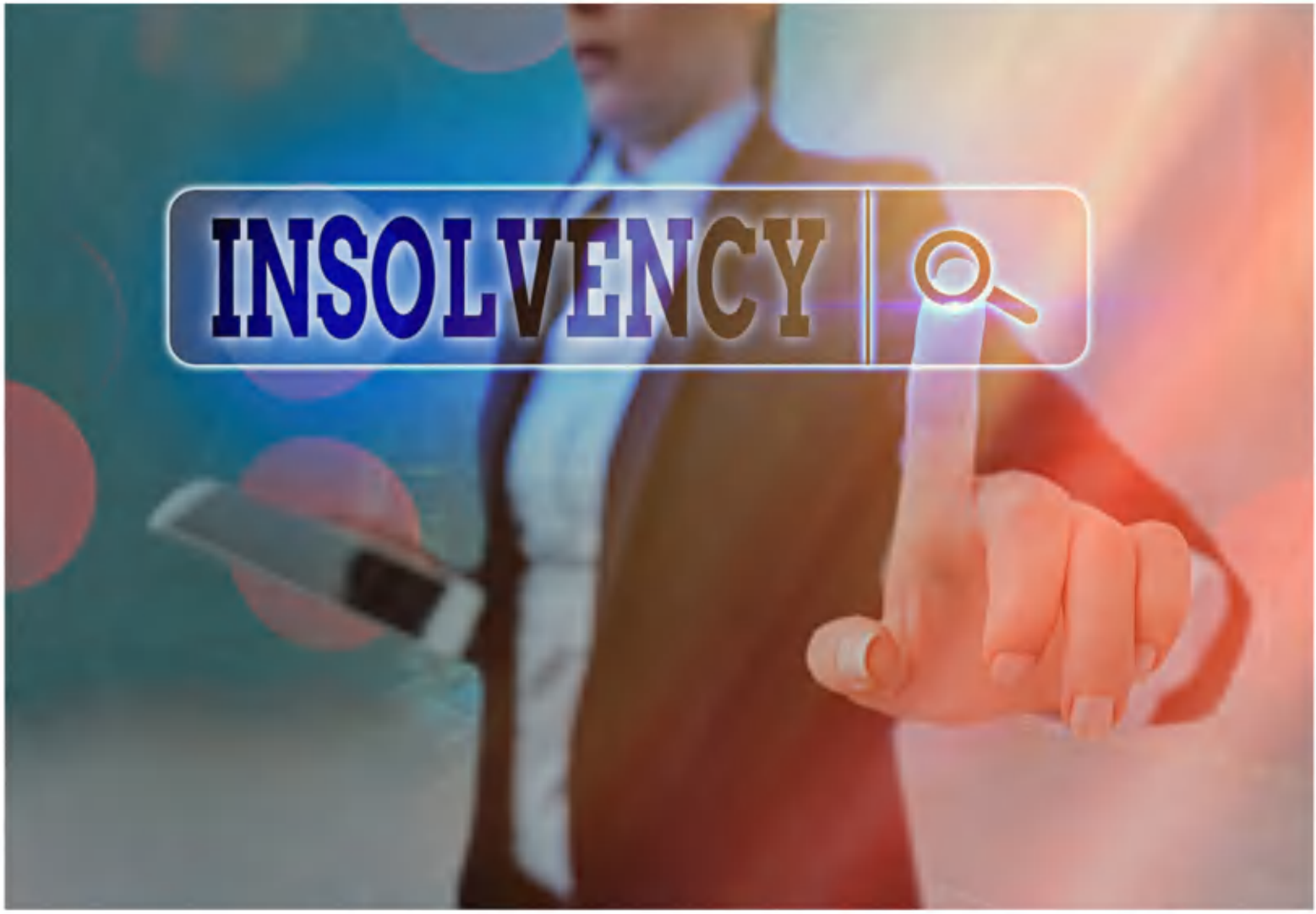
ASC

INSOLVENCY TIMES



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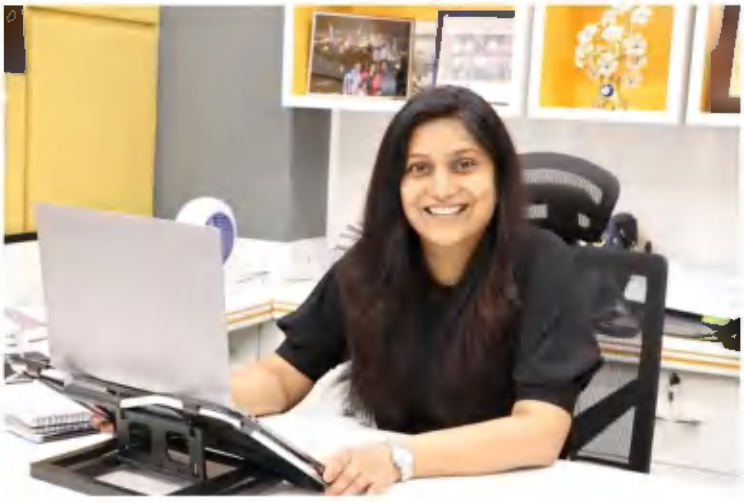


From the Editor's Desk

Dear Insolvency Professionals,

Strict checks on the Resolution Professional

The role of Resolution Professional (RP) is vital and the authorities keep a constant check to maintain the quality. IBBI found that RP was not making efforts to identify and take control of assets of Corporate Debtor and was not fillng application on non- cooperation of ex- directors which was taken as serious negligence on part of RP.

