ASC

INSOLVENCY TIMES

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Editorial

Vacancies in NCLT are undermining IBC, Government needs to fill them soon

The efficacy of the Insolvency and Bankruptcy Code, 2016 (IBC) relies on a set of institutions that combine seamlessly to deliver. The National Company Law Tribunal (NCLT) plays a central role at two stages of the Insolvency process. At the very beginning it decides within a statutory deadline on whether a complaint can be admitted. Subsequently, it has to judge if a resolution package of a firm submitted by creditors satisfies the law. This body is underperforming as it is short-staffed. Consequently, there's a growing pile of unresolved cases, undermining the efficacy of IBC. A parliamentary standing committee report tabled last month had said that of the sanctioned strength of 63 members across 16 NCLT benches, there are 34 vacancies, including that of the president.

Time is of the essence in resolution. IBC has been designed to prioritize resolution over liquidation. This aim can be achieved only if the resolution process sticks to timelines because it limits erosion of a company's value. Without NCLT and NCLAT functioning at full strength, IBC runs the risk of going the way of some other reforms.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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1. Indian Bank Association (IBA) moves RBI seeking license to set up a ₹6,000-crore bad bank

IBA has put a Preliminary Board for setting up the bad bank of National Asset Reconstruction Company Limited (NARCL)

National Asset Reconstruction Company Ltd (NARCL) after mobilizing an initial capital of ₹100 crore and fulfilling other legal formalities has approached the RBI seeking licence to undertake asset reconstruction business. As per sources, The Indian Banks' Association (IBA) has moved an application to the RBI seeking license to set up the ₹6,000-crore bad bank of NARCL. IBA, entrusted with the task of setting up a bad bank, has put a preliminary board for NARCL in place. The company has hired a stressed assets expert from State Bank of India (SBI), as the managing director.

Finance Minister Nirmala Sitharaman in Budget 2021-22 had announced that the high level of provisioning by public sector banks of their stressed assets calls for measures to clean up bank books. "An Asset Reconstruction Company Limited and Asset Management Company would be set up to consolidate and take over the existing stressed debt," she had said in the Budget Speech. It will manage and dispose the assets to alternative investment funds and other potential investors for eventual value realization", she said.

Meanwhile, state-owned Canara Bank has expressed its intent to be the lead sponsor of NARCL with a 12 per cent stake. The proposed NARCL would be 51 per cent owned by PSBs and the remaining by private-sector lenders.

2. NCLT orders to freeze Assets of Promoters, Company Secretary, and Chief Financial Officer of Videocon on the instance of MCA

The MCA's move comes in the wake of banks being able to recover only 4% of their admitted claims of Rs 64,838 crores under the Insolvency process

In response to a Petition filed by the Ministry of Corporate Affairs (MCA), the National Company Law Tribunal (NCLT), Mumbai has ordered a countrywide search and freeze of the assets of Venugopal Dhoot, the Promoter of Videocon group, his wife, his company, the company's Chief Financial Officer (CFO) and the Company Secretary (CS).

The NCLT Mumbai bench has directed the Central Depository Services Ltd (CDSL) and National Securities Depository Ltd (NSDL) that securities owned or held by the Videocon promoters "in any company or society be frozen, and be prohibited from being transferred or alienated" and the details be shared with the MCA. It further directed the Central Board of Direct Taxes (CBDT) to disclose information about all assets of the Videocon promoters in their knowledge or possession, for the purpose of freezing and restraining such assets.

The MCA's move comes in the wake of banks being able to recover only 4% of their admitted claims of Rs 64,838 crores under the insolvency process. The government had approached the NCLT under Section 241 and 242 of the Companies Act, which empowers the MCA to act if there is a fraud, misfeasance or persistent negligence. It is also pertinent to mention here that the Mumbai Bench of the NCLT has admitted a Personal Insolvency Petition against Videocon Promoter Venugopal Dhoot just a day after the MCA received permission to freeze his assets.

3. McLeod Russel steps out of Insolvency after Settlement with the Financial Creditor

Techno Electric had approached the Tribunal claiming that the Indian Tea Company failed to abide by a Loan Agreement

The Promoters of McLeod Russel India, the country's largest tea producer, have reached a settlement with the Financial Creditor, Techno Electric & Engineering, paving the way out of the corporate insolvency resolution process (CIRP).

