25+ YEARS OF EXCELLENCE

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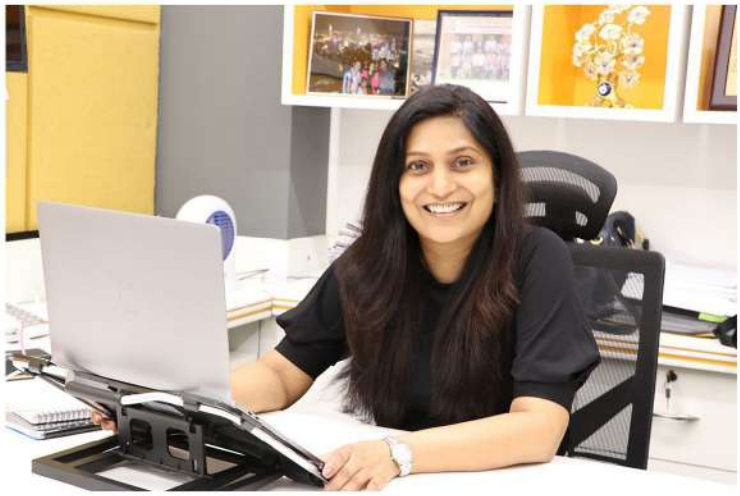
Editorial



NOIDA is an Operational Creditor under IBC – Supreme Court

Ending a prolonged legal battle beginning at NCLT, the Hon'ble Supreme Court considered whether NOIDA, the Appellant (i.e. Lessor) who has acquired land for the purposes of setting a residential township is a Financial Creditor (FC) of the Corporate Debtor (CD) under the Insolvency and Bankruptcy Code, 2016 (Code).

While holding it to be an Operational Creditor (OC), it made some important findings that raising of the amount, which, according to the Appellant, (NOIDA) constitutes the financial debt, has not taken place in the form of any flow of funds from the Appellant/Lessor, in any manner, to the lessee.

The mere permission or facility of moratorium, followed by staggered payment in easy instalments, cannot lead to the conclusion that any amount has been raised, under the lease, from the Appellant, which is the most important consideration.

While this landmark judgement will pave way for approval of many stuck-up Resolution Plans of real estate projects giving relief to thousands of waiting Homebuyers, the urban development agencies like Noida will have to draw their fresh strategies how not to let its investments get caught in the quagmire of Insolvency & Bankruptcy Process.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

Anju Agarwal
Partner
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Supreme Court puts CIRP in abeyance and permits Promoter to complete the Project

The Suspended Director had sought the abeyance on the ground that settlement had been entered into with the Applicant, but the NCLAT had refused citing the interest of all allottees/ homebuyers

The Supreme Court has recently directed the corporate insolvency resolution process (CIRP) in respect of the Corporate Debtor to be kept in abeyance and permitted the erstwhile promoter of the Corporate Debtor to complete the construction of real estate housing project within the stipulated time period.

The suspended Director of the Corporate Debtor filed an appeal before the Apex Court under Section 62 of the Insolvency and Bankruptcy Code, 2016 against the order of the National Company Law Appellate Tribunal (NCLAT) wherein the Appellate Adjudicating Authority had rejected the suspended Director's request to complete the project and directed the Resolution Professional to continue with the CIRP of the Corporate Debtor.

The Suspended Director had filed an appeal before the NCLAT for stay of proceedings on the ground that a settlement had been entered into between the Suspended Director and the applicant who initiated the insolvency process in respect of the Corporate Debtor. The NCLAT refused to stay the proceedings and cited the reason that though settlement has been made by the Appellant with the Insolvency Applicant, however the interest of all the other allottees/ homebuyers is also at stake. The Appellate Adjudicating Authority had observed that the settlement plan does not encompass all the allottees of the project.

The Supreme Court, after noting that only 7 out of the 452 homebuyers had objected to the settlement plan put forth by the Suspended Director, held that it will be in the interest of homebuyers to permit the promoter to complete the construction of the project.

