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Editorial

Whether PMLA overrides IBC: Supreme Court to decide

Whether moratorium imposed under the Code applies to actions by the Enforcement Directorate under the Prevention of Money Laundering Act (PMLA)? This question has been baffling the professionals involved in the domain of Insolvency and Bankruptcy Code (IBC) for some time now. It has been the conscientious opinion of the professionals in the domain that once the assets of the Corporate Debtor are subjected to a Resolution Plan, such plan after approval is binding on all stakeholders, including all government agencies.

The question as to whether there can be attachment or confiscation of assets by the ED after approval of Resolution Plan, is likely to be decided by the Apex Court soon, in the Appeal which has been filed by Ashok Kumar Sarawgi against the ED. The question is a significant one as the threat to the assets of the Corporate Debtor upon the offences committed by the erstwhile management thereof significantly affects the chances of resolution applicants coming forward to resolve the Corporate Debtor.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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All legal proceedings deemed stayed when Moratorium under Section 96 of IBC kicks in, rules Delhi High Court

The High Court further held that Interim Moratorium is limited to particular Guarantor and will not protect other personal Co-Guarantors

The High Court of Delhi has recently held that the interim moratorium under Section 96 of the Insolvency and Bankruptcy Code, 2016 (IBC) kicks in as soon as an application is filed by a creditor or a debtor for commencement of Insolvency proceedings under Section 94 or 95 of the Code, as applicable. As a result of this, all pending legal proceedings in respect of any debt are also deemed to have been stayed.

The High Court while dealing with two summary suits filed by the creditors of Bhushan Steel Limited against the ex-Promoters of Bhushan Steel for recovery of money, held that the Interim Moratorium under Section 96 of the Code is specific to all debts of a particular debtor and will not be applicable to other personal co-guarantors. The Court said that Interim Moratorium against one of the Co-Guarantors will not protect the other Co-Guarantors even though the liability of both the Co-Guarantors arise from the same debt.

The Court observed that a reading of Section 96 of IBC makes it clear that the relevant date for the interim moratorium to come into effect is the date 'when an application is filed under Section 94/95'. When the legislature has specifically used the word 'filed' in respect of an application under Section 94/95, the court cannot read the same to mean the date when the application is "registered", as is sought to be contended on behalf of the plaintiffs.

Future Retail Insolvency: 16 applicants submit Expression of Interest

Amongst the interested players are Reliance Retail Venture and April Moon Retail (a JV of Adani Airport Holding and Flemingo Group)

Adani Group and Reliance Industries are among the 16 bidders who have sent their expressions of interest (EoIs) to acquire the assets of Future Retail, currently undergoing corporate insolvency

resolution process (CIRP). WHSmith Travel Limited and Capri Global Holdings Limited have also shown interest, banking sources have reported.

The biggest known players who have expressed interest in the insolvent company are Reliance Retail Venture Limited and April Moon Retail Private Limited (Joint Venture between Adani Airport Holding Limited and promoters of Flemingo Group). Earlier this year, Reliance Retail had agreed to buy Future Retail and six other entities' assets for ₹24,713 crore. However, the said bid was rejected by the stakeholders of the Corporate Debtor.

The other interested contender is April Moon. Over the past two years, Adani Group has had a rapid expansion in its airports business. It already has eight airports under its umbrella. Flemingo Group, on the other hand, is a renowned duty-free player. Both these companies have formed a Joint Venture which has bid for Future Retail. Future Retail's brands have a significant presence at airports. According to sources, it owns monies to the airports too.

The process hereon will be to vet the eligibility of the players who have expressed interest. After this, a list of eligible potential bidders will be released by the Resolution Professional of Future Retail. Post that, sources said, the eligible bidders will get access to the data room of Future Retail where they can access important documents, evaluate assets and debts among other things. Once this process is over, the eligible bidders will be entitled to place a bid. The entire process could take up to three months.