P.P. Gupta, the Managing Director, Techno, said, "The matter stands closed to our satisfaction. This is now behind us and we wish the company good luck." The National Company Law Tribunal, Delhi (NCLT) allowed an application under Section 12A of the Insolvency and Bankruptcy Code, 2016 (IBC) filed by the Interim Resolution Professional (IRP) of McLoed Russel seeking withdrawal of CIRP of the Corporate Debtor while taking on record the consent terms entered between McLeod Russel and Techno Electric in a sealed cover.

Eshna Kumar, counsel for Aditya Khaitan and erstwhile corporate debtor, said, "The release of McLeod Russel from the clutches of insolvency resolution process by the order of the NCLT, in its true spirit gazes through the intent of the legislature under Section 12A of the Code read with Regulation 30A of CIRP Regulations.

It is understood that the settlement involved the principal loan amount of Rs 100 crore that Techno and McLeod had entered into in 2018. The settlement between Techno and McLeod is a relief for the industry as it is the largest tea producer, industry sources pointed out.

4. Suspended Management of Baghauli Sugar and Distillery opposes ongoing CIRP proceedings alleging violation of a Supreme Court Order in Sahara Group case

The Apex Court had barred the Group from parting with any property without its permission

The corporate insolvency resolution process (CIRP) involving Baghauli Sugar and Distillery, a Sahara Group company, has brought out a fresh conundrum in view of a Supreme Court order barring the group from parting with property without its permission. The National Company Law Tribunal (NCLT) in Allahabad, which is hearing the Baghauli Sugar case, said last week that "it is open for the suspended management" to submit a revised one-time settlement proposal for fresh consideration by the Committee of Creditors (CoC).

The counsel for the suspended management had argued that the Insolvency proceedings against Baghauli Sugar violated the Supreme Court order in the Sahara Group case pertaining to the refund of Rs 17,500 crores collected from investors. Alternatively, the NCLT suggested that the suspended management of Baghauli Sugar could seek a clarification/modification of the order passed by the Supreme Court. The CoC or the Resolution Professional (RP) could clarify from the Apex Court whether the continuation of Insolvency proceedings against the company is in consonance with the Supreme Court's order, the NCLT said in an order recently given.

The suspended management submitted before the NCLT that the proceedings went against the Supreme Court order that said no Sahara Group company shall part with any movable and immovable property without the admission of the court. If the proceedings were allowed, the petitioner argued, it would be a cause for "great miscarriage of justice." Continuing with the process would result in either approval of a resolution plan or liquidation of the company. Both cannot be acted upon unless the leave of the Hon'ble Supreme Court is obtained.

With the NCLT suggesting that the parties concerned seek the view of the Supreme Court on the way forward, a question mark has arisen over the Insolvency proceedings against Baghauli Sugar, which have exceeded the mandatory period. The Parliamentary Standing Committee on Finance had recently underscored the need to refresh the act to include learnings and make the process transparent and fair. As part of this endeavour, the panel recommended forming a code of conduct for the committee of creditors, whose supremacy has been reiterated by the Supreme Court.

5. FSDC discusses IBC, Stressed Assets, Financial Inclusion

The Council noted the need to keep a continuous vigil by the Government and all Regulators on the Financial conditions.

The Financial Stability and Development Council (FSDC) recently discussed measures to manage stressed assets and noted the need to keep a continuous vigil by the government and all regulators on the financial conditions. In its 24th meeting which was chaired by the Finance Minister, the FSDC discussed issues relating to management of stressed assets, strengthening institutional mechanism for financial stability analysis, financial inclusion, framework for Resolution of financial institutions and issues related to Insolvency and Bankruptcy Code processes. The previous meeting was held in December 2020.

"The meeting deliberated on the various mandates of the FSDC, viz, Financial Stability, Financial Sector Development, Inter-regulatory Coordination, Financial Literacy, Financial Inclusion, and Macro prudential supervision of the economy…," the Ministry said.