Moratorium does not apply to natural persons like the Director of the Corporate Debtor for liability under Section 138 of Negotiable Instruments Act: Supreme Court

The Bengaluru Bench of NCLT admitted the plea filed by Sun Star Hotels and Estate Pvt Ltd, a Financial Creditor of the erstwhile Vijay Mallya-promoted company, claiming default of Rs 16.80 crore

The Supreme Court has clarified that the moratorium provisions contained in Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) would apply only to the Corporate Debtor. The natural persons mentioned in Section 141 of the Negotiable Instruments Act would continue to be statutorily liable under the provisions of the Act, the Apex Court held.

The Apex Court was dealing with a Writ Petition which sought for quashing the criminal complaints against the Company/Corporate Debtor as well as its directors under Section 138 of he Negotiable Instruments Act, 1881 on the ground that the Resolution Plan was approved by the Committee of Creditors (CoC) under Section 30(4) of the Code and the Complainant has accepted the approved Resolution Plan. The Petitioner had contended that the Resolution Plan having been accepted in which the dues of the original complainant also figure, the effect of such acceptance would be to obliterate any pending trial under Sections 138 and 141 of the Act.

Citing its reliance on previous decisions of the Court, the Supreme Court held that the issue about the liability of natural persons like a Director of the Company does not come within the applicability of moratorium provisions contained in Section 14 of the IBC which would apply only to the Corporate Debtor. The Court further laid down that the natural persons mentioned in Section 141 of the Negotiable Instruments Act would continue to be statutorily liable under the provisions of the said Act. Having said this, the Hon'ble Supreme Court concluded that its earlier decisions were quite clear on the point and, as such, no interference in the petition was called for.

RBI nudges twin Srei lenders banks to classify account as fraud

Under 12A of the Insolvency and Bankruptcy Code (IBC), a Promoter classified as a wilful Borrower or an account classified as Fraud cannot submit a Settlement Plan to Lenders

As per reports, the Reserve Bank of India (RBI) is nudging the lenders to the twin Srei companies to classify both Loan accounts to the Kolkata-based Infrastructure Financier as fraud. Financial Creditors have claims of about Rs 32,000 crore against the two Debt-laden companies.

If the account is classified as fraud, it will prevent Kanoria from regaining control over the companies. Under 12A of the Insolvency and Bankruptcy Code (IBC), a promoter classified as a wilful borrower or an account classified as fraud cannot submit a settlement plan to lenders. Srei Equipment Finance and Srei Infrastructure Finance were admitted for corporate insolvency proceedings by the RBI last October. A fraud tag can also affect a defaulting promoter's ability to control other businesses.

The Delhi High Court had earlier directed Punjab & Sind Bank, which classified the Srei companies as fraud, not to take action against the twin Srei companies until the next hearing. Lenders believe that classifying the two accounts as fraud at this juncture could be deemed as contempt of court. However, the banking regulator believes that the stay on 'taking action against the companies' is different from declaring it as 'fraud.' Lenders are seeking legal opinion on the matter, the reports suggest.

Supreme Court asks Banks not to impose Penalty on EMI default by Amrapali Home-Buyers

Liability of home-buyers would come into effect from the date when possession of the flat is handed over, and banks can take action if they do not discharge their liability

In a relief to over thousands of home-buyers of Amrapali Group of Companies who have booked their flats under the subvention scheme, the Supreme Court has directed the banks that their accounts shall not be treated as Non-Performing Assets Accounts and no penalties shall be charged from them for default of EMI payment. The Apex Court asked the banks to regularize the accounts of home-buyers when they approach the lenders concerned. The top court said that the banks will be liable for the principal amount and the interest over it. A Subvention Scheme in the present case is a legal agreement made between the home buyer, the developer Amrapali Group of Companies, and the banks providing the home loan. Under the scheme, the buyer did not have to pay any amount in the form of EMI during the No EMI period till the completion and possession given to the home buyer.

Around 10, 000 home-buyers have availed the subvention scheme but due to the acts of omission and commission on behalf of Amrapali Group of Companies, they were saddled with the liability of paying the EMI towards the loan without even getting the passion of their flat.

The Supreme Court said that no banks shall impose a penalty for default committed by the flat buyers and added that the banks shall however be entitled to the principal as well as interest over it. The Court further added that the liability of home-buyers shall arise from the date when possession is handed over and they shall discharge their liability at that time else banks can take appropriate action.

