



ABC

INSOLVENCY TIMES

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INSOLVENT?



From the Editor's Desk



Dear Insolvency Professionals,

How far the proposal of IBBI to restrict the assignments handled by Insolvency Professionals can improve the efficiency?

The Insolvency & Bankruptcy Board of India (IBBI) recently came out with a discussion paper with regard to restricting the number of assignments that are handled by Insolvency Professionals (IPs) under the Corporate Insolvency Resolution Process (CIRP) & Liquidation (including Voluntary Liquidation) Process under the Insolvency & Bankruptcy Code, 2016.

Presently, neither the Code nor the IBBI has put any restriction on the number of assignments that an IP can handle at a given point of time. However, the Code of Conduct for IPs provides that IPs must refrain from accepting 'too many' assignments, if he/she is unlikely to be able to devote adequate time to each of his assignments.

As per the IBBI, a few IPs are handling too many assignments under the Code, which could be detrimental in the long run. On comparing the role of an IP with that of a managing director of a company, & on considering the intense responsibilities of an IP in corporate processes, the IBBI has proposed the maximum number of assignments that can be handled by IPs to reduce the delay in the process, improve the output and quality and increase value maximisation:

- 5 assignments if the turnover of the corporate debtor is less than Rs. 1,000 crore;
- 4 assignments if the turnover is between Rs. 1,000 crore- Rs. 5,000 crore;
- 3 assignments for turnover between Rs. 5,000 crore- Rs. 10,000 crore;
- 2 assignments in case the turnover is above Rs. 10,000 crore but below Rs. 50,000 crore;
- 1 assignment in case of turnover of corporate debtor being Rs. 50,000 crore.

Hoping this change to bring better efficiency, reduced time lag and lesser burden to Insolvency professionals.

Stay Alert!

Anju Agarwal

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NEWS FLASH FROM THE LAST MONTH

Sole discretion of CoC to appoint Resolution Professional without any interference

In an insolvency proceeding, the right to continue with the IRP as a Resolution Professional or to replace the IRP with some other RP is with the Committee of Creditors (CoC), as observed by the National Company Law Tribunal. The power to replace an RP is solely & absolutely vested with the CoC, as per the Hyderabad Bench of the NCLT, which rejected an application from RP Mahender Kumar Khandelwal, who was appointed by the CoC as the IRP to manage the affairs of insolvent power finance company KSK Mahandai Power's resolution until the appointment of an RP. RP Khandelwal had challenged the decision of the CoC by rejecting his appointment as a Resolution Professional. After the rejection of RP Khandelwal, Sumit Binani was appointed as a Resolution Professional. KSK Mahanadi Power's CoC voted with 89.6% in favour of Sumit Binani's appointment as a RP to look after the resolution process.

The Corporate Insolvency Resolution Process (CIRP) against KSK Mahandai Power was admitted before the NCLT, Hyderabad Bench & Mahender Kumar Khandelwal was appointed as the IRP on October 3, 2019. Khandelwal challenged the decision on the ground that it would not only cause a loss to his reputation, but will also cause delay to the resolution process for KSK Mahanadi as Sumit Binani, the new RP would take time to get to know about the affairs of the company.

It can be concluded that the absolute decision lies with the CoC to change or not to change the RP. A resolution on this can be passed by getting on 66% votes of the members of CoC in favour of KSK Mahanadi Power.

NCLT: Liquidator to sell company stressed assets attached by investigating agencies

In a judgement, the Adjudicating Authority has allowed the liquidator to sell the assets of a company which were attached by the investigative agencies. As per the order of the National Company Law Tribunal, Kolkata Bench, passed on 22nd July, 2020, the liquidator is permitted to sell the assets of the Corporate Debtor that were attached by the Enforcement Directorate (E.D.), subject to the right of the buyer to apply for detachment of the property. Attachment & confiscation of properties of a Corporate Debtor under Corporate Insolvency Resolution Process (CIRP) or liquidation is void or of no effect under Section 32-A of the Insolvency & Bankruptcy Code, 2016. Section 32-A provides that Corporate Debtor shall not be prosecuted for an offence committed prior to the commencement of CIRP, once Resolution Plan has been approved by the Adjudicating Authority.