The FSDC is learnt to have discussed exposure of banks' lending to various sectors and the need to tweak certain investment norms to help monetize public assets like highways, power and railway tracks. Ministers of State for Finance along with RBI Governor, Finance Secretary, Economic Affairs Secretary, Revenue Secretary, Financial Services Secretary, Corporate Affairs Secretary, CEA, SEBI Chairperson and others attended the discussion.

6. Tax assessment of IBC cases: IRPs, RPs and liquidators can appear before taxman, rules CBDT

Such Professionals appointed under IBC can now verify the Income Tax Returns to be submitted by a Company or an LLP undergoing CIRP

Interim Resolution Professionals (IRPs) and Resolution Professionals (RPs) have now got the formal recognition of Income Tax authorities for dealing with the tax matters of the corporates that are undergoing Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code (IBC). The Central Board of Direct Taxes (CBDT) in the Finance Ministry has made it clear that these professionals and liquidators appointed under IBC can now verify the income tax returns to be submitted by an LLP or a Company undergoing CIRP.

Under the Income Tax law, the verification process requires a declaration to be signed by such specific person confirming that information given in the return and schedule is correct and complete. So now IRPs and IPs can also sign in such declarations and the earlier stipulation of getting company Director's signature now stands modified. "By this notification, the tax authorities have now clarified that an Insolvency Professional is one who plays the role of IRP, RP and Liquidator while dealing with tax matters (primarily for tax return signing) of the Corporate Debtor undergoing CIRP or Liquidation, an expert said while commenting on the new development.

The move by CBDT is enabling in nature for the purposes of income tax compliance and would help in the process of filing of income tax returns besides facilitating appearance before the income tax authorities. It provides that RPs, IRPs and Liquidators appointed by the Adjudicating Authorities can undertake and represent the Corporate Debtor in income tax matters. The objective is to ensure orderly discharge of tax obligations in time. The change is expected to streamline the tax compliance process, return verification process, and it seeks to align income tax law with IBC.

LATEST JUDGMENTS

1. New Okhla Industrial Development Authority Vs. Mr. Anand Sonbhadra, RP

Only a Lease transferring all the risks and rewards incidental to ownership is a Financial Lease

The Adjudicating Authority had decided that the lease entered between the appellant and the Corporate Debtor is not a financial lease and hence the Appellant is not a Financial Creditor. The National Company Law Appellate Tribunal (NCLAT), in view of the Indian Accounting Standards, noted that when lease involves real estate (like land in present matter) with a fair value different from its carrying amount, the lease can be classified as a finance lease if the lease transfers ownership of the property to the lessee with substantially all the risks and also rewards incidental to ownership of the asset. In the present case, while the risks and liabilities were transferred to the lessee, the rewards incidental to ownership were not transferred. The appellant, even after creating the lease kept with itself all the rights to control and monitor the upcoming project. While dismissing the appeal, the NCLAT held that such lease does not fit in with the requirements of Indian Accounting Standards and cannot be considered as a financial lease.

2. Mohan Gems & Jewels Private Limited Vs. Vijay Verma & Ors.

It is also permissible to sell the Corporate Debtor as a going concern at the Liquidation stage

The National Company Law Appellate Tribunal (NCLAT), New Delhi held that under the Companies Act, 2013, it is permissible to sell the Company undergoing winding up as a going concern and since winding up is nothing but Liquidation under the IBC, it is also permissible to sell the 'Corporate Debtor' as a going concern at the Liquidation stage. The Appellate Adjudicating Authority noted the fact that the sale of the Corporate Debtor was carried out by the Liquidator in accordance with the Regulations and that the Adjudicating Authority, has, apart from travelling beyond its jurisdiction in making observations regarding the power and functions of framing of Regulations by IBBI, also did not appreciate the ratio laid down by the Hon'ble Supreme Court in a catena of Judgements that the Liquidation of the Company is to be seen only as a last resort and every attempt should be made to revive the Company and to continue it as a 'going concern'.

