



ABC

INSOLVENCY TIMES





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Editorial



Selling Company as a Going Concern under Liquidation needs more clarity

Liquidation Regulations 32 (e) and (f) allow the Liquidator to sell the Corporate Debtor or the business of the Corporate Debtor as a going concern. However, while handling such matters, it has been found that more procedural clarity is required from our Regulator, Insolvency and Bankruptcy Board of India (IBBI).

The auction purchaser requests for Reliefs & Concessions as normally resolution applicants do while submitting a resolution plan during CIRP. Under normal liquidation process, the Liquidator will sell and handover the assets to the auction purchaser, keep the Stakeholders' Consultation Committee informed and file application for dissolution of the Corporate Debtor. However, there remains a lack of clarity as in case the said reliefs and concessions are sought, who should approach the Adjudicating Authority, the Liquidator or the auction purchaser. Moreover, such clarity is also to be brought in the e-auction process document issued prior to holding e-auction for information of the auction purchaser.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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1. Success Fees to Resolution Professional disallowed

The Appellate Tribunal laid down that such fees was not a part of IBC for being of a speculative and contingent nature

The Principal Bench of the National Company Appellate Law Tribunal has held that 'success fees' which is more in the nature of contingency and speculative, is not a part of the provisions of the Insolvency and Bankruptcy Code and the related Regulations and thus it is not chargeable by an insolvency Resolution Professional.

The Tribunal thus went on to disallow payment of success fee to a resolution professional, while expressing its concern over the practice of paying such fees to RPs on successful completion of the corporate insolvency resolution process. It was the case of the iRP that the approval of the success fees was a commercial decision of the CoC and the Adjudicating Authority could not have interfered with the same while approving the Resolution Plan and directing distribution of the amount set apart for success fees.

It was observed that under the Code and the related Regulations, there existed no express provision for grant of success fee. While placing reliance on Section 206, 5(27) and 5(13) of the IBC and paras 25 to 27 of the Code of Conduct, First Schedule of IBBI (Insolvency Professionals) Regulations, 2016 which dealt with remuneration and costs, the appellate Adjudicating Authority dismissed the appeal and upheld the order of the Adjudicating Authority which, while not accepting success fee, ordered proportionate distribution of the same among the creditors.



2. NCLAT can't condone delay exceeding 15 days from the Period of 30 days under Section 61(2) of IBC, holds Supreme Court

Appellant had preferred aggrieved by the Order whereby NCLAT refused to condone Delay of 44 days in preferring the Appeal

An appeal preferred before the National Company Law Appellate Tribunal (NCLAT) was dismissed on the ground that condonation was being sought for a lapse of 44 days over and above the statutory period of limitation i.e. 45 days (30 + 15 days) from the date of passing of the impugned order by the Adjudicating Authority. This happened in the case wherein the State Bank of India had initiated insolvency proceedings before the National Company Law Tribunal (NCLT) under Section 7 of the insolvency and Bankruptcy Code, 2016 against Duna Foods Limited (Corporate Debtor) on the ground that the Corporate Debtor had taken credit limits by hypothecating the commodities kept in the warehouses of the appellant.

The NCLAT had noted that the appellant had applied for the certified copy of the order passed by the adjudicating authority after a delay of 34 days. Hence, as noted by the Supreme Court, the said copy of the order was applied beyond the prescribed period of limitation i.e. beyond 30 days and the Appellate Adjudicating Authority did not commit any error in making its decision. Further, the Hon'ble Apex Court stated that in a case there may arise a situation where the appellant may not be in a position to file the appeal within a statutory period of limitation and even within the extended maximum period of appeal which could be condoned owing to genuineness, viz., illness, accident, etc. However, Parliament has not carved any exception of such a situation. Hence, Supreme Court held that delay beyond 15 days in preferring the appeal is not condonable, the same cannot be condoned even in exercise of powers under Article 142 of the Constitution of India.

3. NCLT cannot permit modification or withdrawal of a Resolution Plan at the behest of successful Resolution Applicant: Supreme Court

An open-ended process for further negotiations or a withdrawal, would have a deleterious impact on the Corporate Debtor, the Court said

The Supreme Court, while ruling that the corporate insolvency resolution process (CIRP) carried out under the Insolvency and Bankruptcy Code, 2016 must be completed within 330 days as laid down by the Code, has also laid down that the Adjudicating Authority cannot allow modifications or withdrawals of Resolution Plans approved by the Committee of Creditors at the behest of the successful Resolution Applicant, once the plan is submitted to it.

