



ASL

INSOLVENCY TIMES





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Editorial



Now Omicron impeding IBC progress

After enormous efforts at the level of Ministry of Corporate Affairs, long outstanding vacancies at various NCLTs across India were filled, Omicron, the mutant variant of Covid -19 has put a virtual halt to hearing process. We have another notification from the registrar of NCLTs that only urgent matters will be heard in the coming days due to staff at NCLTs catching deadly virus. It's been almost two years now that NCLTs have not functioned normally. The revival of toxic assets is getting delayed leading to further deterioration.

The plan at NCLTs is to switch back to 100% virtual hearing. Its time that we have to adopt virtual processes and achieve sufficiency & performance but, the courts in India have predominantly worked in paper book mode.

Some innovative thinking is required towards revival of sinking assets of the Corporate Debtor.

Expect more vibrancy from the Insolvency law.

Stay Alert!

Anju Agarwal

Partner

ASC Insolvency Services LLP



Government seeks comments on proposed changes to Insolvency Law

Changes have been proposed to enable a swift admission process, streamlining provisions pertaining to avoidable transactions and wrongful trading and norms

The Government has invited comments on various amendments proposed to the Insolvency law, including provisions relating to the time period for approval of resolution plans as well as avoidable transactions and wrongful trading. The amendments have been proposed by the Insolvency Law Committee (ILC).

As per the public notice issued by the government in this regard, changes have been proposed to enable a swift admission process, streamline provisions pertaining to avoidable transactions and wrongful trading and norms relating to the time period for approval of resolution plans. Besides this, amendments have also been sought in connection to the closure of the voluntary liquidation process and the Insolvency and Bankruptcy Fund.

As per the government sources, the proposed amendments are for the Corporate Insolvency Resolution and Liquidation Framework, which is being administered by the Ministry of Corporate Affairs. To make the admission process for the insolvency cases faster and more efficient, it has been suggested that Financial Creditors should be asked to rely on Information Utility records to establish default. Then the Adjudicating Authority would only be required to consider the Information Utility- authentic records as evidence of default for section 7 applications filed by such Financial Creditors as prescribed.

Under the Code, the provisions on avoidable transactions provide certain look-back periods. Currently, the threshold for such period is the date of admission of a application for initiation of the process. The proposed amendment is to change the threshold for the look-back period from the date of commencement of CIRP to the date of filing of the application for initiation of CIRP.



NCLAT Chennai stays Corporate Insolvency Resolution process in respect of Tata Projects Limited

The Chennai Bench of the NCLAT has stayed the order initiating Insolvency upon being informed that the parties have entered into a settlement agreement

The Chennai Bench of the National Company Law Appellate Tribunal (NCLAT) has stayed the order initiating Corporate Insolvency Resolution Process against Tata Projects Limited upon being informed that the parties have entered into a settlement agreement. The NCLAT also directed the Insolvency Resolution Professional (IRP) to file an application for the withdrawal of the corporate insolvency resolution process (CIRP) under Section 12A of the Code before the Adjudicating Authority within three days. Further, the Adjudicating Authority was directed to dispose off the said application filed by the IRP within three days without fail.

"Till the disposal of the 12 A Withdrawal of Application, the implementation of the impugned order shall remain stayed. In the interregnum, there is no impediment for the Board of Directors of the Corporate Debtor to function independently", The Appellate Adjudicating Authority held.

The National Company Law Tribunal, Hyderabad had recently initiated the CIRP against Tata Projects for its failure to pay back the legally established dues to Nexo Industries Private Limited. However, during the hearing of the appeal, it was brought to the notice of the Bench that the subject matter had been resolved between the parties amicable and accordingly a direction for withdrawal of the Insolvency petition was sought on the matter.

