Section 53 of the IBC?

Technology Development Board, the Appellant, was one of the Financial Creditors the Corporate Debtor having 14.54% voting share in the CoC and received no amount in the distribution of sale proceeds under liquidation. Aggrieved, the Appellant challenged the action on the ground that the claim of the Appellant as a Secured Creditor was not considered, and that the liquidator failed to distribute the sale proceeds as per the voting shares and the order of priority of the creditor.

The NCLT held that the inter-se priorities amongst the Secured Creditors would remain valid and prevail in distribution of assets in liquidation. In appeal, it was contended that once the security interest is relinquished by a Secured Creditor, the priority and the bases of charge loses its significance and all the creditors irrespective of the priority of charge are to be treated for the distribution in terms of Section 53 of the IBC. Per Contra, the Liquidator argued that the disbursement of amount was with regard to waterfall treatment of Section 53 of IBC.

The NCLAT took the view that once a Secured Creditor opts to relinquish its security interest, the distribution of assets would be governed by the provision engrafted in Section 53(1)(b)(ii) whereunder all Secured Creditors having relinquished security interest rank equally irrespective of the priority over the charge and directed the Liquidator to treat the Secured Creditors relinquishing the security interest as one class ranking equally for distribution of assets under Section 53(1)(b)(ii) of the IBC and distribute the proceeds in accordance therewith.

2. India Resurgence Arc Private Limited vs. Amit Metaliks Limited

Approval of a Resolution Plan falls exclusively in the domain of the commercial wisdom of CoC with limited scope of judicial review

The Appellant challenged order of NCLAT whereby the Appellate Authority rejected its challenge to the order of NCLT approving the Resolution Plan of the Corporate Debtor. The Appellant was the assignee of the rights, title and interest of a secured Financial Creditor of the Corporate Debtor. The Appellant's main ground of challenge was that the CoC wrongly approved the Resolution Plan which failed to consider the priority and value of security interest of the creditors while deciding the manner of distribution to each creditor.

Citation point 1 : Company Appeal (AT) (Insolvency) No.731 of 2020
Citation point 2 : Civil Appeal no. 1700 of 2021

The Supreme court held that the amount to be paid to different classes or sub- classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the CoC; and a dissenting secured creditor like the Appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest. It was further held that the fact that a dissenting financial creditor is having a security available with him, would not entitle him to enforce the entire of security interest or to receive the entire value of the security available with him.

3. Regional Provident Commissioner vs. Vandana Garg

EPFO, Govt bodies can't revise Claims once Resolution Plan is approved

The NCLAT has held that once a Resolution Plan for a debt-laden corporate entity is approved, even government-bodies like the Employees Provident Fund Organisation (EPFO) cannot revise their claims. The case relates to insolvency proceedings against GVR Infra Projects Limited, which had not paid its EPFO dues since April 2014, including interest and damages, even though the same was deducted from employees share. The Bench asserted that as per the Code, EPFO dues are part of workmen salaries and dues, which are accorded the highest priority and are to be paid in full by the Resolution Applicant when bidding for the company under corporate insolvency resolution process.

The Bench, however, held that since the Regional Provident Commissioner of EPFO had, while filing the claim with the Resolution Professional, quoted a certain sum, the same cannot be revised later, even if the total dues outstanding is higher than the sum quoted. Once the plan is approved, all claims made by any persons or authorities stand extinguished and no person is entitled to initiate or continue any proceeding regarding a claim that is not part of the Resolution Plan.

4. Indus Biotech Private Limited vs. Kotak India (Offshore) Fund

Without a resolution of the dispute between parties, the existence of default could not be conclusively determined

The NCLT decided that there existed an arbitrable dispute between Kotak who held Optionally Convertible Redeemable Preference Shares ("OCRPS") and Indus. The NCLT negated Kotak's right to redemption of the OCRPS and refused to classify the failure of the Company to repay the redemption value as a default under Section 7 of the Insolvency and Bankruptcy Code, 2016. These contentions were presented before the Supreme Court by way of appeal and the findings of the NCLT were approved.

