



# ASC

## INSOLVENCY TIMES

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# INSOLVENT?



## From the Editor's Desk



Dear Insolvency Professionals,

### **Requirement of Framework in the Code for efficient development of Stressed Asset Market**

It is need of the hour to enable banker's, especially public sector banks to take economically efficient decisions, to entail the fair value of sinking firms. Debt re-negotiation is a major activity that must be taken up by banks to settle and value the debt by arriving at the fair value of the loan with necessary haircuts. This is allowable by the bankruptcy code, to take critical decisions about the company including adoption of resolution plans or to liquidate the company. This aims to uplift the stressed asset market and thereby, achieve the actual purpose of the Code.

Pre-packaged resolution schemes offer a quick corporate rescue option, which will be finalized mostly in boardrooms than in courts to save time and to avoid legal battles. It is heartening to know the developments in Sahoo panel report towards pre-pack and its detailed implementation. Such solutions must be incorporated in the framework to have a better resolution and bankruptcy market in the country.

Expect more vibrancy from Insolvency Resolution Process.

Stay Alert!

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## **NEWS FLASH FROM THE LAST MONTH**

### **Restored Insolvency petition in Case of Mittal Corporation Ltd.**

The Hon'ble NCLAT set aside the order passed by the Adjudicating Authority (NCLT Mumbai Bench) and restored the insolvency petition (Corporate Insolvency Resolution) against Mittal Corporation Ltd. NCLAT rejected the plea filed by Punjab National Bank to initiate insolvency proceedings against Mittal Corp and directed it to decide afresh “expeditiously”. It was raised that PNB had gone to NCLT on the basis of a circular issued by RBI on Feb 12, 2018. The appellate tribunal said there was no evidence suggesting that PNB had moved NCLT to initiate insolvency proceedings based on the said circular, under which it was not eligible to file as the default amount was less than Rs 2,000 crore. “In the absence of any cogent evidence to show that the Appellant (PNB) has filed the Application only pursuant to the ‘Circular’ issued by Reserve Bank of India, which we hold at the outset, was not applicable to the facts of the instant case, it was not open to the Adjudicating Authority (NCLT) to reject the application on this ground,” appellate tribunal said.

### **Ex- employee of Financial Creditor can be Resolution Professional**

Supreme Court, in the case of Metenere Ltd. where SBI is the financial creditor and its ex-employee is receiving pension, observed at the outset that NCLAT’s approach was not correct that merely Resolution Professional who remained in the service of SBI and is getting pension, was disentitled to be Resolution Professional. NCLAT held that there could be bias, but Supreme court found that there is no such disqualification as per Regulation 3(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

### **Importance of Bank Guarantee And Its Invocation**

In case of Hindustan Construction co. ltd. Vs. state of Bihar and ors an important issue was confronted in front of Supreme Court and that is difference between conditional and unconditional guarantee. Since, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary.

To invoke the guarantees and recover the amount from banks, the first and foremost step is to identify if the guarantee is conditional or unconditional, which is an issue of interpretation. The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else, the invocation itself would be bad.

In the case, even though “unconditionally” was used in reference to the guarantee initially, but it was read to clarified that “giving right of claim of recovery to the employer” was mentioned too. The guarantee in this case is conditional.

A conditional guarantee is where liability of guarantor arises when proof of breach of terms is given. In unconditional no such proof is required. It attaches the moment the demand is made. Court often interprets contracts to determine what kind of Guarantee is required, since nomenclature may not be exclusive.

Invoking unconditional guarantees does not require any process and are automatically liable and the Bank guarantee is an independent contract.

It is important to have these points while executing any bank guarantee in the resolution process under Insolvency and Bankruptcy code, 2016 as well, since the same principles are followed for its execution for recovery.

Insolvency and Bankruptcy Code 2016 (IBC) came as a landmark legislation to resolve and revive the units in country. The Code has paved way for many a resolution and recovery by financial institutions has been over 45%. However, the recent times have seen that in the insolvency proceedings against corporate debtors there is neither any asset nor any running business and as such, no resolution applicant is coming forward to propose a resolution, resulting in an unusually high incidence of liquidation process under the IBC. Taking the real estate sector example. A resolution applicant would get attracted only if there are inventories or 'receivables' from the allottees. The financial creditor, who is also a secured creditor, would like to have minimum haircut. The matter gets more complicated for many of the allottees have mortgaged their allotted flats to other financial institutions. This makes it a complex resolution process, not attracting Resolution Applicants.

### **SECTION 31 - Corporate Insolvency Resolution Process – Approval of Resolution Plan<sup>1</sup>**

This case brings us to the important issue of involvement of adjudicating authority in finalisation of resolution plan.

