ASC

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Editorial

Notifying Initiation of Personal Insolvency

Word is around that Ministry of Corporate Affairs (MCA) is likely to notify rules relating to initiation of Personal Insolvency, including partners in Partnership Firms. The move is welcome as it will give an opportunity to defaulting individuals to get themselves discharged after going through the process of Insolvency and Bankruptcy. Every individual has a right to restart a fresh commercial life and it should not be impeded by his past business failures.

The Adjudicating Authority for conducting individual Insolvency or the Bankruptcy are Debt Recovery Tribunals (DRTs). The MCA must ensure that adequate infrastructure and sufficient number of courts are set up and functioning before any decision to notify the said initiation is taken up. The number of applications to be taken up by DRTs is likely to be humungous, for outnumbering the CIRPs. The Nation does not want to be entangled into web of procedural delays or lack of judicial appointments. To recapitulate, only 180 days are provided to complete the individual Insolvencies and there is no provision for extension or exclusion.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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1. NCLT dismisses pleas for Consolidated Resolution of Regen Powertech (RPPL)

NCLT has appointed IRP for Regen Powertech and its subsidiaries to settle a Claim of Rs.1614 crores

The National Company Law Tribunal, Chennai has dismissed the petitions of 25 applicants seeking consolidation and simultaneous Corporate Insolvency Resolution Process (CIRP) in relation to corporate debtors of the defunct wind turbine manufacturer Regen Powertech Pvt Ltd and its wholly-owned subsidiary Regen Infrastructure and Services. Interim Resolution Professional, Renuka Devi Rangaswamy was appointed to settle the claims to the tune of Rs.1614 crores.

Sources said that as on March 31, 2017, the net assets of Regen Powertech amounted to ₹2,200 crore and after that the company did not file the financials with the Ministry of Corporate Affairs. For a 2,200 Crore Company, the Resolution Applicant offered only ₹90 crores.

The Bench observed that all the applicants, except the Resolution Professional of RISPL, being customers of either RPPL and RISPL (a subsidiary of RPPL) have no locus standi to maintain the present application seeking consolidation or simultaneous CIRP of the corporate debtors as they were neither a financial creditor nor an operational creditor of the Company and its subsidiaries.

2. NCLT admits Spaze Tower Pvt Ltd, a Real Estate company into Insolvency

This is one of the first matters to be admitted for a Real Estate company after the 10% or 100 allottees ordinance came into effect

The National Company Law Tribunal (NCLT) has initiated the corporate insolvency resolution process (CIRP) of Spaze Tower Private Limited and appointed an Interim Resolution Professional (IRP) for the company. This is a case involving 40 buyers of commercial space in Gurgaon in which the Builder had

promised to repay the investment of the buyers at either Rs 55 or Rs 65 per sq ft per month till the office units were leased out.

Arrears of assured returns and money owed by a builder to a buyer with whom an agreement is in place to make regular payments qualify as 'financial debt', the National Company Law Appellate Tribunal (NCLAT) has held in an order. The NCLT had ruled that persons getting assured returns can be termed as 'financial creditors' and can file for a corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (IBC). NCLT dismissed the application, stating that arrears of assured returns would not be covered by the term financial debt.

3. Initiation of CIRP does not amount to Recovery Proceedings: holds NCLT

The Appellate Bench observed that the Adjudicating Authority is not to take into account the reasons for the Corporate Debtor's Default

The National Company Law Appellate Tribunal (NCLAT) while setting aside the order of the Adjudicating Authority noted that the Adjudicating Authority in the impugned order had observed that the Respondent was not an Insolvent Company and that it was of the considered view that Respondent should be given some more time to repay the debt etc. The Adjudicating Authority had accordingly directed the Respondent/Corporate Debtor to repay the balance debt or the amount as settled with the Appellant within a period of six months failing which the Appellant/Petitioner would be at liberty to file a fresh petition for admission.