This judgement can help to speed-up the insolvency process in similar cases where investigative agencies have attached assets of a corporate debtor. This judgement will be of a greater value in various assets owned by companies attached by investigating agencies. This order will be a landmark in the history of jurisprudence of insolvency law in India. As per NCLT, Kolkata Bench, a liquidator can proceed with the sale of assets, even if it is under attachment by the respondent, to continue with the liquidation process of a company in a timely manner under the provisions of the Insolvency & Bankruptcy Code.



It can be concluded that this ruling could help to speed-up the insolvency process where the investigative authorities have attached the assets of a corporate debtor. This judgement will be of a greater value in various assets owned by companies attached by investigating agencies. This order will be a landmark in the history of Indian insolvency law.

Asset Reconstruction Companies asked by RBI to deal with buyers with ineligibility criteria under Section 29 A of IBC

The Reserve Bank of India recently introduced Fair Practices Code for asset reconstruction companies (ARCs) to deal with prospective buyers under Section 29A of the Insolvency & Bankruptcy Code, 2016. These Fair Practices Code will be periodically reviewed by the Insolvency & Bankruptcy Board of India to know that ARCs are complying with them. As per Section 29A of IBC, 2016, an insolvent, a willful defaulter or a person who was a promoter or was in the management of the Corporate Debtor, among other conditions, would not be allowed to bid for the insolvent company. The invitation for participation in auction for the bids shall be requested to be done by the public. The process should enable the participation of maximum number of prospective buyers. The terms & conditions of such sale by auction may be decided in consultation with investors in the security receipts as per the Securitization & Reconstruction of Financial Assets & Enforcement of Securities Interest Act, 2002 (SARFAESI Act, 2002).

As per the guidelines issued by the Central Bank, ARCs should maintain transparency & non-discriminatory practices while acquiring the asset. Arm's length distance should be maintained by ARCs. ARCs shall release all securities on the repayment of dues or on realization of outstanding loan amount, subject to any right or lien (charge) upon other claim which they may have against the borrower of loan. In case of any right of set-off of loan amount, the borrower should be provided a notice with full particulars about the remaining claims & conditions under which ARCs are entitled to keep the securities with themselves till a relevant claim is paid-off or settled. ARCs should not harass the Corporate Debtor & should ensure that their employees been properly trained to deal with customers in a suitable way.

These Fair Practices Code have been introduced to achieve high standards of transparency & fairness in dealing with stakeholders. In the matter of recovery of loans, ARCs shall not cause any kind of harassment to the Corporate Debtor. It would also ensure that the Corporate Debtor is not subject to any harassment & its employees are trained properly.

Duff & Phelps India drags IBBI to court on order against Senior Advisor

Financial consultancy firm Duff & Phelps has dragged the Insolvency & Bankruptcy Board of India (IBBI) to court, over an order against a senior advisor in its restructuring practice. The Insolvency Regulator, IBBI penalized Vijay Kumar Garg, the Resolution Professional (RP) for Gitanjali Gems, Nakshatra World & other companies which were promoted by Mehul Choksi by passing an order on 8th June, 2020. Choksi was accused of "attempting to siphon-off crores of rupees" from the companies he was managing by the procedure of insolvency. The order accused Vijay Kumar Garg of appointing his company, Duff & Phelps India, as a consultant in contravention of various provisions of the Insolvency & Bankruptcy Code, 2016.

Duff & Phelps filed a petition before the Delhi High Court, challenging the observations made by the IBBI against it. The question as to whether a resolution professional can appoint third-party consulting-firms as per the discretion of the IBBI will be decided by the court, being the



Adjudicating Authority. The final decision on this issue will settle the question as to whether an entity, which is not registered as an Insolvency Professional Entity, will be capable of advising or performing the functions & obligations of the RP as per the provisions of the Insolvency & Bankruptcy Code. Even though IBBI held that services like liasioning are those which should have been undertaken by the RP himself or his employees as a part of his professional services and should not have been delegated to a third party. Delegation of the expressly mentioned duties, under the garb of complexities involved in the case, to a third party (not being a professional) shall be construed by the board as a major deviation on the part of the IP and thereby shall attract penal implications.