Insolvency Proceedings against Shipping company would not bar Suit against Vessel: Bombay High Court

Under the Admiralty Act, Vessel is treated as a separate Juristic entity which can be sued without joining the owner of the said Vessel to the proceeding

In a significant judgment, the Bombay High Court has held that a Shipping Company slipping into liquidation under the Insolvency and Bankruptcy Code will not impact an ongoing Admiralty Suit against its Vessel as the two are separate entities. The present case involved an interplay between the bar against further suits and proceedings under Section 33(5) of the Insolvency and Bankruptcy Code (IBC), and the Admiralty Act and the effect that Insolvency proceedings would have on admiralty claims.

The proceedings involved a claim arising from timely bills raised as berthing charges along with other expenses which were paid by the Plaintiff for securing the ship during a storm. Meanwhile, the company that owned the ship went into liquidation under IBC and the Liquidator was appointed. Eventually, the Plaintiff instituted the present Admiralty suit to recover the berthing charges and other costs.

The Court observed that the bar under Section 33 (5) is applicable only against the Corporate Debtor and not his property which would be a separate entity.



"The said provision prohibits the institution of a suit or other legal proceeding against the Corporate Debtor only. It does not in any way prohibit the institution of a suit or other legal proceeding against a ship/Vessel owned by the Corporate Debtor when invoking the Admiralty Jurisdiction of this Court. I say this because under the Admiralty Act, the Vessel is treated as a separate juristic entity which can be sued without joining the owner of the said Vessel to the proceeding", the High Court held.

The Court went on to explain further that the actions against Vessels under the Admiralty Act would be actions in rem and decrees could be sought against the Vessel in question without suing the owner of the said Vessel (the Corporate Debtor in this case). The purpose of an action in rem against the Vessel is to enforce the maritime claim against the Vessel and to recover the amount of the claim from the Vessel by an admiralty sale of the Vessel and for payment out of the sale proceeds.

Hyderabad Company gets Mehul Chowksi's Firm after Resolution Process

The Hyderabad Bench of NCLT approved the Resolution Plan submitted by Ace Developers

The Hyderabad based Ace Urban Developers Limited now owns AP Gems and Jewellery Park Private Limited, earlier owned by fugitive diamantaire Mehul Chowksi. The Company has gone into the hands of Ace Urban Developers through corporate insolvency resolution process (CIRP) initiated and concluded in the National Company Law Tribunal, Hyderabad (NCLT). The Resolution Professional (RP) of AP Gems had filed an application before the Adjudicating Authority putting forward the Resolution Plan in respect of the company and the NCLT approved the Resolution Plan of Ace Urban Developers.

The Company had gone into Insolvency in 2019 following an application by Phoenix Tech Tower company for initiation of CIRP on account of dues payable to the latter. Assets of AP Gems comprises of the company's two-acre land at Banjara Hills along with a five-storeyed building with 2 lakh square feet of constructed space which were attached by the Enforcement Directorate (ED) in 2018 while investigating Rs. 6,000 crore scam allegedly committed by Chowksi and his associates.

The tussle over these assets is yet to attain a finality as the courts had on earlier occasions, upheld claims of ED that is investigating the case. As the attachment of assets was made first by the ED and the Insolvency process came later on, it is being perceived that the ED has an upper hand in relation to the assets.

Videocon Industries: Lenders to vote on restarting the Corporate Insolvency Process

Although the Appellate Adjudicating Authority has started the process, however lenders can go ahead with it only after a resolution on this is passed by the requisite majority

As per sources, Lenders of consumer durable company Videocon Industries and its 12 units have decided to vote on starting afresh the Resolution process of the Venugopal Dhoot-promoted group as directed by the Appellate Adjudicating Authority. However, lenders can go ahead with it only after a resolution for the said purpose is passed by the requisite majority. At least 66% of lenders would have to vote in order to restart the process.



National Company Law Appellate Tribunal (NCLAT) ordered that winning bidder Twin Star Technologies' Resolution Plan was not compliant with the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC) and remitted the matter back to the Committee of Creditors (COC) to complete the Resolution process.

