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Editorial

Pre-packaged Insolvency Resolution Process – Missing the spirit

With much fan fare the legislation related to Pre-packaged resolution process was enacted in April 2021, specially to resolve the financial stress of Micro, Small or Medium Enterprises (MSMEs), however, the spirit of implementation has been found missing. In fact, the default limits for admission of insolvency was lowered to Rs. 10 Lakhs as compared to Rs. One Crores for the CIRP. The widening of definition of MSMEs by enhancing the value of investments in plant & machinery and turnover criteria has brought lakhs more MSMEs into the eligibility criteria.

The most of the targeted beneficiaries, the MSMEs, are not aware of existence of any such beneficial legislation, though they are facing the financial stress following one-year long COVID pandemic. Even if a few beneficiaries may be aware but they do not know how to proceed to avail the benefits. Hectic marketing of concept is required at the level of MSME ministry and other associations of MSMEs in the industrial areas across India have to play roles in spreading the knowledge including how to follow the process steps prescribed under IBC, 2016.
Discussions with Senior Bankers on the number of proposals also gives a glooming picture. Since, the Applicants are not reaching the branches of banks, the officials are not ready to take up the proposals.

Can PPiRP be also thrown open to ail corporates to avaii the benefits? Both the parent ministries, MSME & Ministry of Corporate Affairs (MCA) will have to proactively find the reasons why the PPIRP has not picked up for bringing in necessary corrections.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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Entries in Book of Accounts/ Balance Sheet of Corporate Dehtor can be treated as acknowledgment of liability of debt payahle to Financiai Creditor: Supreme Court

The period of limitation would get extended by a further period of three days post such acknowledgement, the Apex Court held

The Supreme Court has laid down that entries in Books of Account/Balance sheet of a company can be treated as acknowledgement of liability in respect of debt payable to a Financial Creditor. This shall mean that an application under Section 7 of the insolvency and Bankruptcy Code, 2016 (IBC) would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years. In such a case, the period of limitation would get extended by a further period of three years.

Whiie ailowing the Appeal from the order of the National Company Law Appellate Tribunal (NCLAT), the Apex Bench observed that the corporate insolvency resolution process (CIRP) initiated by the Asset Reconstruction Company (India) Limited against the Corporate Debtor was barred by limitation. The Corporate Debtor had contended that the Application was hopelessly barred by limitation as the same was filed about eight/nine years after the account of the Corporate Debtor was declared NPA.

"it is well settled that entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgement under Section 18 of the Limitation Act", the Apex Court held.

NCLT exercising powers under Sections 7 or 9 of the Code, is not a deht collection forum: Supreme Court

It is not the object of the Insoivency and Bankruptcy Code that CIRP be initiated to penaiize solvent companies for non-payment of disputed dues, the Court said

The Supreme Court has recentiy laid down that the National Company Law Tribunai, exercising powers under Section 7 or Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC), is not a debt collection forum. The Bench further observed that IBC tackles and/or deals with the insolvency and bankruptcy and

that it is not the object of iBC that corporate insolvency resoiution process (CiRP) shouid be initiated to penalize solvent companies for non-payment of disputed dues claimed by an Operational Creditor.

The Apex Court further observed that creditors cannot use the Code either prematurely of for extraneous considerations or as a substitute for debt enforcement procedures. Laying importance to the defense of pre-existence of dispute in Section 9 Applications under the Code, the Apex Court said that the object of the Code, at least insofar as Operational creditors are concerned, is to put the insolvency process against a Corporate Debtor oniy in clear cases where a real dispute between the parties as to the debt owed does not exist.

NCLT initiates Insolvency process against Som Resorts

Court observed that the Company had used Cosmic Stractures to inter into a ballder-buyer agreement concealing the reai transaction

The Delhi Bench of the National Company Law Tribunal (NCLT) has ordered initiation of the corporate insolvency resolution process against Som Resorts Pvt Ltd after the company defaulted on payment of 15 crores. The Adjudicating Authority has appointed Sumit Shukla as the Interim Resolution Professional (IRP) for handling the day-to-day affairs of the Company.

