



# ASC

## INSOLVENCY TIMES



## Editorial



### Remarkable urgency in taking IBC, 2016 to next level

Numerous improvements have been suggested in the implementation of various processes under IBC, 2016, over the last five years, through various NCLT/NCLAT judgements and also through experience of stakeholders in handling CIRP or Liquidation Processes. Many other valuable inputs have also been poured through discussions/seminars at public forums.

Kudos to IBBI for coming out with major amendments/shake up in various regulations keeping in tune with present day requirements.

During the month of June'2022, IBBI has come out with amendments or calling of public comments on the proposed amendments in the matters of CIRP, Liquidation, Expedious Resolution of Real Estate Projects, IPEs to become Insolvency Professional, Grievance & Complaint handling, involving Information Utilities at the time of admission of application under Section 7, 9 and 10 and Inspection & Investigation.

While, going through these amendments/discussions one gets the feeling that these measures are in the right direction and taking IBC, 2016 to next level. Let us all, support the IBBI by giving our views/suggestions.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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## NCLT/NCLAT Should Not Sit In Appeal Over Commercial Wisdom Of CoC To Allow Withdrawal Of CIRP : Supreme Court

***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 held that when 90% or more of the creditors decide that it will be in the interest of all the stakeholders to permit Settlement Plan filed by the promoter of the Corporate Debtor and withdraw corporate insolvency resolution process (CIRP) as per Section 12A of the Insolvency and Bankruptcy Code, 2016 (IBC), the Adjudicating Authority or the Appellate Adjudicating Authority cannot sit in appeal over such commercial wisdom of the Committee of Creditors (CoC).

The Apex Bench allowed the appeals filed assailing the order of the National Company Law Appellate Tribunal, Chennai Bench (NCLAT), which had dismissed appeals against orders of the National Company Law Tribunal, Chennai (NCLT) rejecting the application filed by the Resolution Professional under Section 12A of the Insolvency and Bankruptcy Code, 2016 seeking withdrawal of the application filed by the Financial Creditor under Section 7 of the Code seeking initiation of CIRP against the Corporate Debtor. The appellant, promoter of the Corporate Debtor, had also come up against NCLAT's dismissal of the appeal challenging the order of the NCLT to initiate Liquidation proceedings in respect of the Corporate Debtor.

While allowing the appeals, the Apex Court had cited the case of *Ajay Kumar Jagatramka v. Jindal Steel and Power Limited and Anr.* to emphasize that, "This Court has, time and again, emphasized the need for minimal judicial interference by the NCLAT and NCLT in the framework of IBC." The Supreme Court, after analysing the legislative intent of the provision of Section 12 A of the Code, further held that, "in order to cater to exceptional circumstances warranting withdrawal of an application for CIRP post- admission, it has been recommended to allow such exit provided the CoC approves such action by ninety per cent of voting share".

The Apex Court ruled that the interference would be warranted only when the Adjudicating Authority or the Appellate Authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and de hors the provisions of the statute of the Rules.

## **NCLT Dismisses Insolvency Plea of Wave Megacity Projects with a cost of One Crore**

***The Company was penalized for filing CIRP under Section 10 of the Code to play fraud on thousands of Home-buyers, Noida authority, Government authorities etc.***

The National Company Law Tribunal, Principal Bench (NCLT) dismissed the Insolvency petition filed by Wave Megacity Centre Private Limited under Section 10 of the Insolvency and Bankruptcy Code, 2016 (IBC). The Adjudicating Authority imposed a cost of INR One Crore on Wave for filing the petition to initiate corporate insolvency resolution process (CIRP) against itself for malicious and fraudulent intent and also directed the Central Government to make necessary investigation into the affairs of Wave.

After hearing the objections put forth before NCLT by the homebuyers, the Adjudicating Authority observed that Section 65 of the Code provided that penalty can be imposed on a person who initiates CIRP fraudulently or with a malicious intent for any purpose other than for resolution of the Corporate Debtor. NCLT further held that although Section 65 only provides for imposition of penalty, but the same is also a ground for dismissal of the Petition.

In its order the NCLT observed that the removal of directors of Wave just before filing of the Section 10 Petition is an indicator that the management who was running the Wave wants to hide from the reasons of default and wants to immunize itself from the rigors of the Code. NCLT also noted that there are around 285 cases pending against Wave and therefore the possibility of filing the Section 10 Petition to escape the potential liability arising out of these pending litigations cannot be overlooked.