This view of the Adjudicating Authority in the considered opinion of the Appellate Tribunal was against the spirit of the Insolvency and Bankruptcy Code, 2016 (IBC).
The Appellate Adjudicating Authority placed reliance on the judgment of the Hon'ble Supreme Court in Innovative Industries Ltd. Vs. ICICI Bank [2017] and accordingly held that the Adjudicating Authority had exceeded its jurisdiction by taking into account the defense of the Corporate Debtor that the Corporate Debtor ought not to be Insolvent and some more time must be given to the Corporate Debtor to pay back the outstandings. Such view was found by the NCLAT to contain patent legal infirmities, especially taking into account the fact that no reply or objections were projected by the Corporate Debtor. Consequently, NCLAT reversed the impugned order and allowed the Appeal.

4. State owned Electricity Distribution Companies have no immunity from Corporate Insolvency Resolution Process: The Ministry of Power says

Ministry said that there is no conflict between the Insolvency and Bankruptcy Code, 2016 and the Electricity Act of 2003

According to the Power Ministry, State owned discoms ((electricity distribution companies) have no immunity from Corporate Insolvency Resolution Process (CIRP) and there is no conflict between the Insolvency and Bankruptcy Code, 2016 (IBC) and the Electricity Act, 2003 on resolution of monetary claims.

The ministry's views, finalized after consultations with the law ministry, removes a false sense of security against Insolvency proceedings for discoms and gives debtors a fresh legal ammunition for recovering dues.

The issue had arisen after the Tamil Nadu government wrote to the Ministry saying that the provisions of IBC do not apply to discoms since they were discharging public functions as an extension of the state government. It also said that there was a conflict between IBC and the Electricity Act. Earlier, a Writ Petition was also filed before the Madras High Court by the South India Corporation Private Limited.

The Ministry, while relying upon various judgments of the Supreme Court, had responded while saying that the state-run discoms are set up under the Companies Act and not under a statute like the National Highways Authority of India Act, 1988. Therefore, they are not an extension of the State Government. The Ministry also said that the matter has been settled by the Supreme Court and that there was no dichotomy between the provisions of IBC and the Electricity Act, which applies to different operational issues of discoms.

5. Expert Panel pitches for a National Dashboard for Insolvency Data

The Panel pointed out that cross-validation of data sourced from multiple data banks is a challenge in making credible assessments

An expert panel has suggested designing a national dashboard for insolvency data saying that reliable real time data is essential to assess the performance of the Insolvency process under the Insolvency and Bankruptcy Code, 2016 (IBC). The IBC has been in force for more than five years now, which had prompted the panel to deliberate upon the need for it.

While proposing the creation of the national dashboard for insolvency data, the panel also said the IBBI has made commendable efforts in publishing quarterly data on the Insolvency resolution process in detail, including the Insolvency filings, recovery amount and duration of the insolvency process in detail. In its report, the group said that cross-validation of data sourced from multiple data banks is a challenge in making credible assessments. Against this backdrop, there can be a "national dashboard of insolvency data by using the existing data sources to the extent possible along with specific insolvency indicators, which the IBBI reports on a quarterly basis".

The report noted that data on time, cost and recovery rates will allow a reliable evaluation of the Insolvency process with respect to parameters of effectiveness and efficiency. The working group recommended a range of indicators such as the number of new companies registered, credit supply to stressed sectors like Real Estate, Construction, Metals etc, change in the cost of capital (particularly for stressed sectors), the status of non-performing loans, employment trends, size of the corporate bond market and investment ratio for the related sectors," it added.

LATEST JUDGMENTS

1. Jai Balaji Industries Limited Vs. BST Infratech Limited

Whether right to institute fresh Insolvency proceedings can emanate from a Settlement Agreement post withdrawal of Insolvency Application

The National Company Law Tribunal, Kolkata Bench has upheld the right of an Operational creditor to institute fresh application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) after the Corporate Debtor failed to adhere to the settlement agreement arrived at between the parties which formed the basis of withdrawal of earlier application by the Operational Creditor.