The Adjudicating Authority extends time for completion of Insolvency Resolution process of SREI Infra till January, 2023

The Company is reported to have received interest from three Prospective Resolution Applicants

The Kolkata Bench of the National Company Law Tribunal (NCLT) has extended the time period for completion of corporate insolvency resolution process (CIRP) of SREI Infrastructure Finance till January, 2023. An application was filed by the Resolution Professional of the Corporate Debtor citing reasons for delay in completion of the process post the stipulated time period as per the Insolvency and Bankruptcy Code, 2016 (IBC).

As per Section 12(1) of the Code, the CIRP is required to be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process. However, the Resolution Professional of the company could not complete the process due to certain reasons alleged by him in his application for extension.

As per reports, three participants have shown interest in the Corporate Debtor and expressions of interests (EOIs) have been received thereby. The Committee of Creditors (CoC) have submitted before the Adjudicating Authority that serious prospective resolution applicants (PRAs) have submitted their EOIs for taking over and resolving the distressed company and its assets. The CoC of the Insolvent Company has further assured the Adjudicating Authority that it will make all endeavor to complete the resolution process within the time sought through the interim application.

The NCLT placed reliance on the totality of circumstances particularly keeping in mind that three additional EOIs

Government asks State owned companies to consider Insolvency courts to shut loss- making units

Public Sector companies would have to file Insolvency applications under the Insolvency and Bankruptcy Code, 2016

The Government of India has asked the state owned firms to consider moving the country's Insolvency courts, which are the National Company Law Tribunals (NCLTs) established across the country under the Insolvency and Bankruptcy Code, 2016 (IBC) and the rules thereunder, to shut loss making units. As per reports, the move of the Government comes from the hope for speedier resolutions as the Government looks to slim down its public sector holdings.

Public Sector Companies will have to file an Insolvency application under the Code for the resolution of a loss making unit within three months of approval from a committee comprising the top cabinet ministers, according to guidelines released by the Government.

The government is looking to close a loss-making unit in nearly nine months from the day the company seeks approval to do so. State run firms can also opt to close their units by approaching the Ministry of Corporate Affairs (MCA), as is currently the norm, the government has added in its guidelines.

The move is a renewed push by the government administration to slim down the public sector, an effort often hampered by land-related delays and disputes. The Board of parent companies have been asked to demerge land assets of their subsidiary companies to ensure that land disputes do not hamper shutting down units from now onwards.

Piramal Capital and Housing Finance withdraws Insolvency proceedings against Reliance Power

The entities have reached an out of court settlement over a 526 crores default by the Corporate Debtor

Piramal Capital and Housing Finance Limited haver reportedly withdrawn its application made for commencement of corporate insolvency resolution process (CIRP) against Reliance Power Limited under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC).

The move was reportedly followed by an out of court settlement reached between the companies over a loan of 526 crores defaulted by Reliance Power and its subsidiary Reliance Natural Resources Limited (RNRL). RNRL merged with Reliance Power in 2010.

The loan giving rise to the action was obtained from the erstwhile Dewan Housing Finance Corporation Limited (DHFL). The Piramal Group had acquired DHFL in 2021 and merged it with Piramal Capital and Housing Finance.

Piramal Capital initiated the Insolvency proceedings against Reliance Power under Section 7 of the Code before the Mumbai Bench of the National Company Law Tribunal (NCLT) for initiation of Insolvency in respect of the dues owed by the Company to Piramal.

IBBI Chief recommends Lenders to file for Insolvency after 90-day default

The delay in filing leads to erosion in the value of assets which is why CIRP applications shall be filed by creditors as soon as default has occured

Lenders should file for Insolvency proceeding against a company as soon as a 90-day default occurs to prevent erosion in the value of the assets, Insolvency and Bankruptcy Board of India (IBBI) chairman Ravi Mittal has said.

"It is noticed that more than a year is being taken by Financial Creditors in filing corporate insolvency resolution process (CIRP) applications post occurrence of default," Mittal said. "This delay leads to erosion in the value of assets. Thus, the creditors need to change their behaviour and submit the CIRP application early as soon as default has occurred", he further added.