In December, 2020, 95% of lenders had voted in favour of the plan from Twin Star, the holding company of Vedanta Ltd. However, afterwards the CoC appealed to the NCLAT that the Twin Star plan was not feasible, following criticism that Videocon and its units were sold at a throwaway price. The recovery for lenders was 4.15% of the admitted claims.

Lenders are in the process of seeking a better resolution plan than the one submitted by Twin Star, however it is going to be challenging to draw a finer Resolution Plan since the liquidation value and the offer by the winning bidder is already known. Also, as per sources, Twin Star is in the process of filing an appeal against the order of the Appellate Adjudicating Authority. It is likely to argue that once a plan is approved by the NCLT, it is binding on all the stakeholders in line with the landmark Supreme Court order on Ebix Singapore, which stated that an NCLT-approved plan cannot be withdrawn or modified.

Sical Logistics has received bids from four applicants in Resolution Process: Lenders hope to recover atleast one-fourth of their dues

The company which began facing a liquidity crunch after the sudden demise of promoter VG Siddhartha in July 2019

Lenders of Sical Logistics, a subsidiary of listed Coffee Day Enterprises has received four bids from Resolution Applicants in its corporate insolvency resolution process(CIRP) of which, Ambey Mining and Pristine Malva Logistics have separately made the highest offer, as per sources. Sical Logistics received 26 expressions of interest although only four entities submitted firm Resolution Plans. Lenders are hoping to recover at least one-fourth of their dues from the company which began facing a liquidity crunch after the sudden demise of promoter VG Siddhartha in July 2019.

The Company has admitted claims worth 1,561 crores. After the demise of the promoter, the company faced a liquidity crunch due to its inability to execute projects it had won. As a result, these projects were put on hold. Bankers continued to withhold collections from operations towards debt servicing obligations, including certain obligations falling due in the future.

Sical Logistics got admitted for the corporate insolvency process in March 2021 after talks of a debt-recast scheme between the company and lenders collapsed. In fact, till March 2019, Coffee Day Enterprise had infused Rs 281 crores as unsecured loans to the subsidiary for meeting various funding requirements of the businesses, according to a credit rating report. Sical Logistics is in the business of mining, multi-modal logistics for bulk and containerised cargo port terminals, port handling, trucking and warehousing, ship agency, customhouse agency, offshore supply logistics and retail logistics. On a consolidated basis, it has investments in port terminals, container freight stations, container rail and a dredger.



LATEST JUDGMENTS

M/s. Visisth Services Ltd. Vs. Liquidator of United Chloro-Paraffins Pvt. Ltd, NCLAT

Sale of a Company as a 'Going Concern' means sale of both assets and liabilities, if it is stated on 'as is where is basis'

The Hon'ble NCLAT dealt with the issue whether the Successful Bidder can withdraw from the Bid after payment of the EMD and seek for refund of the amount paid on the ground that the offer made by the Bidder was a 'conditional offer'.

On first issue, whether sale of Corporate Debtor as a 'Going Concern, in Liquidation Proceedings includes its liabilities, NCLAT holds that it can be seen from the Regulation 32 A of the IBBI (Liquidation Process) Regulations, 2016 that Sale as a 'Going Concern' means sale of assets as well as liabilities and not assets sans liabilities. We conclude that Sale of a Company as a 'Going Concern' means sale of both assets and liabilities, if it is stated on 'as is where is basis'.

On second issue, whether the Successful Bidder can withdraw from the Bid after payment of the EMD and seek for refund of the amount paid on the ground that the offer made by the Bidder was a 'conditional offer', NCLAT held that the Liquidator will carry on the business of the Corporate Debtor for its beneficial Liquidation as prescribed under Section 35 of the Code. The Liquidator will only act and cannot modify/revise the terms of the contract. The Liquidator shall endeavour to sell the Corporate Debtor Company as a 'Going Concern' only in accordance with the law.