"In the present case it is observed that Som Resorts has used Cosmic Structures to enter into builder-buyer agreement and collect money from homebuyers with an ulterior motive to conceal the real transaction", the NCLT observed.

Som Resorts had launched a commercial cum residential project and homebuyers had booked space in the project during 2012-15 on the assurance that they would have possession of the units within 36 months from the project commencement date. The Company, however, defaulted in handing over possession of the units and also failed to refund the deposit to the homebuyers.

NCLT cannot exercise power to initiate insoivency proceedings arhitrarily, rules Supreme Court

The Top Court said that discretion must be exercised by the NCLT under Section 7(5)(a) of the Code when the Corporate Debtor raises reasonable objections

The Supreme Court has recently held that the National Company Law Tribunals (NCLTs) cannot exercise discretionary power to order initiation of insolvency proceedings "arbitrarily or capriciously" and are required to consider grounds made by the Corporate Debtor against it.

The Top Court said that if a Corporate Debtor opposed the initiation of Insolvency proceedings on the ground that it has a money award in its favour and the awarded amount exceeds the debt, then NCLT would have to exercise its discretion under Section 7(5)(a) of the Code to keep the admission of the application of the Financiai Creditor in abeyance.

"Even though Section 7(5)(a) of the insolvency and Bankruptcy Code (IBC) may confer discretionary power on the Adjudicating Authority and Appellate Authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant an exercise of discretion in a particuiar manner, discretion wouid have to be exercised in that manner" the Bench observed. NCLT set aside the verdicts of NCLT and NCLAT refusing to stay the insolvency proceedings.

NCLT allows Insolvency process against Future Retail Limited

The debt-ridden Big Bazaar parent aiong with its other group companies together owe around 29,000 crores to Lenders

The Mumbai Bench of the National Company Law Tribunal (NCLT) ordered Insolvency Proceedings against debt-ridden Future Retail Limited and appointed an Interim Resolution Professional for the Kishore Biyani-led company. The Application for initiation of corporate insolvency resolution process (CIRP) of the company was filed by Bank of India, which alone has dues of 856 crores against Future Retail. The Bank moved NCLT over non-payment of dues under the terms of their framework agreement.

While the Adjudicating Authority initiated the CiRP of Future Retail, it also dismissed an Intervention filed by Amazon opposing Insolvency proceedings on the ground that it scuttled Amazon's rights against the Corporate Debtor. The Court placed its reliance upon the Emergency Arbitration Order in favour of Amazon and held that there is no injunction in the order against the Lenders from exercising their contractual or statutory rights. Further, NCLT held that the banks are exercising their statutory rights in accordance with law as they are not a party to the arbitration proceedings.

As per reports, Amazon is expected to chailenge the order before the Nationai Company Law Appellate Tribunal (NCLAT). The admission order would impose moratorium prohibiting the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor, which is likeiy to diminish Amazon's dues against Future Retail considering the enormous dues payable to Financial Creditors.

Dues recovery: Banks invoke SARFAESI against telecom infrastructure provider GTL

Bankers are up for pursuing recovery by ali means possibie rather than wait for fuii operationalisation of the NARCL

Following delays in transfer of loans of telecom infrastructure provider GTL to the bad bank, lenders have now invoked the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act) to recover their dues. The recovery action has been initiated by IDBI Bank on behalf of the Lenders, whose total exposure to GTL stood at 7250 crores as of December, 2021.

Names like VOVL, Jaypee Infratech, Meenakshi Energy, Consolidated Construction Consortium, Sion Panvel Toliways, Supreme Panvei Indapur Tollway, Helios Photo Voitaic, Chhapra-Hajipur Expressways, Mittal Corp, Worlds Window Impex and SSA International feature on the list of 168 accounts State Bank

has drawn up for sale to ARCs during the current year. These 11 accounts owe SBI an aggregate Rs 9,186 crore.

Bankers have been reported saying that it makes more sense to pursue recovery by all means possible rather than wait for the full operationalization of the National Asset Reconstruction Company (NARCL).