After taking note of the fact that Wave had accepted payment in cash from many homebuyers, issued them plain paper receipts and induced them to accept reduced price on paper which causes serious loss to the state exchequer. On the basis of all the facts seen in cumulative, the Adjudicating Authority ruled that Wave under the garb of IBC proceedings has attempted to play fraud on the stakeholders and IBC proceedings cannot be used to make illegal acts as legal.

## **Supertech Insolvency limited to one project only: Big Relief for 11,000 Homebuyers**

***NCLAT in its interim order has stated that the CoC will be limited to only Eco Village-II project of the Company***

In a relief to thousands of homebuyers, the National Company Law Appellate Tribunal (NCLAT) has held that the Insolvency proceedings in respect of Supertech Limited will only pertain to the project Eco-Village II of the Company, with the condition that construction will be carried out by Supertech Limited.

The Appellate Tribunal has considered the interest of homebuyers who had opposed the initiation of corporate insolvency resolution process (CIRP) as they were skeptical about continuation of construction activities of projects under CIRP. The Corporate Debtor i.e. Supertech Limited had submitted a resolution plan to pay off Union Bank and all other banks and give possession to homebuyers in a phased manner.

Insolvency was initiated against the Real Estate Developer by Union Bank of India for non-payment of dues amounting to around INR 432 crores, after which the National Company Law Tribunal (NCLT) initiated CIRP in respect of Supertech Limited, one of the companies of Supertech Group.

## **Monitoring Committee of a Corporate Debtor through its Chairman has the authority under IBC to file CIRP application against another Corporate Debtor: NCLT Delhi**

***The Adjudicating Authority laid down that Monitoring Committee and Chairman thereof are appointed in accordance with the provisions of the Code***

The National Company Law Tribunal, New Delhi Bench (NCLT) has recently held that an application for initiation of corporate insolvency resolution process (CIRP) of filed through a Monitoring Professional of a Monitoring Committee appointed post approval of Resolution Plan of the Corporate Debtor against another Corporate Debtor is covered under Section 9 of the Insolvency and Bankruptcy Code, 2016.

The Monitoring Professional for M/s. Educomp Infrastructure & School Management Limited was held by the Adjudicating Authority to be covered under the provisions of the Code, by virtue of Section 2(d) of the code which includes within the ambit of applicability, "such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify on this behalf"

NCLT observed that the Monitoring Committee is formed under the provisions of the Code and the Chairman thereof, is also appointed in accordance with the provisions of the Code. Hence, he has proper authority to proceed to take any steps necessary to protect the interest of the Applicant.

The Applicant, the Operational Creditor, was a company who is currently undergoing Resolution Plan implementation. The Adjudicating Authority after ruling that the Monitoring Professional who was also the Resolution Professional before the Resolution Plan of the Corporate Debtor was approved, had locus to file the present Petition under Section 9 of the Code.

The Tribunal was hearing an application filed by M/s. Educomp Infrastructure & School Management Ltd. through the chairman of the Monitoring Committee, Mr Ashwini Mehra.

## **NCLAT allows withdrawal of Insolvency proceedings against Kanoria Sugar**

***The Bank accepted OTS for INR 40 crores as against outstanding of 49.65 crores***

The National Company Law Appellate Tribunal (NCLAT) has permitted withdrawal of corporate insolvency resolution process (CIRP) against Kanoria Sugar and General Manufacturing Company.

The Appellate Adjudicating Authority permitted Punjab National Bank, the Financial Creditor of Kanoria Sugar to withdraw its Insolvency plea after a settlement with the Company.

“We permit the Creditor to withdraw the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC). In result, the CIRP initiated stands terminated”, ruled the Appellate Adjudicating Authority.

The order of withdrawal came in light of the fact that the Lender accepted a One-Time Settlement (OTS) for Rs. 40 crores against the outstanding amount of 49.65 crores. “Both the parties have settled the matter between them”, the NCLAT observed.

## **SARFAESI proceedings cannot be continued against the Corporate Debtor once CIRP is admitted and Moratorium is ordered: Reiterates Supreme Court**

***Sale of assets of the Corporate Debtor under SARFAESI ACT completed after Moratorium was imposed held invalid, irrespective that the same was initiated prior to initiation of CIRP***

The Apex Court has observed that the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act) cannot be continued once the corporate insolvency resolution process (CIRP) is initiated and moratorium is ordered. The Bench said that in such a situation, any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act is prohibited.