The Code does not envisage a pre-admission enquiry into the proof of default: Rules NCLAT

The Appellate Bench said that a pre-admission enquiry into the default by an independent forensic audit may defeat the object of the Code

While an Insolvency application filed by an Operational Creditor can be resisted on the ground that there is an "existing dispute", the Insolvency and Bankruptcy Code, 2016 (Code) does not provide for such a defense for resisting an Insolvency application filed in respect of a financial debt. In case of an application filed by a Financial Creditor, the Adjudicating Authority is only required to satisfy itself of the occurrence of default, ensure that the application is otherwise complete and ascertain whether any disciplinary proceeding is pending against the proposed Resolution Professional.

The National Company Law Appellate Tribunal (NCLAT) has recently reiterated the above-said principle wherein the Corporate Debtor tried to defer and resist the admission of an Insolvency application even though it had admitted to the default of Financial Debt on the ground that the application contained certain false statements and that the application was filed with a fraudulent/ malicious intent.

The Appellate Bench further held that since there was a "debt" and "default", the Adjudicating Authority ought to have admitted the application. However, it entered disputed questions of fact and directed a forensic investigation to unravel the true position of the loan account, which could have otherwise been easily decided by the Resolution Professional.

Bank of India initiates Insolvency proceedings against Future Retail

The Bank has initiated the action following a default by the group of 3495 crores on the one-time restructuring scheme between the bank and the company

Bank of India has filed Insolvency proceeding before the National Company Law Tribunal, Mumbai (NCLT) against Future Retail Ltd for non-payment of the dues to the Bank. The Company stated it defaulted on non-payment of monies due in terms of framework agreement entered between the company and the bank. The decision of lenders to file an application to NCLT is likely to have a bearing on the 24713 crore offer that Reliance Industries linked entities made to acquire Future Group companies.

The bank has filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 with the Adjudicating Authority for a default of 3495 crores after the company failed to pay the dues or come up with a debt restructuring plan, as per reports.

The lenders have also suggested that lenders have jointly decided to recommend Vijaykumar Iyer backed by Deloitte India as the Interim Resolution Professional. Lenders have dues of over 17500 crore which includes Rs 3700 crore offshore bonds and Rs 13800 crore borrowing from local banks. The key factor which is being contemplated to have influenced the decision of lenders is the uncertainty of recovery, after Reliance took control of more than 800 of Future Retail's 1500 store sites citing non-payment of rentals.

RECENT JUDGMENTS

Mahendra Kumar Jajodia Vs. State Bank of India, Stressed Assets Management Branch

Lenders can invoke personal guarantees in IBC cases, says Supreme Court

The Supreme Court has rejected a plea against a recent ruling by the National Company Law Appellate Tribunal (NCLAT), paving way for lenders to initiate insolvency proceedings who have signed personal guarantees on corporate loans. This is irrespective of pendency of any proceedings against the Corporate Debtor under the Insolvency and Bankruptcy Code, 2016 (IBC).

Earlier, the NCLAT had ruled that initiation of corporate Insolvency was not a pre-requisite to initiate Insolvency proceedings against the Personal Guarantors to the Corporate Debtor. The Supreme Court verdict will ensure an optimal recovery for lenders and refrain them from taking steep haircuts, causing less losses to banks. It will also discourage defaulters from misutilization of loan amount and transferring assets to related parties even before the recovery process is initiated.

Under the IBC norms, a corporate resolution process or liquidation against the Corporate Debtor is required to initiate proceedings against personal guarantor. The Apex Court stayed the NCLAT decision after noting that it does not see any cogent reason to entertain the appeal. The order implies that proceedings against the personal guarantors need not be dependent on the Principal Debtor, i.e. the Corporate Debtor.

Nitin Bharal, Ex- Director Vs. Stockflow Express Private Limited

Proceeding on Fraudulent Transactions under Section 66 of IBC can be initiated even in the absence of any Transaction Audit: NCLAT

The National Company Law Appellate Tribunal (NCLAT) at New Delhi has held that an application under Section 66 of the Insolvency and Bankruptcy Code, 2016 (IBC) can be initiated by the Resolution Professional of the Corporate Debtor even in the absence of any transaction audit. Referring to Section 18 of the Code, the Appellate Adjudicating Authority further held that the Interim Resolution Professional (IRP) has the power to collect information and furnish a detailed analysis to the Adjudicating Authority.