Where once a resolution plan has been approved by committee of creditors, statutory mandate on Adjudicating Authority under section 31(1) is to ascertain that a resolution plan meets 37 requirement of sub-sections (2) and (4) of section 30 thereof and there is no provision in Code or Regulations that the *bid of any resolution applicant has to match liquidation value*. Order approving resolution plan of the applicant was appealed against by one of the promoters of the corporate debtor as well as the financial creditor on ground that amount offered under resolution plan was less than liquidation value of the corporate debtor. The NCLAT allowed appeals and directed the appellant to increase upfront payment accordingly and held that failure to deposit enhanced amount with escrow account within thirty days would lead to setting aside of the resolution plan. On appeal, the appellant submitted that the NCLAT had exceeded its jurisdiction in directing matching of liquidation value in the resolution plan. Held that there is no provision in the Code or Regulations under which bid of any Resolution Applicant has to match liquidation value arrived at in manner provided in regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. For final approval of a resolution plan, the Adjudicating Authority has to be satisfied that requirement of sub-section (2) of the section 30 has been complied with. Once a resolution plan has been

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<sup>1</sup> Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh - [2020] 113 taxmann.com 421 / [2020] 158 SCL 567 (SC)



approved by the committee of creditors statutory mandate on the Adjudicating Authority under section 31(1) is to ascertain that a resolution plan meets requirement of sub-sections (2) and (4) of section 30 thereof. Where no breach of said provisions in order of the Adjudicating Authority in approving resolution plan had been found, the Appellate Authority could not have interfered with the order of the Adjudicating Authority.

### **The NCLAT set aside the insolvency proceedings against Ansal Properties and Infrastructure Ltd**

The petition was filed by the two flat buyers who had jointly booked a unit in APIL Sushant Golf City Lucknow and one of them has also booked separate unit in same project, against the Ansal Properties and Infrastructure Ltd (APIL), In the said petition It admitted the insolvency plea against APIL based on the recovery certificate which was issued by the Uttar Pradesh Real Estate regulatory Authority (UP RERA) because as per the agreement between them, the APIL undertook to complete it within two years from the date of commencement of construction on receipt of sanction plan from the authority and give them the possession within 2 years but he failed to do so.

NCLT gave its judgment on 17th march to initiate the resolution process and appointed an interim resolution professional replacing the board of the company.

When the petition was filed by Sushil Ansal, a director and shareholder of the company who challenged the NCLT order, the three member NCLAT bench gave its judgment that-

1. Order given by the NCLT to be set aside
2. The management of the company to be handed back to its board.

The NCLAT has observed that a decree-holder cannot be treated as a financial creditor for the purpose of triggering insolvency proceedings against a company. It states that NCLT should not admit the application of home buyers who claim to be financial creditors but as a decree holder on account of non-payment of the amount due under the recovery certificate issued by UP RERA.

Although it has been said that the decree holder is covered by the definition of creditor under S.3 (10) of the IBC but such entity would not fall in the definition of financial creditor unless the debt was disbursed against the consideration for the time value of money or falls within any of the clauses in the definition of financial debt.

### **Limit of 1 crore in IBC is universal and applies fairly to all?**



The limit of 1 crore depends on whether application is filed by a financial creditor or an operational creditor. If it's a financial creditor, one can file an application collectively through representative for an aggregate amount of default which can be more than 1 crore most likely. However, if it's a case of operational creditor, then there's no remedy of filing collectively as IBC does not provide for combined application being filed by operational creditors. In such cases operational creditor has no right to recover their dues from corporate debtors. This causes disadvantages to small operational creditors.

### **Objection to be raised before approval of Resolution Plan<sup>2</sup>**

NCLAT in a case recently held that any objection on networth certificate provided by Successful Resolution Applicant cannot be raised by the suspended Board of Directors after the Resolution Plan has been approved by the CoC with huge majority of voting share.

It was pointed out that the Appellant has participated in Committee of Creditors' meeting during CIRP process but never raised the issue with regard to the eligibility of Respondent, who is resolution applicant, as regards networth criteria. It was considered too late in the day to accept the argument emanating from the Appellant that the networth of the Resolution Applicant calculated on the basis of market value of fixed assets minus secured loans is not in accordance with the definition of net worth under Section 2 (57) of the Companies Act, 2013. No objection to calculation having been raised at the relevant time and the criteria adopted for arriving at the conclusion in regard to networth not being shown to be fundamentally flawed and perverse, argument raised on this score is repelled. No objection on this score can be permitted to be raised by the Appellant after the Resolution Plan has been approved by the Committee of Creditors with huge majority of voting share

### **Substantial material required by CoC to approve liquidation**

In Edelweiss Asset Reconstruction Co. Ltd. v. M/S K.K. Kadri Paper Mills Pvt. Ltd., the NCLT Ahmedabad held that even though the CoC is empowered under S.33 of the Code to authorize liquidation of the corporate debtor, they need to show relevant material to throw light on the need for liquidation, and in the absence of such supporting material the CoC's decision for liquidation cannot be accepted by the NCLT.

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<sup>2</sup> Singh Raj Singh V. SRS meditech Limited (2020) ibclaw.in 289 NCLAT



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

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