The Bench ruled that the time limit can be extended only in exceptional circumstances as otherwise, the open-ended process for further negotiations or a withdrawal, would have a deleterious impact on the Corporate Debtor, its creditors, and the economy at large as the liquidation value depletes with the passage of time.

It asked the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) to stick to this and should therefore, while deciding IBC matters, respect the deadline keeping in mind the effect of such delays on the insolvency resolution process.



“Judicial delay”, it said, was one of the major reasons for the failure of the insolvency regime that was in effect prior to the IBC and added that we cannot let the present insolvency regime meet the same fate. The judgment came on an appeal against an order of the Appellate Adjudicating Authority.

4. NCLT/NCLAT should strictly adhere to IBC timelines; delays cause commercial uncertainty: Supreme Court

The Apex Court while issuing a slew of directions to the Adjudicating and Appellate Authorities asked them to clear pending Resolution Plans forthwith

The Supreme Court directed the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) to closely follow the Insolvency and Bankruptcy Code (IBC) schedules and clear outstanding Resolution Plans within the 330-days timeframe. Excessive delays, according to the Bench, induce commercial uncertainty, a decline in the value of the Corporate Debtor, and render the insolvency and Bankruptcy procedure inefficient and expensive. The Apex Court stated that if these delays become systemic and frequent, they will have an evident impact on the parties' commercial assessments during the negotiation.

The Bench placed reliance on the Thirty-second Report of the Ministry of Corporate Affairs' Standing Committee on Finance (2020-2021) on 'Implementation of Insolvency and Bankruptcy Code- Pitfalls and Solutions' which represented a despondent state of affairs regarding the pendency of applications before the Adjudicating Authority.

According to the Court, excessive delays produce commercial uncertainty, a decline in the value of the corporate debtor, and make the procedure inefficient and costly. Supreme Court urged the NCLT and NCLAT to be aware of the impact of such delays on the insolvency resolution process, as well as the fact that adjournments limit the judicial process' efficacy. The NCLT and NCLAT should make every effort to comply with the IBC's timetables and clear pending resolution proposals as soon as possible, the court stated.

5. RBI supersedes Boards of 2 Srei Companies; Insolvency process to begin soon

The Council noted the need to keep a continuous vigil by the Government and all Regulators on the Financial conditions.

The Reserve Bank of India (RBI) has superseded the Boards of Srei Infrastructure Finance and Srei Equipment Finance, which will be taken for Insolvency proceedings owing to governance concern and payment defaults by them.

This is the second instance of the RBI superseding a Finance Firm's Board. Earlier, it had taken such action in the case of mortgage lender DHFL, which now after successful resolution is under the wing of Piramal Enterprises.

According to estimates, banks have about a Rs 28,000-crore exposure to Srei and bond holders another Rs 18,000 crore. Analysts expect a steep haircut as part of the resolution. Sources have pointed out that the company was “shocked” at the decision and would pursue all legal options.



The RBI will reportedly initiate the process of resolution of the two non-banking financial companies under the Code and the rules framed thereunder. It will also apply to the National Company Law Tribunal (NCLT) for appointing the former Chief General Manager of the Bank of Baroda as the insolvency Resolution Professional.

6. Next phase of IBC implementation should be Personal Insolvency: Opinion by IBBI Chief MS Sahoo

The outgoing IBBI chief said the next phase should include “individual insolvency with provisions for a fresh start and an informal approach to insolvency resolution

The next phase of India’s insolvency regime should be the commencement of personal insolvency provisions and a greater emphasis on a more informal process for resolving insolvency, the outgoing Insolvency and Bankruptcy Board of India (IBBI) Chairperson MS Sahoo said in an interview. He opined that the next phase of the implementation of the IBC should include “individual insolvency with provisions for a fresh start and an informal approach to insolvency resolution, moving away slightly from court proceedings.”

The IBC does have provisions for a “fresh start” scheme for individuals with debts. The process would allow such persons who are unable to pay off their debts to be discharged of their liabilities. Individual insolvency proceedings for personal guarantors to Corporate Debtors under the IBC have commenced, however individual insolvency of Partnership and Proprietorship Firms as well as other individuals has not yet been brought into force.

Mr. Sahoo noted that the next phase of IBC would require improvement in “capacity, conduct and approach” of all players involved in the insolvency process, including committee of creditors (CoCs) and insolvency professionals. He added that considering an informal approach to insolvency resolution may yield better results.