When the Appellant contended that there was no transaction audit and hence a finding of fraudulent

transactions under Section 66 of the Code is unsustainable, the Appellate Adjudicating Authority held that the IPR had averred that there was no cooperation from the Promoters and hence an Affidavit was filed by him with a detailed analysis which clearly showed the debts written off to defraud the creditors and the cash transactions done with a willful intention of financial gain at the cost of negatively effecting the creditors.

For the aforesaid reasons, the NCLAT held that there was no illegality or infirmity in the well considered order of the Adjudicating Authority, hence the Appeal was liable to be dismissed.

Steel Strips Limited Vs. Avil Menesis

After approval of a Resolution Plan by CoC by requisite vote & after expiry of CIRP, it is not open for the CoC/Adjudicating Authority to consider a new Resolution Plan which may be better plan, rules NCLAT

The National Company Law Appellate Tribunal (NCLAT) has recently ruled that once the Resolution Plan is approved by the Adjudicating Authority under sub-section (1) of Section 31 of the Code, it shall be binding on the Creditors including the Operational Creditors i.e. the Appellants in the present case. Moreover, the Appellate Bench noticed that in the proposed Resolution Plan, nil payments had been shown against the payments to be made to the Operational Creditors.

The Appeal was filed against an orders in two cases before the National Company Law Tribunal (NCLT), Bengaluru Bench, hence the Appellate Tribunal decided to dispose off both the appeals by a common order. The Appellant had contended that the NCLT without appreciating the facts with respect to the claims of the Operational Creditors passed an order approving the Resolution Plan.

After consideration of the arguments advanced by the parties in the Appeal, the NCLAT decided that the Resolution Plan was not only violative of the provisions of law but also made discriminatory treatment towards the Appellants and similarly situated Operational Creditors. Moreover, the Appellate Bench noted that a Resolution Plan was already approved by the Committee of Creditors (CoC) of the Corporate Debtor and the same was agreed to be binding on the Corporate Debtor and its employees, members, creditors including the Central Government, any State Government etc.

Vibrus Homes Private Limited Vs. Ashimara Housing Private Limited

Interest Free Security Deposit is an Operational Debt: NCLAT

The National Company Law Appellate Tribunal (NCLAT) has recently observed that an interest free security deposit made towards the advance license fee is an operational debt and the application for initiation of corporate insolvency resolution process (CIRP) was rightly admitted by the Adjudicating Authority for default of the Corporate Debtor in non-payment of the security deposit.

The Appellate Adjudicating Authority placed reliance on a clause of the Agreement which obligated the Operational Creditor to make an interest free deposit towards advance license fee and the same will be retained as a security deposit by the licensor/ Corporate Debtor till the end of the license period.

After payment of the interest free amount, another cheque was issued by the Operational Creditor, however the payment in pursuance of the said cheque was stopped by the Corporate Debtor. Subsequently, the project could not take off and an application under Section 9 of the Code was filed by the Operational Creditor which has been admitted.

Ramesh Chander Agarwala Vs. State Bank of India & Anr.

Resolution Professional may submit an Additional Report in continuation of his first Report u/s 99 of IBC after giving an opportunity to the Personal Guarantor – NCLAT, New Delhi

Personal Guarantors of a Corporate Debtor filed an appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC) before National Company Law Appellate Tribunal (NCLAT) against the order of the Adjudicating Authority wherein the National Company Law Tribunal (NCLT) appointed a Resolution Professional without furnishing any limited notice to the Personal Guarantors in terms of the judgment of NCLAT in the case of 'Ravi Ajit Kulkarni Vs. State Bank of India.