The final decision on this matter will settle the question as to whether an entity, not registered as an Insolvency Professional Entity, will be capable of advising or performing the functions & duties of the RP as per the provisions of the IBC.



Affinity Finance services Pvt. Ltd. v. Kiev Finance Ltd.- NCLT, Kolkata Bench

The application was filed by liquidator on the ground that after the order for liquidation was passed, one prospective resolution applicant has approached Resolution Professional showing interest to submit a resolution plan for the corporate debtor which was under liquidation.

Earlier the case was admitted on 28.02.2018 on an application made by the Operational Creditor. The IRP was confirmed to RP and was also appointed as liquidator. During the CIRP process period of 180 days, no resolution plan was received hence the CoC resolved to liquidate the company and an order was passed on 10.09.2018. However, before that on 04.09.2018 a prospective resolution applicant approached Resolution professional and hence a CoC meeting was called on 08.09.2018 wherein it was resolved to make an application to Adjudicating Authority for extension of CIRP period of 90 days. Before the RP could make an application, the liquidation order was passed. Hence the application was made for recalling of liquidation order. Ld. Counsel of CoC submitted that the Adjudicating Authority may pass such order invoking its inherent power under Rule 9 of Companies (Court) Rules 1959 or under Rule 11 of NCLT Rules.

The Adjudicating Authority made it clear that the inherent powers cannot be used to circumvent the procedure. Secondly, as the NCLT Rules are made applicable even to the Adjudicating Authority under Section 5(1) of the Insolvency and Bankruptcy Code, the Rules under Companies (Court) Rules 1959 cannot be invoked because they are replaced by NCLT Rules. The order of liquidation of Corporate Debtor passed by the Authority cannot be reviewed or revoked as prayed by RP. It was pointed out that the RP can sell the Corporate Debtor as a going concern as per Regulation 32 (c) of IBBI (Liquidation Process) Regulations 2016. Since the Authority cannot review its own order, it was held that the application requesting for recalling of liquidation order is not maintainable and hence stands rejected.

State Bank of India v. Ushdev International Ltd.- NCLT, Mumbai Bench

An application under Section 33 of the I&B Code, 2016 was filed by the Resolution Professional for liquidation of the Corporate Debtor as the CoC had rejected the Resolution Plan submitted by a Resolution Applicant with 77.61% voting share against the Resolution Plan.

The decision of CoC was being challenged by the Financial creditor of the Corporate Debtor having 1.03% share in CoC, namely Lodha Development Management Pvt. Ltd. (“Lodha”), the Promoters of the Corporate Debtor, namely Mr. Suman Gupta, promoter; the employees of the Corporate Debtor, namely Employees Association and the Resolution Applicant himself, namely Taguda Pte. Ltd. (the Resolution Applicant/Taguda). The objection raised was regarding the justification of the alleged 'commercial wisdom' claimed to be exercised by the CoC.

After considering various laws and discussions, the Hon’ble NCLT decided that the decision made by CoC for liquidation of company shall stand cancelled.

The Hon’ble NCLT observed that the job of the Adjudicating Authority is not merely a stamping authority to approve each and every decision of the CoC, but to test decision on three parameters i.e. (i) it's feasibility, (ii) it's viability & (iii) it's effective implementation. In the present case, the CoC



has not demonstrated “no viability” and “no feasibility” of the Resolution Plan, therefore, the decision to liquidate is a flawed decision.

The Hon’ble NCLT also observed that Liquidation has to be a last resort, that too in Public interest which ought to be fair and just, only in the absence of a Resolution Plan. Therefore, the decision of CoC, which is adversely affecting so many lives, be based upon common judicious prudence coupled with commercial viability, and lack of these criteria is nothing but a bad exercise of a non-commercial decision.



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- 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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