There is a concern that the Insolvency and Bankruptcy Code (IBC) is losing its sheen due to excessive delays and loss of value in the resolution process, he pointed out in the Board's quarterly report released this week.

The Reserve Bank of India (RBI) mandates banks to classify an account as a non-performing loan if the borrower has an overdue of 90 days. Mittal pointed out that the lenders have the option to withdraw an application before the National Company Law Tribunal (NCLT) admits the case. Even if the CIRP application is admitted by the NCLT, if the Lenders agree on a settlement with the defaulting borrower, they still can withdraw the application under Section 12 A of the IBC, he added.

RECENT JUDGMENTS

Rajratan Babulal Agarwal v. Solartex India Private Limited

Standard of Pre-existing Dispute under the IBC is not equivalent to principle of 'Preponderance of Probability': Supreme Court

The Hon'ble Supreme Court of India while adjudicating an appeal has held that the standard with reference to which a case of a pre-existing dispute under the Insolvency and Bankruptcy Code, 2016 (IBC) must be employed, cannot be equated with the principle of preponderance of probability, which guides a civil court at the stage of finally decreeing a suit.

The Operational Creditor had filed a petition under Section 9 of the IBC seeking initiation of corporate insolvency resolution process (CIRP) against the Corporate Debtor before the National Company Law Tribunal (NCLT). The NCLT admitted the application and commenced the CIRP in respect of the Corporate Debtor on the premise that there was no pre-existing dispute as alleged by the Corporate Debtor and its Directors/ Management.

The Apex Court, while relying on Mobilox judgement, observed that IBC does not enable the Operational Creditor to put the Corporate Debtor into insolvency resolution process prematurely over small amounts of default. It is for this reason that it is enough that a dispute exists between the parties. However, the Supreme Court allowed the Appeal and held that NCLAT erred in its finding that there was no pre-existing dispute.

"The standard, in other words, with reference to which a case of a pre-existing dispute under the IBC must be employed cannot be equated with even the principle of preponderance of probability which guides a civil court at the stage of finally decreeing a suit. Once this subtle distinction is not overlooked, we would think that the NCLAT has clearly erred in finding that there was no dispute within the meaning of IBC", the Apex Court held.

Mr. Rakshit Dhirajlal Doshi v. IDBI Bank Limited

Once CoC decides to commence liquidation of the Corporate Debtor, Appeal against CIRP becomes infructuous: NCLAT

The National Company Law Appellate Tribunal (NCLAT), Principal Bench at New Delhi, while adjudicating an Appeal filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC), has held that an appeal challenging the order initiating the corporate insolvency resolution process (CIRP)

becomes infructuous if the Committee of Creditors decided to liquidate the Corporate Debtor and accordingly an application for liquidation is filed. The order of the Appellate Adjudicating Authority came while an application for commencement of Liquidation process filed by the Resolution Professional of the Corporate Debtor was pending before the National Company Law Tribunal (NCLT).

"After hearing the parties and going through the pleadings made on behalf of the parties, we agree with the reasons given by the Adjudicating Authority while passing the impugned order and as the CoC has recommended for liquidation of the Company for which the IA is pending before the Adjudicating Authority, hence this Appeal has become infructuous.", the Appellate Adjudicating Authority observed.

Mr. Dalip Narinder Gupta v. MSMK Printech Private Limited

Can an already appointed IRP by the NCLT be changed on instance of the Operational Creditor: NCLT Delhi

The National Company Law Tribunal, New Delhi (NCLT) was recently faced with a question whether an Operational Creditor who has not proposed the name of the Interim Resolution Professional (IRP) in its application for initiation of corporate insolvency resolution process (CIRP) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC), seek modification of the order of admission whereby the NCLT has appointed an IRP, proposing a different IRP.

In the present case, the Operational Creditor filed an application seeking modification of the order of the NCLT whereby the Tribunal had admitted the application for initiation of CIRP and appointed an IRP from the list of Resolution Professionals provided by the Insolvency and Bankruptcy Board of India (IBBI). The modification of the order was sought to the extent of replacement of the NCLT appointed IRP with the IRP proposed by the Operational Creditor in its application.