During discussions between both parties, a dispute arose pertaining to the calculation and conversion formula to be followed while converting the OCRPS into equity shares. While the dispute was ongoing, Kotak invoked the provisions of the Share Subscription and Shareholders Agreement ("Agreement") seeking redemption of the OCRPS at the redemption value. The Agreement provided that the 'redemption value' would constitute a debt owed by Indus to Kotak from the due date till it was repaid in full. When Indus failed to redeem the OCRPS as per the prescribed timeline under the Agreement, Kotak interpreted the failure to mean a default under the Code and approached the NCLT under Section 7 of the IBC seeking initiation of Insolvency proceedings of Indus. The NCLT, as well as the Supreme Court sided with the corporate debtor's contentions and held the Section 7 application to be inadmissible until the dispute between the parties is settled through arbitration.

Citation point 3 : Company Appeal (AT) (CH) (Ins.) No. 50 of 2021

5. N. Subramanian v. M/s Aruna Hotels Ltd. & Another

SC allows section 9 Application in light of acknowledgement of liability by the Corporate Debtor

A Full Bench of the Hon'ble Supreme Court owing to the acknowledgement of liability by the Corporate Debtor, dismissed allegations made by it regarding 'existence of dispute', and accordingly, upheld the National Company Law Tribunal's (NCLT) verdict admitting application filed by the Operational Creditor under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC).

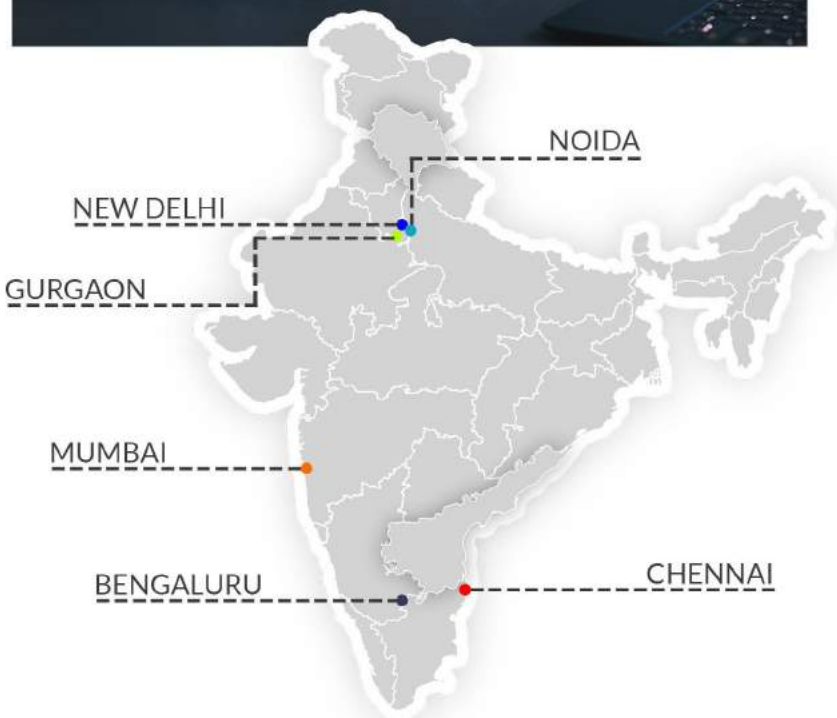
The Appellant was the erstwhile employee of the Corporate Debtor who retired from the service as a Public Relations Manager. The Appellant averred that a sum of Rs.1.87 crores was owed to him, being the arrears of salary from the year 1998 till 2013 when he retired from service and that several acknowledgements of liability have been given of the arrears payable, the last of which was by a letter by the erstwhile Managing Director of the Corporate Debtor.

Before the SC, the Appellant emphasized that the letter of acknowledgement clearly divulged the amounts due and payable to him and hence, the application filed within three years could not be said to be barred by limitation.

Citation point 5 : REED 2021 SC 03547

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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