"In substance, once the application is "filed" (as per Section 95, 96 read with Rule 10) the Adjudicating Authority has to act on it, and following principles of natural justice, give limited notice to Personal Guarantor to appear referring to the Interim Moratorium that has commenced as per terms of Section 96. Then the next stage is of appointing Resolution Professional as per Section 97 read with Rules and Regulations. Third stage will be Resolution Professional acting in terms of Section 99 and submitting Report. At the fourth stage comes the adjudication of the application under Section 100 which ought to be decided by giving hearing to parties keeping in view Application, evidence collected and report under Section 99", The NCLAT observed

On the grievance of the personal guarantors that the Resolution Professional has already submitted a report under Section 99 of the IBC, the Appellate Adjudicating Authority held that though the limited notice in terms of Ravi Ajit Kulkarni was not issued to Personal Guarantors but subsequently personal guarantors have appeared before Adjudicating Authority. Therefore, in the interest of justice, NCLAT permitted the Personal Guarantors to submit a representation to the Resolution Professional and subsequently, the Resolution Professional can submit an additional report in continuation of his first report and the Adjudicating Authority will consider both the report before taking any decision under Section 100 of the Code.

Mr. Mukund Choudhary Vs. Mr. Subhash Kumar Kundra, RP for CLC Industries Ltd.

The Court does not release Directors of the Corporate Debtor company from their duties, but only suspends their powers as Directors and appoints a Resolution Professional for managing the Company: NCLAT

The National Company Law Appellate Tribunal (NCLAT) held that the Court does not release the Directors of the Corporate Debtor company from their duties, but only suspends their power as directors and appoints a Resolution Professional for managing the company. Basing its reliance on the provisions of the Insolvency and Bankruptcy Code (IBC), the Appellate Adjudicating Authority said that the circular in question provided only for the procedure of filing the Forms and it does not specify anywhere that the Financial Statements are not to be signed by the Directors as required in the Companies Act, 2013.

The case of the Appellants was that the Appellants/ directors had serious objections to the various entries in the Balance Sheet and accordingly were not inclined to sign the financial statement as prepared by the RP without due justification and clarity. The Appellants further submitted that the RP was competent to sign the Balance Sheet prepared by him and the Appellant should not be coerced to sign the Financial Statement as they were already suspended from the management of the Corporate Debtor.

However, the Appellate Adjudicating Authority was not convinced with the arguments advanced by the Appellant and observed that it is the duty of the Appellants to cooperate and sign the Financial Statements which is in terms of the provisions of the Code as well as in compliance of the Companies Act, 2013.

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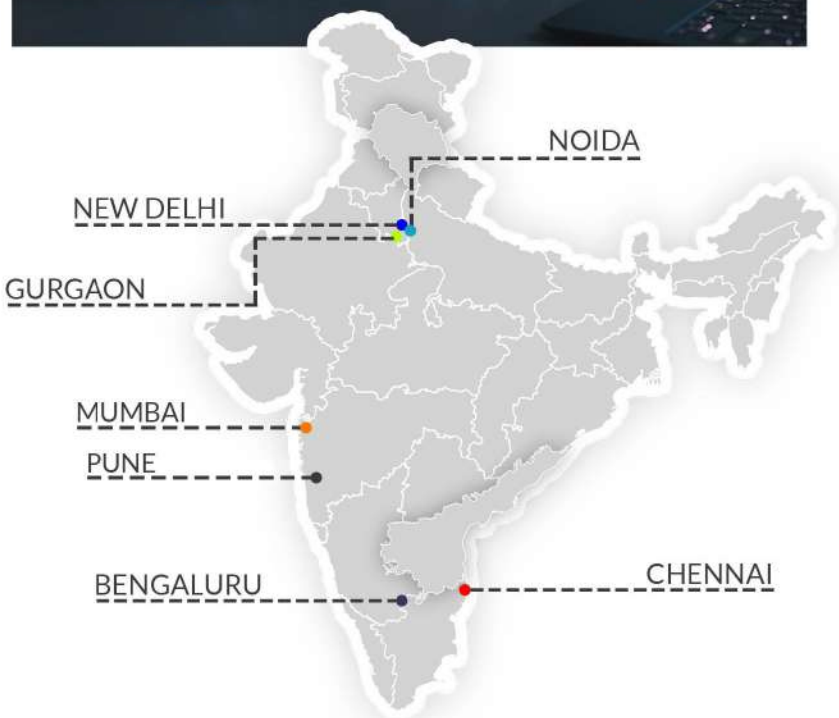
- Insolvency Process,
- Bankruptcy Process,
- Filing petition with NCLT/DRT,
- Appointment of Insolvency Professionals,
- Assets Management of the Company,
- Hearing of Cases or any other enquiries



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