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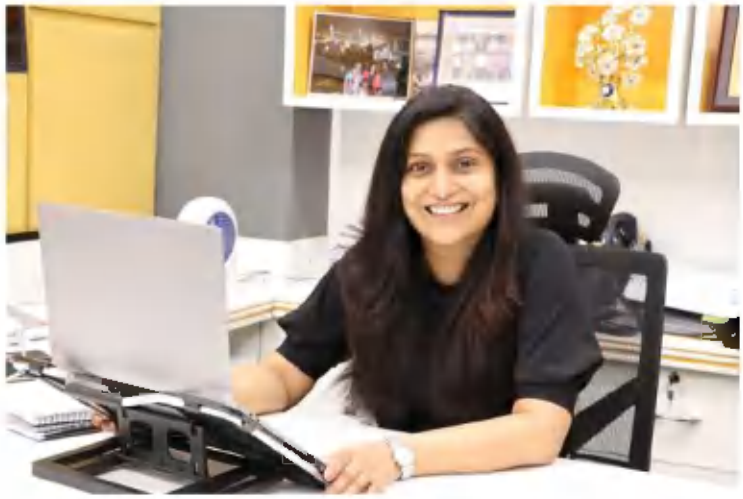

Is the NCLT prepared for post-Covid cases under IBC?

The government had suspended fresh proceedings under the Insolvency and Bankruptcy Code (IBC) starting from 25th March, 2020 and the era of suspension is likely to end this March as the government is not likely to extend it further. IBBI Chairman MS Sahoo was asked that once the suspension of IBC proceedings against Covid-related default is done away with from March, 2021, is there a possibiiity of a fiurry of cases coming up, and is the NCLT prepared for this.

Whiie expiaining that the number of appiications for initiating insoivency is iikely to increase, but the increase may not be significant, Sahoo pointed out that the stakeholders are continuing to resolve stress through CIRP in respect of stress other than Covid-19 stress, schemes of compromise and arrangement under the Companies Act and the RBi's prudential framework.

"They are expioring innovative options for resoiution of stress while taking severai cost cutting measures to avoid stress. Further the viabie companies would have normal business operations after the pandemic subsides, higher threshold of default keeps most MSMEs out of insolvency proceedings, also Covid-19 period defaults remain outside insolvency proceedings forever. Nevertheless, Government has proposed in the budget that NCLT framework will be strengthened and e-Courts system shail be implemented", he said.

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1. NCLT Hyderabad endorses Liquidator in BS Company's case, turns down demand of Lenders seeking Removal

BS Company, which is Involved in providing technology and Integrated IT solutions, currently owes a debt of Rs 3000 crores to banks. A bench of judicial member K Anantha Padmanabha Swamy and technical member Binod Kumar Sinha has pronounced that once the liquidation process is initiated, the lenders have no role to play. They have to remain as a mere group of claimants looking forward to the Liquidator to determine their claims.

While clarifying the role of a Liquidator in the liquidation process, the Bench elucidated that "As a Liquidator, he has got the power to seek a thorough probe into the loan fraud perpetrated by BS Company and its old management to unearth the gamut of issues ranging from complacency shown by the bankers and diversion of funds by the old management".

The Insolvency and Bankruptcy Code, 2016 ¬¬– under which the liquidator was appointed – is very clear about the role of the liquidator who enjoys the power to ensure that maximum money is realized through the sale of assets of the company under liquidation. In this whole process, there is no provision that enables the lenders to seek the removal of the liquidator.

The Lender institutions were finding it inconvenient when the liquidator was raising questions about the due diligence supposed to be done by the banks at the time of granting loans. The Liquidator can take steps to maximise the value of assets of the company under the liquidation process.

2. NCLT orders liquidation of Three C Homes Private Limited

The Nationai Company Law Tribunai has ordered liquidation of Three C Homes Private Limited after rejecting the resolution pian proposed by the soie resoiution applicant and passed by the Resoiution professionai. The NCLT opined that the Resolution Plan was not in compiiance with the provisions of IBC, specificaiiy the Insoivency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Reguiations, 2016 on the procedure to be foliowed at the time of approval.

The Bench felt that there was no effective participation of the authorised representative of the home buyers in the voting process conducted for approval of the Resolution Plan. Considering that the Resolution Applicant was offering only 19.77% of the liquidation value of the Corporate Debtor, the NCLT opined that Resoiution Pian did not have any potentiai to fulfii the dream of the homebuyers.