The Tribunal after considering the fact that the Operational Creditor had not proposed the name of any IRP in its CIRP application and the NCLT was pleased to appoint an IRP on its own, declined the request of the Operational Creditor to replace the IRP with the proposed one at this stage. The NCLT further observed that once the CIRP has been commenced it is the domain of the CoC and not the Operational Creditor to take steps with respect to replacement of IRP.

Jayashree Mohan erstwhile Director v. Pathukasahasram Raghunathan Raman

There is no provision under IBC to come out of the Liquidation process once Liquidation is ordered: NCLT Chennai

The Chennai Bench of the National Company Law Tribunal (NCLT) has recently held that the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC) treat corporate insolvency resolution process (CIRP) and Liquidation process as two separate stages and the procedures to be followed in each stage have been delineated by way of framing separate regulations by the Insolvency and Bankruptcy Board of India (IBBI)

In the present case, the Applicant had alleged that since it had settled all the creditors including Financial Creditors and Operational Creditors, hence there is no impediment in bringing an end to the liquidation process and allowing the revival of the Corporate Debtor.

However, the Tribunal held that there is no provision under IBC to come out of the liquidation process once liquidation is ordered, except by way of a Scheme under Section 230 of the Companies Act, 2013 or by Sale as a going concern and the provisions of IBC never envisaged for termination of liquidation process and as such the prayer sought by the Applicant transcends beyond the scope of the Code.

Darshan Gandhi v. USV Private Limited & Anr.

A Decree in respect of a Financial claim is a established proof of debt and default, and does not require any further agreements in writing: NCLAT, New Delhi

The National Company Law Appellate Tribunal, Principal Bench at New Delhi (NCLAT) has held that once the existence of 'Financial Debt' and its default has been admitted and confirmed by the Corporate Debtor, the absence of any written contract cannot be said to be an essential element to prove the Financial Debt, more so when the debt is confirmed and crystallized by way of a decree by the Debt Recovery Tribunal (DRT) in favour of the Financial Creditor. The NCLAT observed that in the present case, the nature of transaction has been established that there was a debt and default thereof.

The Appellate Adjudicating Authority, while observing that the City Civil Court had passed a decree confirming the debt, held that a decree in respect of a financial claim is a established proof of debt and default, and does not require any further agreements in writing.

Further, the Appellate Bench observed that judgment and/or decree for money in favour of a Financial Creditor, or the issuance of a Recovery Certificate in favour thereof would give rise to a fresh cause of action for the Financial Creditor to initiate proceedings under Section 7 of the Code, if the dues of the creditor under the judgment or decree or any part thereof remained unpaid.

Excel Engineering & Ors. v. Vivek Murlidhar Dabhade & Ors.

Payment of 100% dues of farmers and minimal percentage of dues to other Operational Creditors under the Plan is equitable distribution: NCLAT

The National Company Law Appellate Tribunal, New Delhi (NCLAT) recently was faced with an Appeal wherein the Resolution Plan of the Successful Resolution Applicant (SRA) was challenged being discriminatory and in violation of Section 30(2) of the Insolvency and Bankruptcy Code, 2016 (IBC) on the ground that the farmers, wo were operational creditors, were given 100% of the dues whereas the other operational creditors were allocated only 1% of their dues.

The NCLAT observed that the Corporate Debtor was a Sugar Industry and the farmers were an integral part thereof whose families are dependent on it. Moreover, the Appellate Bench observed, even the secured financial creditors accepted that 100% payment should be made to the farmers who are the backbone of the industry.

The Appellate Adjudicating Authority further clarified that there is no embargo in classification of the Operational Creditors into separate/different classes for deciding the way in which money is to be distributed to them by the Committee of Creditors (CoC) of the Corporate Debtor.

Accordingly, the Resolution Plan was approved and the NCLAT concluded by saying that the limited judicial review which is available, can in no circumstance trespass upon a business decision arrived at by the majority of the CoC, when even the material on record shows that the Plan was not lacking any equitable perception with respect to any criterion as envisaged under the Code.

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