LATEST JUDGMENTS

1. Technology Development Board Vs. Mr. Anil Goel & Ors.

Hon'ble Apex Court stays NCLAT order in the matter of Technology Development Board

Hon'ble Supreme Court stayed the order of NCLAT wherein it was held that once a Secured Creditor opts to reinquish its security interest, the distribution of assets would be governed by the provision engrafted in Section 53(1)(b)(ii) whereunder all Secured Creditors having reinquished security interest rank equaliy.

The Adjudicating Authority had held that the inter-se priorities amongst the secured creditors would remain valid and prevail in distribution of assets in liquidation. On appeal, the National Company Law Appellate Tribunal (NCLAT) observed that whether a secured creditor holds the first charge or second charge is material only if it elects to realize its security interest. A conjoint reading of sections 52 and 53 of the Code leaves no room for doubt that the legislature in its wisdom thought it proper to provide an option to the secured creditor armed with a security interest to choose out of the two options, namely, wither enforce security interest against the assets out of liquidation estate which is the subject of security interest or relinquish the same and claim as secured creditor in the manner set out under Section 53(1)(b)(ii) ranking equal to other secured creditors.

The Hon'ble NCLAT laid down that Section 52 incorporating the doctrine of election, read in juxtaposition with Section 53 providing for distribution of assets treats Secured Creditor reinquishing its security interest to the Liquidation estate differently from a Secured Creditor who opts to realize its security interest, in so far as any amount remains unpaid following enforcement of security interest to a secured creditor is concerned by relegating it to a position low in priority.

2. Rajendra Narottamdas Sheth & Anr Vs. Chandra Prakash Jain & Anr.

The material placed on record by the Corporate Debtor can be relied to justify enlargement of limitation period under Section 18 of Limitation Act

The Hon'ble Supreme Court has held that on the basis of a letter placed on record by the Corporate Debtor in its reply to an application under Section 7 of IBC amounted to an acknowledgement of debt outstanding as on the relevant date, NCLT had rightly held that the application was filed within the period of limitation. Further, the Supreme Court while hearing the argument that the onus to prove whether the application lies within the statutory period of limitation by virtue of Section 18 of the Code is upon the financial creditor, it laid down "the burden of prima facie proving occurrence of the default and that the application filed under Section 7 of the Code is within the period of limitation, is entirely on the Financial Creditor. While the decision to admit an application under Section 7 is typically made on the basis of



material furnished by the financial creditor, the Adjudicating Authority is not barred from examining the material that is placed on record by the Corporate Debtor to determine that such application is not beyond the period of limitation.” In light of the same, the Appeal by the Corporate Debtor was dismissed.

3. R. Velu, RP of Palm Lagoon Backwater Resorts Pvt Ltd Vs. Invent Assets Securitization and Reconstruction Pvt Ltd

The Corporate Debtor shall be ordered to be liquidated if the statutory period of 330 days has passed and the Resolution Applicant has failed to implement the Resolution Plan

The Resolution Plan approved by the Adjudicating Authority contained provision to transfer personal properties of the Promoter and Suspended Directors of the Corporate Debtor who had given their personal properties as security in favour of the Corporate Debtor, whom Corporate Debtor took loan. The National Company Law Appellate Tribunal On a prayer of the Appellant with regard to liquidating the Corporate Debtor, the Adjudicating Authority had taken the view that it cannot either order Liquidation or to direct the refund of the EMD, as the Tribunal had become *Functus Officio* after approval of the Resolution Plan with the consent of both the parties. The Adjudicating Authority had further observed that it cannot exercise its powers under Section 60(5) of IBC and recall its own orders regarding approval of the Resolution Plan and thereby cannot direct the RP to refund the EMD of the Respondent/ Resolution Applicant.

In appeal, the Hon'ble Appellate Adjudicating Authority (NCLAT) observed that if 330 days complete and the Resolution Applicant failed to implement the plan, the Adjudicating Authority ought to have passed the Order of Liquidation as per the provisions of the Code. The NCLAT further observed that the Respondent/ Resolution Applicant failed to comply the conditions as stipulated in the plan and directions given by the Adjudicating Authority. While placing its view that the Appellant has rightly moved the Application before the Adjudicating Authority seeking an Order of Liquidation of the Corporate Debtor, held that the Company ought to be liquidated for failure to implement the plan in its totality and on completion of 330 days under Section 33 of the Code. Further, as a necessary corollary to the said order by the NCLAT, it can safely be said that the Adjudicating Authority has the jurisdiction under Section 60(5) of the Code to review and reverse its own order of approval of the resolution plan when there is failure of the implementation thereof.