RECENT JUDGMENTS

Rakesh Kumar Jain, RP of HBN Home Colonisers Pvt Ltd V. Jagdish Singh & Ors: NCLAT

Whether Adjudicating Authority is competent to pass order under Section 66 of IBC during currency of moratorium under Section 14 of the Code

The National Company Law Appellate Tribunal (NCLAT) has held that in the there is no inconsistency or repugnancy between Section 14(1)(a) and Section 66 of the Insolvency and Bankruptcy Code, 2016 (IBC). Section 14 of the Code is a bar against institution and prosecution of any suits or proceedings or execution of orders and decrees in other courts or Tribunals but not a bar to pass appropriate order in the pending proceedings against the Resolution Professional or suspended directors and related parties of the Corporate Debtor, before the Adjudicating Authority, during the Insolvency resolution process or Liquidation process thereof.

The Appellate Adjudicating Authority further went on to hold that Section 66 of the Code empowers the Adjudicating Authority (NCLT) to pass appropriate orders when the suspended directors or Insolvency Professional of the Corporate Debtor carried on fraudulent trading or business during the CIRP process. Therefore, the order passed by the National Company Law Tribunal (NCLT) suffered from no infirmity or inconsistency as the same was passed in exercise of power conferred on it by Section 66 of IBC. Hence, the contention that during moratorium, the Adjudicating Authority shall not pass such an order was found by the NCLAT to be unsustainable and without any merit. The Appellate Tribunal further laid down that if such a contention is accepted, Section 66 of IBC would become otiose or redundant.

Vishnu Oil Mill Private Limited v. Union of India; Rajasthan High Court

A group of Financial Creditors can converge and join hands to touch the financial limit of Rs. 1 crore stipulated under IBC so as to initiate CIRP

The Hon'ble High Court of Rajasthan has recently observed that on a plain reading of Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC), it becomes clear that there is no ambiguity in the provision which required any interpretation other than what is conveyed in its literary sense. The provision for initiation of corporate insolvency resolution process (CIRP) in respect of a Corporate Debtor, clearly stipulates that the application for triggering CIRP may be initiated by a Financial Creditor either individually or jointly with other Financial Creditors.

Previously the threshold default limit for filing a CIRP Application against a Corporate Debtor in default of a Financial Debt was only 1 Lakh and it has been drastically increased to 1 crore vide Gazette Notification, observed the High Court. The Court further observed that it can easily be envisaged that in cases of Micro, Small and Medium Enterprises (MSMEs), there may not exist Financial Creditors whose individual debt is Rs. 1 Crore or above. If the threshold limit was to be fixed at 1 crore qua each individual Financial Creditor, then there was no reason whatsoever for allowing joint applications by Financial Creditors, the Hon'ble High Court held.

Potens Transmission & Power Pvt Ltd v. Gian Chand

90 days periad under Clause 1(12) of Schedule 1 in the Liquidation Regulations, 2016 to pay balance consideration is mandatory: ruies NCLAT

The National Company Law Appellate Tribunal (NCLAT), New Delhi was dealing with the question whether the Adjudicating Authority was correct in setting aside the sale and the period of 90 days to submit the amount is mandatory. The Appellate Adjudicating Authority held that the order passed by the Adjudicating Authority was correct and the period of 90 days to submit the amount is mandatory.

The Appellant had submitted that a major part of the delay was caused due to an application being pending before the Adjudicating Authority which could have been rejected at an earlier date but the same was kept pending while other similar applications were disposed off by the NCLT. The Appellant had further contended that some time must have been granted to it for making the deposit post disposal of the application by the Adjudicating Authority.

NCLAT laid down that the 90 days period provided for making the deposit is the maximum period under which the Auction Purchaser had to make the deposit. Second Proviso of the item 12 of Schedule I provided that the sale shall be cancelled if the payment is not received within the 90 days period.

"When the consequences of non-compliance of the provision is provided in the Stature Itself, the provision is necessary to be held to be mandatory", the Appellate Bench observed.