3. No MSME benefit under Section 240A of IBC, if date of registration after admission of CIRP

The Insoivency Law in india contains provisions for Micro, Smaii and Medium Enterprises (MSME's). The Insolvency and Bankruptcy Code (Second Amendment) Ordinance, 2018 has brought reiief to the MSMEs by relaxing the applicability of the provisions of Section 29A of iBC, as regards submission of a resolution plan in case of some particular entities in the favour of MSMEs. intention behind this is to restrain untrustworthy promoters from buying back assets at a subsidized price. Section 240A (1) provides that provisions of ciauses (c) and (h) of section 29A shali not appiy to the resolution appiicant in respect of corporate insolvency resoiution process of any micro, smaii and medium enterprise. However, for availing the said reiaxations, the Corporate Debtor should have the status of an MSME prior to the initiation of CIRP as has been recentiy heid in a case by the NCLAT, New Delhi.

4. Status Quo ordered on Accounts of Anil Amhani's Reliance Companies Declared Fraud

The Deihi High Court directed the State Bank of India (SBI) and the Reserve Bank of India (RBI) to maintain status quo in relation to the account of Anil Ambani's Reliance Communications (RCom) and its units. The State Bank of India toid the Deihi High Court that the said accounts were ciassified as "fraud" which couid open up the possibiiities of a probe by the Centrai Bureau of Investigation. The Court asked the bank to maintain status quo on the said accounts. Under Reserve Bank ruies, an account can turn into a Non-Performing Asset for default of payment for a specified period. However, once an account is declared as "fraud", the matter must be reported to the Reserve Bank and request made for a CBi inquiry if the amount invoived in the fraud is above ₹ 1 crore.

The laws aiso stipulate that the bank shouid fiie a compiaint with the Central Bureau of Investigation if the amount invoived in the fraud is above ₹ 1 crore. If the amount is iess than one crore, the local poiice investigates the issue. This shouid be done within a time frame of 30 days from the date of reporting the complaint to the Reserve Bank.

Point 3 Source : https://bit.ly/37e0xYH

Point 4 Source : https://bit.ly/3rSJ8xr

5. Demanding payment of outstanding amount by Recovery Agent - Not Ahetment to Suicide

The Nagpur Bench of the Bombay High Court quashed an FIR against a finance company empioyee, charged with abetment to suicide for demanding ioan repayment from a borrower. The Bench said that it was part of the empioyee's duty to demand the payment and by that act, he cannot be said to have instigated the borrower to end his life. A bench of Justices Vinay Deshpande and Anii Kilor heid that the Petitioner who was booked under Section 306 (abetment to suicide) of the Indian Penal Code, had merely been discharging his official duty in trying to recover the dues from the borrower.

The Borrower later ended his life and alleged in his suicide note that he was being harassed by the petitioner for loan repayment. The bench relied on its previous order which stated, "The allegations are oniy to the effect that the appiicant demanded outstanding loan amount from the deceased which was the part of his duty being empioyee of the finance company. In view of that, the demand of outstanding loan amount from the person who was in default of payment of ioan amount, during the course of empioyment as a duty, at any stretch of imagination cannot be said to be any intention to aid or to instigate or to abet the deceased to commit suicide,".

6. NCLAT allows extension of CIRP Period on ground of RP having tested positive for COVID- 19

NCLAT, New Deihi aliows exclusion of 203 days in the period of CIRP in an appeal by the Resoiution Professionai of Rosewood Trexim Pvt. Ltd., inclusive of the period for which the Resoiution Professional (RP) was immobilized as a victim of COVID -19. The Resoiution Professional had preferred the appeai assaiiing the impugned order inter aiia on the ground that the Resolution Professional had faiien sick and was necessitated to go into self-isoiation and that he subsequently tested positive for COViD-19. The Resolution Professional asserted that the progress in conduct of CIRP was hampered because of the legitimate iliness of the RP. NCLAT aiiowed the appeal while setting aside the impugned order and allowed exclusion of 203 days from CIRP period The Bench also allowed extension of CIRP period by 90 days. However, the Court's approach towards the delays justified by such grounds would always depend on case to case.

Point 6 Source : https://bit.ly/3rY01WF

JUDICIAL PRECEDENTS

1. Stressed Assets Stabilization Fund (SASF) Vs. V. Padmakumar & Anr

The Apex Court to entertain an appeal on the question whether entries in the balance sheet constitute an acknowledgement under Section 18, Limitation Act

It has been held by the Punjab and Haryana High Court that once the terms and conditions of the One Time Settlement (OTS) entered with the bank are violated by a borrower and the settled amount is not paid within the agreed time frame, no further orders are required from the Court to extend the period of payment under the OTS. The Division Bench further heid that in such a case, the Bank becomes free to recover the outstanding amount in accordance with the iaw, irrespective of the OTS.