If the Bidder is allowed to withdraw from the Bid at this stage and seek refund on the ground that their conditional offer has not been accepted, then the liquidation process would be a never ending one, defeating the scope and objective of the Code, said the Appellate Bench. In the declaration signed, the Appellant-Bidder unconditionally agreed to abide by the terms of the e-Auction which is inclusive of forfeiture of the EMD, in the event the Bidder did not perform their part of obligation after the acceptance of the Bid in their favour.

The acceptance was conveyed to the Bidder. Clearly noting the terms and conditions that the Company was being sold as a 'Going Concern in an as is where is basis', the Bidder cannot now be permitted to turn around and plead that their offer was conditional.



Wittur Elevator Components India Pvt. Ltd. Vs. Axiomata Elevators Pvt. Ltd.

Section 17 of the Code can be interpreted as suspension of powers of the board of directors and not their duties & responsibilities, the Board is fastened with the responsibility of running & managing the company's affairs

The National Company Law Tribunal (NCLT), Kochi Bench has held that on a careful reading of Section 17 of the Code, this can be interpreted as suspension of powers of the Board of Directors (BOD) and not their duties and responsibilities. The NCLT went on to hold that the Board is fastened with the responsibility of running and managing the company's affairs. If the powers of the Board are suspended and the management of the affairs of the Corporate Debtor vests with the Interim Resolution Professional (IRP) after his appointment, then the responsibility also lies with the IRP.

The suspension of the powers of the BOD means suspension of the role of directors, and responsibilities emanating from such role. Section 20 mandates the Interim Resolution Professional to preserve and protect the value of the property and to manage the operations of the Corporate Debtor as a going concern. But in this case, even though the RP is empowered to take possession of the Registered Office and records of the Corporate Debtor, he has taken only symbolic possession of the same and allowed the suspended Directors to enjoy for their benefits. This, the Adjudicating Authority has held, is against the provisions of the Code. On verification of records of this case, it was seen that only one meeting of Committee of Creditors (CoC) took place with the presence of Resolution Professional, and without making any endeavour for inviting Expression of Interest, the CoC unanimously resolved to liquidate the Corporate Debtor.

Everest Organics Ltd. Vs. Leesa Lifesciences Pvt. Ltd.

CoC has the power to consider the eligibility/ineligibility of the Resolution Applicant whether they are eligible/ineligible under Section 29A(e) of the Code

The National Company Law Appellate Tribunal (NCLAT) holds that the Code and the Regulations empowers the Committee of Creditors (CoC) approving the Resolution Plan and also empowers that it shall not approve a Resolution Plan where the Resolution Applicant is ineligible under Section 29A of the IBC. In this case, the Adjudicating Authority directed the COC to consider whether the 3rd Respondent is really ineligible under Section 29A(e) of the IBC and therefore directed the COC, which has the power to approve the Resolution Plan and also consider the Resolution Applicant's ineligibility under Section 29A.

In accordance with the above Provisions of Law and the Regulations made thereunder, the Adjudicating Authority held that the COC has the power to consider the eligibility/ineligibility of the Resolution Applicant whether they are eligible/ineligible under Section 29A(e) of the Code. The stand of the Respondent was that the Resolution Professional did not afford any opportunity to cure the defect and suo motu rejected on the ground of ineligibility which is mere technicality. The COC has power to take a decision with regard to approval of the Resolution Plan.

Further in accordance with the Regulations, the Committee has power to evaluate the Resolution Plans received by the Resolution Professional. As per CIRP Regulation 39(4), the COC has power to approve



the plan and after approving the Plan by the Committee the Resolution Professional shall submit to the Adjudicating Authority. Therefore, this Tribunal is of the view that the COC has power to decide and approve the Resolution Plan of the Resolution Applicants. Further, the COC also can consider the eligibility/ineligibility of the Resolution Applicants under Section 29(A)(e) of the Code. This Tribunal in unequivocal terms stated that the order passed by the Adjudicating Authority has no legal infirmity or illegality.