The Bench pointed out that even if specific permission has not been sought by the Operational Creditor to re-file the proceedings on the cause of action having arisen in favour of the Operational Creditor, once the Corporate Debtor has failed to comply with the terms and conditions fixed in the settlement agreement, the right of the Operational Creditor still subsists and he has all the rights to file this petition for enforcing the settlement agreement having been entered into by the parties and admitted before this Adjudicating Authority.

Further, the Bench opined that the failure of the Corporate Debtor to comply with the terms settled between the parties is a proved default on its part and its failure to pay the installments, the right to sue rightly accrued in favour of the Operational Creditor.

2. Drip Capital Inc Vs. Concord Creations India Pvt Ltd

Whether Adjudicating Authority can take into consideration the financial health of the Corporate Debtor or its inability to pay Debt in a CIRP Application

The National Company Law Appellate Tribunal, Chennai has ruled that while deciding an application for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, the Adjudicating Authority has no jurisdiction to evaluate the financial health of the Corporate Debtor. Furthermore, inability to pay the debt is also not a consideration to be taken into account at the time of hearing of an insolvency application.

It was pointed out by the Appellate Bench that the 'Adjudicating Authority' is not a 'Court of Law' and that 'CIRP' is not a litigation. As a matter of fact, if the 'Adjudicating Authority' is subjectively satisfied as to the existence of default and arrive at a conclusion that the application is a complete one and further that no disciplinary proceedings are pending against the proposed 'Resolution Professional' it is incumbent upon it to admit the application. In reality, no other 'yardstick' is required to look into any other requirement for admission of the application.

3. Adisri Commercial Private Limited and another Vs. Reserve Bank of India and others

High Court cannot interfere with the right of a Statutory Institution to initiate Resolution of a company under IBC

The High Court of Bombay has refused to grant a Writ against an order of the Reserve Bank of India (RBI) passed under the RBI Act, 1934 to supersede the Board of Directors and appointment of an administrator. The RBI had further mentioned in the order that it intends to initiate proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC) for resolution of the Company and would apply to the National Company Law Tribunal (NCLT) for appointing the administrator as the Interim Resolution Professional (IRP).

On the challenge of the said order before the High Court of Bombay, the Petitioner, who was the shareholder of the Company had prayed for a writ against RBI, a government body for haste and arbitrariness in its order. However, the Court refused to interfere with the impugned order stating that it was not a fit case where the extra ordinary jurisdiction under Article 226 of the Constitution should be invoked as it would impeach upon the decision-making process of the RBI. The present case entailed matters of financial, economic and corporate decision making which the authorities like the RBI were fully empowered and competent to deliberate upon.

4. COC of Meenakshi Energy Ltd Vs. Consortium of Prudent ARC Limited & Ors.

The RP to consider the Resolution Plans received before the expiry of 330 days of 'CIRP' period for voting and discard the plans received subsequently

The National Company Law Appellate Tribunal has ordered the Resolution Plan submitted prior to the 330 days CIRP period to be discarded and not to be considered by the Resolution Professional, thereby not producible before the Committee of Creditors for approval. The Appellate Adjudicating Authority was of the view that in the absence of the Adjudicating Authority allowing the application for extension of the CIRP timeline in the matter of the Corporate Debtor, the Resolution Plan submitted subsequent to the timeline could not be deliberated upon by the Resolution Professional.

The Adjudicating Authority, after granting an extension to the Resolution Professional, had directed the Resolution Professional to complete the process within 330 days failing which the liquidation proceedings would commence. Two plans were received by the Resolution Professional prior to the 330 days timeline while one was received subsequently. Moreover, the request for further extension of the CIRP period was also turned down by the Adjudicating Authority and the Appellate Adjudicating Authority, which drove the NCLAT to disallow the plan submitted post the expiry of the 330 days timeline.

5. Sach Marketing Private Limited Vs. RP of Mount Shivalik Industries Ltd

Whether interest bearing Security Deposit could be considered as a Financial Debt ?

The National Company Law Appellate Tribunal (NCLAT), New Delhi had overturned a decision of the Adjudicating Authority wherein the Adjudicating Authority had denied to treat an interest bearing security deposit as a financial debt for the reason that firstly, such security deposit was returnable and represented a future obligation and secondly, such deposit cannot be deduced as a financial debt by implication.