In the instant case, the Court deciined to apply another case wherein it was heid that "ciaim for extension of time for payment of baiance settiement amount, pursuant to mutually agreed on OTS by the borrowers should be considered by the Court, liberaiiy." The Division Bench distinguished the present case from the Anu Bhaila case inasmuch as in that case extension of OTS was aliowed after the defauiter had already repaid over 50% of the settled amount.

The Supreme Court issued notice in an appeal against the NCLAT order which had held that entries in the balance sheet of the company do not constitute an acknowledgement of liability in terms of Section 18 of the Limltation Act, 1963. The relevance being for computation of the period of limitation for initiation of corporate insolvency resolution process. The Bench comprising Justices R.F. Nariman, Hemant Gupta and B.R. Gavai was hearing an appeal filed by the Stressed Assets Stabilization Fund against the 5-bench NCLAT judgment, which had turned down reference by a three-member bench to reconsider the decision in V Padmakumar vs Stressed Assets Stabilization Fund & Anr.

Placing reliance on the decision of the Supreme Court in Gaurav Hargovindbhai Dave v Asset Reconstruction Company (India) Limited and another , the NCLAT had observed that for the purposes of computing the period of limitation for an application under Section 7 of the IBC, the right to sue occurs from the date of default i.e. the date of classification of account as an NPA.

2. M/s Venus Recruiters Pvt. Ltd. v. Union of India

a) Avoidance Application for Preferential Transaction shall not survive beyond conclusion of CIRP

The Delhi High Court while hearing a matter has held that an avoidance application relating to preferential transaction under section 43 of Insolvency and Bankruptcy Code shall not survive beyond the conclusion of the insolvency resolution process. The court observed that the continuation of the Resolution Professional for the purpose of prosecuting an avoidance application after the completion of insolvency resolutlon process (CIRP) is beyond the contemplation of the IBC.

The Corporate Debtor was under CIRP. The COC approved the Resolution Plan and the RP had filed the same for approval by the Adjudicating Authority. Later, the RP filed application under Section 43 for avoidance transaction. However, the proposed Resolution Plan was approved by the NCLT and all the pending applications were disposed off. The avoidance application was neither heard nor dealt with on the merits at that point of time.

Eventually, the new management took over the Corporate Debtor pursuant to the order and NCLT passed an order in the avoldance application and issued notice to certain parties. By the time the petitioner was impleaded as a party to the avoidance appiication and issued notice, the resolution plan of the original corporate debtor had already been approved by the NCLT.

b) Assessment by the RP of the objectionable transactions cannot he an unending process

The Court made an observation that an avoidance application for any preferential transaction is meant to give some benefit to the creditors of the Corporate Debtor and not the 'New Corporate Debtor' post the approval of the Resolution Plan. The Court further held that CIRP Regulations in Chapter X clearly stipulate the "structure and methodology for dealing with objectionable transactions".

Relying on sections 43 and 44 of iBC and Regulations 35A of CIRP Regulations which gives a specific timeline for formation of an opinion on objectionable transactions by the Resolutlon Professional, the Court stated, "A conjoint analysis of Sections 43 and 44 read with the applicable Regulations clearly show that the assessment by the RP of the objectionable transactions including preferential transactions cannot be an unending process."

3. M/s Mohan Lai Jain, Liquidator, Kaiiher Associates Pvt. Ltd. Vs. Laiit Modi & Ors.

The NCLAT has ruled that the Adjudicatlng Authority has the jurisdiction to inquire into and try cases of preferential transactions under section 44 and fraudulent/ wrongful trading under section 67 of IBC and it is impermissible for the Adjudicatlng Authority to delegate its powers to another agency. The Bench adjudged that whlle the jurisdiction

Citation point 2 : (2019) 10 SCC 572

of the Adjudicating Authority was rightly invoked by the Resolution Professional/Liquidator as specifically provided by Section 43 & 66 of the IBC, respectively, it was not permissible for the Adjudicating Authority to abdicate Its powers & refer the matter to the Ministry of Corporate Affairs or an Investigating Agency.

The Bench, while clarifying on the jurisdictional significance of Adjudicating Authority over the above-said matters said that the allegations of preferential transactions by corporate debtor and fraudulent trading/ wrongful trading carried on by the Corporate Debtor during the corporate insolvency resolution process can be inquired into by the Adjudicating Authority. All that the Adjudicating Authority is required to do is to take cognizance of the complaint emanating from the Liquidator in regard to the alleged preferential transactions and fraudulent trading/wrongful trading having occurred qua the Corporate Debtor.

The impugned order of NCLT in the said case was found by the NCLAT as not being in conformity with the statutory provisions and the dictum of the Hon'ble Apex Court in Embassy Property Developments Pvt. Ltd. vs. State of Karnataka and Ors . The impugned order to the extent indicated, could not be supported and the same was modified by providing that the Adjudicating Authority will inquire into such alleged dealings with expedition, preferably within two months. Appeal was accordingly disposed off.