Vijay Kumar Ghai v. Pritpal Singh Babbar

Till a decision is taken by NCLT in terms of Section 100 and 101 of tbe Code, proceedings under Section 138 of Negotiable instruments Act wiii stand abated

The High Court of Chandigarh was dealing with the question whether the interim moratorium under Section 96 of the Insolvency and Bankruptcy Code, 2016 (IBC) would apply to the Complaint filed by the Respondent under section 138 of the Negotiable instruments Act.

The Court observed that once a personal guarantor to a Corporate Debtor has filed an application under Section 94(1) of the Code before the Adjudicating Authority, all legal proceedings in respect of any debt that the personal guarantor is facing, would be covered by the interim moratorium and consequently, the

proceedings in the Complaint filed under Section 138 of the Negotiable Instruments Act would also remain stayed till the proceedings before the NCLT are taken their logical conclusion, in terms of Sections 100 and 101 of the Code.

The Court interpreted the terms "all the debts" and "any legal action or proceedings pending in respect of any debt" as occur in Section 96 of the Code, to mean that it would cover all such debts including any debt not pertaining to a Corporate Debtor for whom the accused stood as a personal guarantor in such a complaint under Section 138 of the Negotiable Instruments Act, even in his capacity as a Director of such Corporate Debtor.

Raj Singh Geblot v. Vistra (ITCL) India Ltd.

Element of 'Disbursai' necessary for a debt to have been Financial Debt in order to sustain an Application under Section 7 of the Code

In the instant Appeal filed before the National Company Law Appellate Tribunal, New Delhi (NCLAT) against the order of the Adjudicating Authority which had admitted a petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC), the Hon'ble NCLAT has held that Section 7 of IBC will not be attracted If there Is no disbursal of fund by the Financial Creditor to the Corporate Debtor. The NCLAT further held that if there is no 'disbursal', then even a 'financial debt' will not attract Section 7 of the Code.

The Appellate Adjudicating Authority laid down the following basic ingredients as a requirement for a debt to be considered a financial debt -

a. The Creditor must be a 'Financial Creditor' and be covered by Section 5(7) & (8) of the Code.
b. The Financial Debt must be owed by the Corporate Debtor. However, the default may be occurred in respect of that Financial Creditor or any other Financial Creditor.
c. FInancial Debt to carry interest element and be disbursed against the consideration of time value of money.
d. Money borrowed against the payment of interest.
e. Investment made with the object of profit sharing from revenue generated will also not be covered wIthin the ambit of Section 7 of the Code.
f. Award received under Arbitration and Conciliation Act, 1996 or amount emerged from the Settlement Agreement will not come within the purview of Section 7 of the Code.

M/s Agarwal Veneers v. Fundtonic Service Pvt Ltd

Appiication to commence CIRP can be denied when the Creditor Is usIng insolvency as an inappropriate substitute for Debt Recovery Procedures

The National Company Law Appellate Tribunal (NCLAT), relying on the Supreme Court judgment in Vidarbha Industries, has observed that the Application filed for initiation of corporate insolvency resolution process (CIRP) was rightly dismissed as CIRP cannot be initiated with a fraudulent intent 'for any purpose other than the resolution of Insolvency or Liquidation and therefore it is clearly covered under Section 65 of the Insolvency and Bankruptcy Code, 2016 (IBC).

"The Preamble of IBC is carefully worded to describe the spirit and objective of the Code to be 'Reorganisation' and 'Insolvency Resolution', specifically omitting the word 'Recovery'. The Parliament has made a conscious effort to ensure that there is a significant difference between 'Resolution' and 'Recovery'. The Hon'ble Supreme Court has time and again observed that the fundamental intent of IBC is 'maximising the value of assets' in the process of 'Resolution", the Appellate Adjudicating Authority held.

It was submitted before the Appellate Bench that the Operational Creditor had filed the Petition as a tool of recovery and that the Code is not intended to be a substitute to a Recovery Forum. Further, the Adjudicating Authority had also noted that the Operational Creditor had not produced on record any bank statements to show that payments were received from the Corporate Debtor against the invoices based on which the claims had been raised.

For enquiries related to:

- Insolvency Process,
- Bankruptcy Process,
- Filing petition with NCLT/DRT,
- Appointment of Insolvency Professionals,
- [redacted]
- Hearing of Cases or any other enquiries

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