In the instant case, Indian Overseas Bank had extended certain credit facilities to the Corporate Debtor. Eventually, SARFAESI proceedings were initiated against the Corporate Debtor. The Bank took symbolic possession of two secured assets, which were later put on auction pursuant to the provisions of SARFAESI Act. In the meanwhile, CIRP proceedings were initiated by the Adjudicating Authority under Section 10 of the Code. However, even thereafter, the Bank continued the auction proceedings and accepted the balance consideration for the said assets.

Referring to Section 14 and 238 of the Code, the Court observed that, “*After the CIRP is initiated, there is moratorium for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act. It is clear that once the CIRP is commenced, there is complete prohibition for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property.*”





# RECENT JUDGMENTS

## Kotak Mahindra Bank Limited V. A. Balakrishnan & Anr.

### ***Liability in respect of a claim arising out of a Recovery Certificate is a Financial Debt, says Supreme Court***

The Supreme Court has recently ruled that a liability in respect of a claim arising out of a Recovery Certificate would be a “Financial Debt” within the meaning of clause (8) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (IBC). The Court further held that consequently, the holder of the Recovery Certificate would be a Financial Creditor within the meaning of clause (7) of Section 5 of IBC.

The Apex Court went on to hold that the holder of such certificate would be entitled to initiate corporate insolvency resolution process (CIRP), provided the same is initiated within a period of three years from the date of issuance of the Recovery Certificate.

In the present case, an application under Section 7 of the Code was filed within a period of three years from the date on which the Recovery Certificate was issued. As such, the Court found that the application was within limitation and the Adjudicating Authority erred in holding that the same was barred by limitation.

The Respondent Corporate Debtor had contended that the limitation shall be computed from the date the account of the Debtor was declared as NPA and not from the date of issuance of Recovery Certificate. However, the Apex Court found that Recovery Certificate injured effectively and completely the Debtor’s rights and therefore limitation would begin from the said date. In effect, the Court laid down that the issuance of Recovery Certificate could trigger the limitation.

## Puneet Kaur V. K.V. Developers Private Limited

### ***Just because Homebuyers have not filed their claim, does not empower the RP and RA to extinguish the claims if the same are reflected in the books of CD: NCLAT***

The National Company Law Appellate Tribunal (NCLAT) has recently laid down that the claims of homebuyers who have failed to submit their claims prior to the approval of the successful Resolution Plan when such claims were visible from the books of the Corporate Debtor.

The Resolution Professional and the successful Resolution Applicant had alleged before NCLAT that the homebuyers failed to file their claim during the insolvency process of the Corporate Debtor even after

repeated opportunities being given to them. They further argued that filing of the present Appeal by the Homebuyers was just an abuse of process by them and to enable them to do indirectly what they couldn't do directly i.e. belated filing of claim.

The NCLAT, after noticing that about 53 % of total homebuyers/allottees were not part of the resolution process of the Corporate Debtor, held that such exclusion cannot lead to a fair and just resolution of the Corporate Debtor and such exclusion was an unfair and inadequate treatment to the Financial Creditors. "In the present case, there is no denial that details of the Appellant and other homebuyers who could not file their claims has not been reflected in the Information Memorandum, the Resolution Applicant could not have taken any consideration of the claim of the Appellants in the Resolution Plan. However, we are of the view that the claim of those Homebuyers , who could not file their claims, but whose claims were reflected in the record of the Corporate Debtor, ought to have been included in the Information Memorandum and the Resolution Applicant ought to have been taken note of the said liabilities and should have appropriately dealt with them in the Resolution Plan", the NCLAT held.

## **Partha Paul V. Kotak Mahindra Bank Ltd.**

***IBC not a substitute to a Recovery Forum: Whenever there is existence of a real dispute, IBC provisions cannot be invoked, rules NCLAT***

The National Company Law Appellate Tribunal (NCLAT) has reiterated, after relying on judgments of the Supreme Court, that the provisions of the Code are not intended to be a substitute to a recovery forum and also laid down that whenever the premises of facts and circumstances indicate a real dispute, the provisions of the Insolvency and Bankruptcy Code 2016 (IBC). The Appellate Bench further laid down that the Code cannot be used whenever there is existence of real disputes and also whenever the intention is to use the Code as a means for chasing of payment or building pressure for releasing the payments.