(NCLAT) set aside the order of the Adjudicating Authority and held that after coming into force of Part-III in the Insolvency and Bankruptcy Code, 2016 (IBC), one would have to proceed as per Chapter III of Part-III of IBC. In the Resolution Plan of Corporate Debtor, a provision relating to right of Financial Creditor to proceed against Personal Guarantor can be there, but enforcement of such right has to be as per provisions of law.



4. Pandurang Ramachandra Shinde, Suspended Board of Directors Vs. Vijendra Kumar Jain, RP

Property of the Corporate Debtor sold during moratorium is void immaterial of the question of depreciation in value

Where the Hon'ble Adjudicating Authority observed that on record fact remains that there is transfer of interest of the Corporate Debtor (which was to receive the amounts from the three entities) for the benefit of the Appellant Chief Executive Officer of Corporate Debtor who had to receive back unsecured loan given to Corporate Debtor, and this would put to detriment the other creditors of the Corporate Debtor, and accordingly allowed an application by the Resolution Professional for avoidance of transactions undertaken by the Corporate Debtor.

in an appeal before the National Company Law Appellate Tribunal (NCLAT), the NCLAT recorded that the parties before us have tried to argue and raise disputes with regard to the depreciated value and as to what was value at the time of sale of the car. But however in the present matter we need not go into those details as broad facts on the face of record (which are not in dispute) show that the CIRP was initiated on 18th December, 2018 and the Appellant who was continued by the CoC as Chief Executive Officer sold of the car of the Corporate Debtor after initiation of corporate insolvency resolution process (CIRP). The disputes being raised with regard to what was the depreciation and what was the value and if it was undervalued need not be decided as the act of the Appellant would be clearly hit by Section 14 of IBC and during moratorium the Appellant could not have transferred the car of the Corporate Debtor without the act being one in compliance of provisions of IBC, the Appellate Bench observed.

5. State Bank of India Vs. Fedders Electric and Engineering Ltd

Resolution Plan of Fedders Electric and Engineering Ltd approved by CoC on application of Resolution Professional

The National Company Law Tribunal (NCLT), Kolkata has approved the Resolution Plan in the matter of Fedders Electric and Engineering Ltd, the Corporate Debtor. The plan submitted by IM+ Capitals Limited envisages a total payment of 96.50 crores to be paid in 150 days from the date of approval of Resolution Plan by the Adjudicating Authority and all the funds shall be sourced by the Resolution applicant through its internal sources which includes the working capital, fixed deposits and internal resources of the company. However certain financial creditors namely Punjab National Bank having 11.73% voting share, Central Bank of India (8.96% voting share), ICICI Bank (4.70% share) and Toyota Financial Services Pvt Ltd (0.003% share) had dissented to the Resolution Plan.

The Hon'ble NCLT approved the Resolution Plan as approved by the COC after finding it in accordance with sub-section (2) of section 30 of the Insolvency and Bankruptcy Code, 2016 and after noticing that the plan provides for the interest of all the stakeholders of the Corporate Debtor.



6. Mr. Surendra Kanhaiyalai Shah v. M/s Magicon Impex Private Limited

Debt in the form of Security Deposit which is interest bearing amounts to Financial Debt under Section 5(8)(f) of the Code

The New Delhi Bench of the National Company Law Tribunal has held that the amount released in the form of Security Debt under an agreement and the same is interest bearing, would mean that it is carrying consideration of time value of money having commercial effect of borrowing and therefore the debt would fall under the definition of 'financial debt' in Section 5(8)(f) of the insolvency and Bankruptcy Code, 2016.

The Bench was hearing a petition filed by the Financial Creditor against the Corporate Debtor for initiation of corporate insolvency resolution process in respect of the Corporate Debtor under Section 7 of the Code. While hearing the Applicant on the issue of maintainability of the Petition, and whether the amount claimed by the Applicant is covered under the definition of financial debt under the Code. The Corporate Debtor had appointed the Financial Creditor as "Consignment and Freight Agent" and for that purpose the parties had executed an agreement, by virtue of which the Petitioner had paid and the Respondent had accepted an interest-bearing security deposit. It was submitted by the Petitioner that the term "financial debt" is not restricted only to loan in strict sense, but in its broader connotation, it includes all kinds of transactions wherein the money is raised by a party against consideration for the time value of money.



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,**
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