Phoenix ARC Private Limited vs Vishwa Bharati Vidya Mandir

Writ Petition By Borrowers Challenging SARFAESI Proceedings Initiated By Private Banks/ARCs Not Maintainable: Supreme Court

The Supreme Court observed that a writ petition challenging proceedings under SARFAESI Act initiated by private banks/Asset Reconstruction Companies is not maintainable. "If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable. The court said that the activity of the bank/ARC (of lending the money to the borrowers) cannot be said to be as performing a public function which is normally expected to be performed by the state authorities.

The ARCs contended that the writ petitions against the private party - ARC and that too against the communication proposing to take action under the SARFAESI Act would not be maintainable at all, and, therefore, the High Court ought not to have entertained such writ petitions and ought not to have granted the interim protection to the borrower. On the other hand, the borrowers contended that the ARC to act fairly while dealing with the security so as to secure the interest of the borrower as well as public at large (depositors). As the ARC has not performed the statutory duty cast upon it and there is a contravention of the statutory duty imposed under the Security Interest (Enforcement) Rules, 2002, a writ would lie against ARC for such an illegal action.

M/s Mantena Laboratories Ltd. Vs. Union of India - Telangana High Court

A public announcement is required to be made immediately within 3 days from the date of appointment. However, the Regulation does not provide that in case the announcement is made after three days, it will become nullity

Hon'ble High Court after having carefully gone through the provisions of the Insolvency and Bankruptcy Code, 2016(IBC) and the Regulations framed thereunder has held that the statutory timeline for making a public announcement under the Code cannot specifically be interpreted to mean that any public announcement made after the lapse of the time period provided in the Act would make such announcement void. The Court observed that though it is true that a public announcement is required to be made immediately within three days from the date of appointment. However, the Regulation does not provide that in case the announcement is made after three days, it will become nullity.

The High Court further went on to hold that Section 60(5)(c) of the Code provides for an appeal in case of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings in respect of the Corporate Debtor. Therefore, there is an efficacious alternative remedy available to the petitioners to prefer an appeal in the present set of facts and circumstances.



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



Delhi Head Office

73, National Park, Lajpat Nagar IV,
New Delhi - 110024 (India)
Phone: +91-11-41729056-57, 41601289
www.ascgroup.in, info@ascgroup.in

Noida Corporate Office

C-100, Sector-2, Noida- 201301
Uttar Pradesh (India)
Phone No: +91-120-4729400

Gurgaon Office

605, Suncity Business Tower
Golf Course Road, Sector-54,
Gurugram - 122002, Haryana (India)
Phone No.: +91-124-4245110/116

Mumbai Office

MBAI SAGAR TECH PLAZA, A WING, OFFICE NO.
315-316, ANDHERI KURLA ROAD, SAKINAKA,
ANDHERI (E), MUMBAI - 400037, INDIA.
022-67413369/70/7171

Bengaluru Office

0420, Second Floor,
20th Main, 6th Block, Koramangala,
Bangalore - 560095, Karnataka (India)
Phone No.: 80-42139271

Chennai Office

Level2 – 78/132,
Dr RK Salai Mylapore
Chennai - 600004, Tamil Nadu (India)
Mobile No: +91-8860774980

Pune Office

UNE OFFICE NO. 4, 1ST FLOOR SILVER OAK,
SN NAGAR ROAD, WADGAON SHERI,
PUNE- MH – 411014
LANDMARK: NEAR INORBIT MALL

Singapore Office

11 Woodlands Close, #04-36 H,
Woodlands 11, Singapore -737853
Mobile No: +65-31632191
www.ascgroup.sg,
info@ascgroup.sg

Canada Office

885 Progress Ave Toronto
Ontario M1H 3G3 Canada

Please write us at: anju@insolvencyservices.in, mahima@insolvencyservices.in

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