In the present case, the Respondent was seen to be resorting to multiple legal proceedings before more than one adjudicatory forums, which suggested that the Respondent had been involved in forum shopping and had been chasing the Appellant for releasing its dues one way or the other. Moreover, the impugned order was passed without according due opportunity to the Appellant of being heard which was found to be against the principles of natural justice. Moreover, it was noted by the Appellate Bench that the Respondent Bank had created a web of litigations by initiating multiplicity of proceedings which are extremely prejudicial to the Appellant's company and wastage of precious judicial hours.

With such observations on the matter, the Appellate Adjudicating Authority set aside the impugned order and remanded the matter back to the Adjudicating Authority with a direction to give a patient hearing to the case on merits and to decide the matter considering the facts of the case as well as the provisions of applicable laws on the issue and then to finally pass appropriate order in accordance with law.



## **Aashray Social Welfare Society & Ors. V. Saha Infratech Pvt. Ltd. & Ors.**

***No rule that creditors falling in a class can only be represented before the Adjudicating Authority by the designated Authorized Representative – NCLAT, New Delhi***

The National Company Law Appellate Tribunal has held that the Financial Creditors in a class, who are members of the Committee of Creditors (CoC), have every right to be heard in an application filed by such creditors on their own and not through the Authorized Representative of such ‘creditors in a class’. The Application was filed by the creditors whose claims had been partly or fully rejected by the Interim Resolution Professional (IRP).

The Bench observed that “The Authorized Representative under the statutory scheme is to represent the Financial Creditors i.e. Homebuyers in a class for a limited purpose i.e. for attending meetings of the CoC and voting on behalf of the Financial Creditors in a Class.” It was further observed that since the Authorized Representative has not come up before the Adjudicating Authority for filing the impleadment application, the Appellants who themselves are homebuyers have no right to participate in adjudication initiated by the application.

The Appellate Adjudicating Authority lastly made a remark, relying on a Supreme Court judgment, that claim of one Financial Creditor to keep out other Financial Creditors from CoC need to be examined and order passed without opportunity to Financial Creditors shall not operate as res judicata.

## **Rolta India Limited V. Mr. Anant Sadekar & Ors.**

***Its not for the NCLT to direct payment of TDS by the Corporate Debtor to the Income Tax Department after withdrawal of Section 9 Petition: NCLAT***

The National Company Law Appellate Tribunal (NCLAT) has recently observed that on withdrawal of Insolvency Proceedings by the Operational Creditor, the Adjudicating Authority did not fault in not directing the payment of TDS amount by the Corporate Debtor to the Income Tax department. The question for consideration before the Appellate Adjudicating Authority was whether the NCLT ought to have directed the deposit of TDS amount by the Corporate Debtor as mentioned in the Joint Settlement deed between the parties at the time of allowing withdrawal of Section 9 Application.

The Appellate Bench noted that steps were being taken by the Income Tax Department towards recovery of TDS amount. The NCLAT was of the view that under the Income Tax Act, 1961, the Income Tax Authority has ample jurisdiction to take steps for recovery of its dues including the amount of RDS which although deducted has not been deposited by the Appellant.

The NCLAT observed that the Adjudicating Authority after withdrawal of Section 9 Application ought not take any further steps regarding deposit of TDS amount by the Appellant and further steps for recovery and appropriate action against the Corporate Debtor regarding deposit of the TDS amount is to be taken by the Income Tax Authorities.

## **M.S. Ramesh J. and M.S. Mohammed Shaffiq J., Writ Petition Karnataka High Court**

### ***High Court grants stay interim stay on Liquidation Process with liberty to the aggrieved Resolution Applicant to file Appeal against the Liquidation order***

The High Court of Karnataka has in a Writ Petition filed granted interim stay upon the Liquidation process of the Corporate Debtor and granted liberty to the aggrieved parties to file an appeal before the Appellate Adjudicating Authority.

In the present case, a Resolution Plan was approved by the Committee of Creditors (CoC) and by the Adjudicating Authority. However, in the meanwhile when implementation of the plan was in place, one of the Financial Creditors filed a Liquidation Application before the Adjudicating Authority taking the ground that the Successful Resolution Applicant had failed to adhere to the terms of the Resolution Plan and has not paid the requisite amount as per terms set out in the Plan.

Consequently, a request for modification of Resolution Plan was sought for, to which the majority of CoC did not have any objection. However, the Adjudicating Authority rejected the request for modification and ordered Liquidation appointing the Liquidator to carry out the liquidation process of the Corporate Debtor.



## For enquiries related to:

- 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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