4. Mohit Minerals Ltd. Vs. Nidhi Impo Trade Pvt. Ltd.

The NCLAT held that in case of a person other than an Advocate issuing a Demand Notice on behalf of the corporate creditor, the Board Resolution would he required but in the event of a Demand Notice being issued by an Advocate duly instructed by the operational creditor, there is no need of requirement of authority being backed by the Board Resolution.

An Appeal was filed by the Appellant Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 against the impugned judgment of the Adjudicating Authority dismissing the application holding the same to be not maintainable for the reasons that the demand notice was issued without any authority. NCLAT held that notice delivered could not be held to be bad in law unless it was shown that the lawyer was not duly instructed. Since the Adjudicatlng Authority was aware of this legal proposition but in the opinion of the Adjudicating Authorlty, there was no due authorization backed by Board Resolution of the Operational Creditor. This finding was found unsustainable by the NCLAT as in case of a person other than an Advocate, the Board Resolution would be required but in the event of a demand notice being issued by an Advocate duly instructed by his client (operational creditor), there is no need of requirement of authority being backed by the Board Resolution.

Once an Advocate is duly instructed to issue the demand notice, there is no room for holding that the notice delivered by the Advocate is not a notice delivered by an authorized person.

Citation point 4 : Civil Appeal No. 9170 of 2019

5. M/s Factor Power Ltd. & Anr. Vs. Rurai Eiectrification Corporation Ltd.

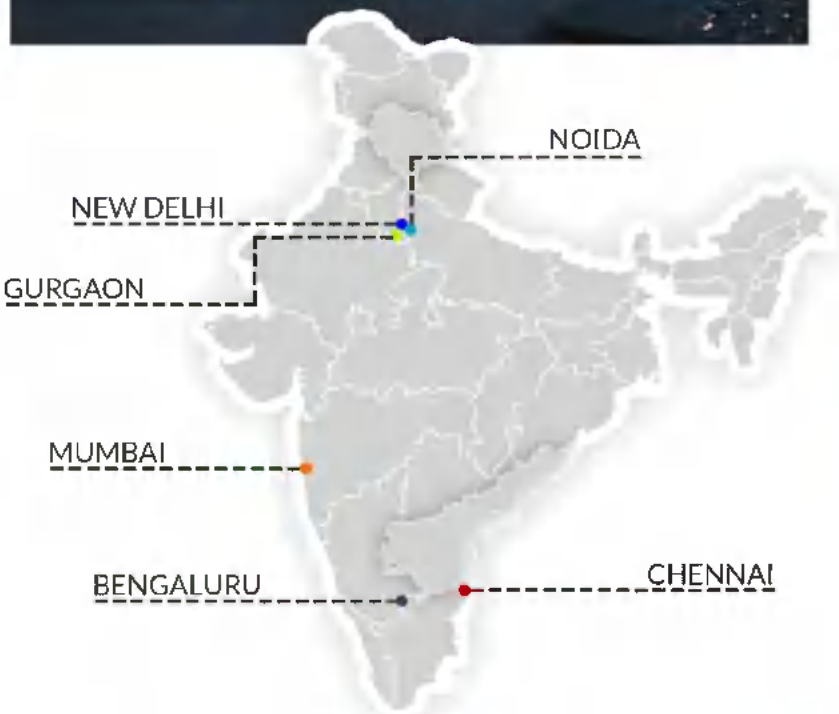
Even when a statute provides that all orders of a tribunal are appealable no appeal will be maintainable against simple procedural orders

An appeal under Section 20 of the Recovery of Debts and Bankruptcy Act, 1993 was ruied by the Debt Recovery Appellate Tribunal (DRAT), Delhi Bench to be totally misconceived and iil-advised inasmuch as the order appeaied against passed by the Debt Recovery Tribunal (DRT) was simpie order adjourning the Original Appiication of respondent for consideration of two misceilaneous appiications fiied hy the two appeiiants-defendants and one by the O.A. appiicant.

The DRAT was not inciined to go into the merits of the submissions of the appeilant since the DRT had aiready seized of the Originai Appiication. Being the originai forum, whose jurisdiction was invoked by the respondent, the proceedings cannot be bye-passed in such a manner. DRAT laid down that since the DRT had not passed any order which can be said to have affected any rights of the appellants, the present appeal itself was not maintainable being an appeal against only an order which can be said to a procedural order of simple adjournment.

For enquiries related to:

- Insolvency Process,
- Bankruptcy Process,
- Filing petition with NCLT/DRT,
- [redacted],
- Assets Management of the Company,
- Fresh Start Process,
- [redacted]



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