The Appellate Bench observed that since the amount of deposit was treated as long term loans and advance in the financial statement of the Corporate Debtor and the said amount admittedly had an element of interest payable at 21% per annum, therefore it can be construed as having the commercial effect of borrowing. Also, the Corporate Debtor had accepted the Security Deposit from the Appellant and credited the interest for some time, which is nothing but a consideration for the time value of money .

While placing reliance of the judgment of the Supreme Court in M/s Orator Marketing Pvt Ltd, the Appellate Bench went on to hold that the Apex Court verdict was squarely applicable to the facts of the present case and the 'debt' in question is a 'Financial Debt'.

6. Jaldhi Overseas Pvt Ltd Vs. Steer Overseas Pvt Ltd

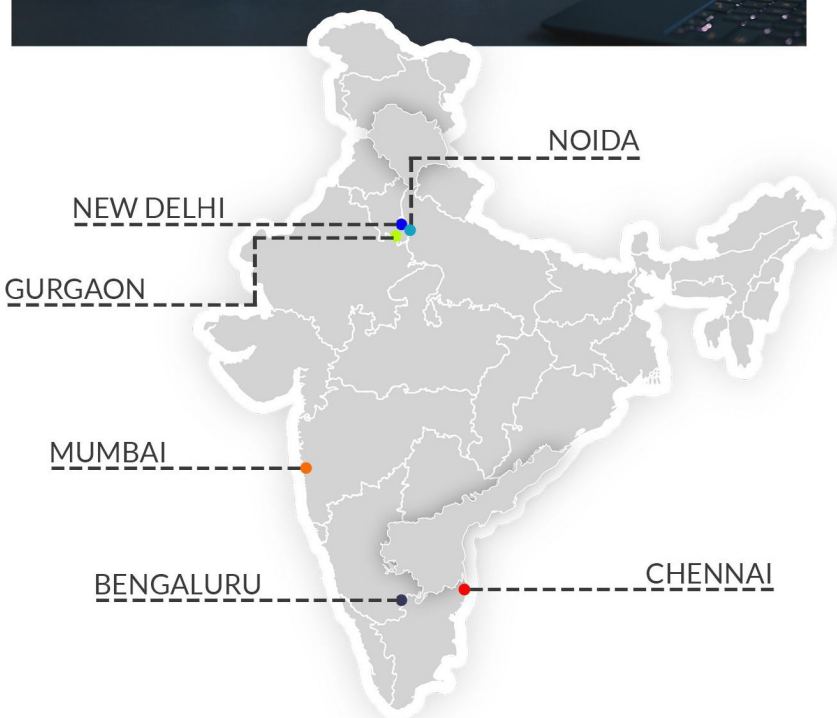
Insolvency proceedings can't be initiated on the basis of a Debt arising from a Foreign Award

The National Company Law Tribunal, Cuttack Bench (NCLT) has dismissed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) wherein the claim of the Operational Creditor was based upon a foreign award passed by the Arbitral Tribunal, Singapore in favour of the Operational Creditor. The Corporate Debtor in its defense submitted that firstly, enforcement of a foreign award through NCLT is impermissible. Secondly, CIRP cannot be initiated on the basis of a foreign award. Thirdly, NCLT is not a civil court nor an executing court. Fourthly, there is a pre-existing dispute between both the parties and fifthly, the petition was not maintainable because the claim is not an 'Operational Debt'.

The Adjudicating Authority held that the foreign award is quite different from domestic award. Unlike a domestic award, a foreign award has to undergo certain tests to become an enforceable award/ a deemed decree. Therefore, a foreign award is not a decree in itself and cannot directly constitute debt to initiate proceedings against the Corporate Debtor under IBC. The NCLT went on to hold that it cannot in the given situation act upon the foreign award under a presumption that there is undisputed debt amount. Such an exercise will amount to give an effect to the foreign award by passing/ violating the procedures laid down under the Arbitration and Conciliation Act, 1996.

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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