3. South Indian Bank Ltd. v. Gold View Vyapaar (P) Ltd.

The NCLAT ordered NCLT to decide a long pending matter 'one way or the other'

The National Company Law Appellate Tribunal (NCLAT), New Delhi while disposing of an Appeal, directed NCLT to decide the matter 'one way or the other', hoping that it would take up the Application with 'all sincerity'. In the instant matter, an Appeal was filed against an impugned order of NCLT, Kolkata Bench

Citation point 1 : COMPANY APPEAL (AT) (INSOLVENCY) No. 849 of 2020

that an Application under Section 7 of IBC has been pending before it since 30-12-2019 and the Admission Order is not yet passed one way or the other. The counsel submitted that the matter was getting protracted before the Adjudicating Authority which defeats the purpose of the provisions of IBC requiring the Application to be admitted within 14 days.

4. Mr. Nitin Chandrakant Naik v. Sanidhya Industries LLP

Properties of the Personal Guarantors cannot be included in CIRP of Corporate Debtor

The Resolution Plan approved by the Adjudicating Authority contained provision to transfer personal properties of the Promoter and Suspended Directors of the Corporate Debtor who had given their personal properties as security in favour of the Corporate Debtor, whom Corporate Debtor took loan. The National Company Law Appellate Tribunal (NCLAT) set aside the order of the Adjudicating Authority and held that after coming into force of Part-III in the Insolvency and Bankruptcy Code, 2016 (IBC), one would have to proceed as per Chapter III of Part-III of IBC. In the Resolution Plan of Corporate Debtor, a provision relating to right of Financial Creditor to proceed against Personal Guarantor can be there, but enforcement of such right has to be as per provisions of law.

5. Maitreya Doshi Ex-Director of Doshi Holdings Pvt. Ltd. Vs. Anand Rathi Global Finance Ltd.

In Simultaneous CIRPs against Co-Borrowers, recovery of debt in one of the CIRP against a Co-borrower can always be taken note of and set off in CIRP of other Co-borrower

The National Company Law Appellate Tribunal (NCLAT) upheld the decision of the Adjudicating Authority observing that the liability invoked by Financial Creditor is on the basis of Corporate Debtor being Co-borrower and not merely Pledgor. There is no bar in the Insolvency and Bankruptcy Code, 2016 (IBC) to proceed against both the Co-borrowers when the debts are outstanding, as has been found by the Adjudicating Authority. A Co-borrower is as much a Borrower like the any other entity and is fully liable to repay the loan taken and it is immaterial as to in which account Co-borrowers received the money, when receipt is an admitted position. It also held that recovery of debt in one of the proceedings can always be taken note of and set off in the other proceeding so that the Co-borrowers are not put to disadvantage.

6. Sumit Shukla RP of Trimurti Concast Pvt. Ltd. v. Dy. Commissioner Commercial Tax Muzaffarnagar UP & Ors

Ex-management are collectively as well as independently, must furnish information and assist the RP in managing the affairs of the Corporate Debtor in order to enable the RP to complete the CIRP expeditiously

The National Company Law Tribunal at Allahabad held that the ex-management are collectively as well as independently responsible to furnish information and assist the Resolution Professional in managing the affairs of the Corporate Debtor in order to enable the Resolution Professional to complete the Corporate Insolvency Resolution Process (CIRP) expeditiously and therefore, the persons who are responsible to co-operate with the Resolution Professional and whom are the concerned persons for persuading other managerial personnel to supply the requisite documents, cannot escape their obligation.

Citation point 6 : Company Appeal (AT)(Insolvency) No. 233 of 2021

7. Hytone Merchants Pvt Ltd versus Satabadi Investment Consultants

The Hon'ble Supreme Court has reiterated that once the Operational Creditor has filed an Application which is otherwise complete, the Adjudicating Authority has to reject the application under Section 9(5)(ii)(d) of IBC, if a notice has been received by Operational Creditor or if there is a record of dispute in the information utility. What is required is that the notice by the Corporate Debtor must bring to the notice of Operational Creditor the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties.

On the basis of the said ruling, the Apex Court found that the National Company Law Tribunal (NCLT) had rightly rejected the application of Overseas after finding that there existed a dispute between Kay Bouvet and Overseas and as such, an order under Section 9 of the IBC would not have been passed. The Court further noted that the National Company Law Appellate Tribunal (NCLAT) has patently misinterpreted the factual as well as the legal position and erred in reversing the order of NCLT and directing admission of Section 9 petition.

Citation point 7 : Company Appeal (AT) (Insolvency) No. 258 of 2021

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