IBBI takes it very strictly and does not let any such negligence or professional incompetency exists in execution of Insolvency Law.

Expect more vibrancy from Insolvency Resolution Process.
Stay Alert!
Anju Agarwal
Partner
ASC Insolvency Services LLP

NEWS FLASH FROM THE LAST MONTH

In SREi Equipment Finance Limited v. Rajeev Anand & Ors

The Supreme Court held that an admission made in a counter affidavit of the Corporate Debtor, in a prior S.7 application, can be relied upon by the creditor in future S.7 applications for the purpose of establishing that a default has occurred. A document filed in the earlier petition that was dismissed as withdrawn can be relled upon by the adjudicating authority in fresh application.

Facts:

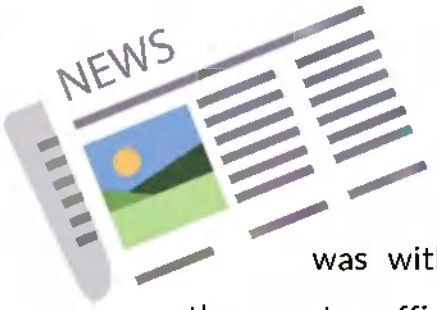
A loan, which was given way back in 2008, was restructured into two loans of Rs.18.86 crores by an agreement dated 01.04.2016, and the second being a loan of Rs.16.80 crores by agreement dated 24.06.2016, with an interest figure of Rs.2.72 crores, the total amount coming to Rs.38.39 crores.

To this section 7 application, a counter affidavit was filed by the corporate debtor on 15.05.2017, in which It was stated that though Rs.35.66 crores have become due, yet a section 7 application was premature in as much as instalment payments that were agreed upon had not yet matured. It was on this basis that this first application was withdrawn by the appellant on 30.05.2017 with liberty to file a fresh application.

A fresh application was filed on 04.08.2017 for amount of Rs.21.41 crores to be still outstanding. The corporate debtor now filed a counter affidavit in which it denied this and stated that, an amount of Rs.65.60 crores have been repaid by it. As a result NCLT admitted the application, or dered setting up of Committee of creditors and appointed resolution professional.

On appeal to NCLAT, it dismissed the order or NCLT and dismissed section 7 application. Further, civil appeal to Supreme Court held that NCLAT has wrongly recorded the affidavits and evidences and set aside the order of NCLAT and restore NCLT's order.

In this case, an application under S.7 was filed. The Corporate Debtor in its counter affidavit stated that instalment payments that were agreed upon had not yet matured.

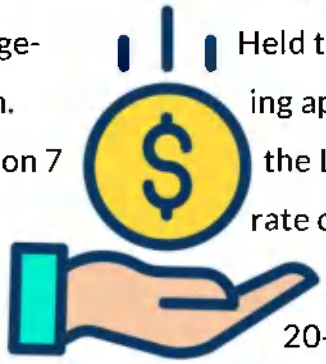


For this reason, S.7 application was withdrawn. However, the counter affidavit made an admission with respect to another loan that been taken by the corporate debtor from the financial creditor. Subsequently, the creditor filed another S.7 application, relying, inter alia, on the admission in the counter affidavit. The NCLT admitted the application. However, on appeal, the NCLAT set aside the order on the premise that a 'document' filed in the earller petition that was dismissed as withdrawn could not have been relied upon by the adjudicating authority. This was later challenged in Supreme Court as discussed herein.

K.R.V. Uday Charan Rao v. Bank of India - [2020] 113 taxmann.com 54 (NCL-AT)

Where corporate debtor acknowledged debt and also made offer for one-time settlement, CIRP application filed under section 7 within 3 years of such acknowledgement was not barred by limitation.

CIRP appllcation filed under section 7 was admitted against the corporate debtor on 8-07-2019. The shareholder of the corporate debtor contended that CIRP application was barred by limitation as loan was availed by the corporate debtor on 20-8-2010 from the financial creditor. The financial creditor on the other hand stated that the corporate debtor had acknowledge debt in 2018 and had also debt in 2018 and had also made offer of one-time settlement through various letters in 2017.



Held that for counting period of limitation in filling application under section 7, article 137 of the Limitation was applicable. Since the corporate debtor acknowledged debt for purpose of accepting liability on 17-3-2015, 20-3-2015 and 5-3-2018, CIRP application filed under section 7 within 3 years of such acknowledgement was not barred by limitation and the Adjudicating Authority had rightly admitted same.

Sulochana Gupta and another V. RBG Enterprises Pvt ltd.

Write petition under 226 cannot be used to challenge order passed by NCLT, as decided by Kerala High Court. It was stated that order of tribunal cannot be challenged by 226. It was also noted that alternate remedy was available. Also, that the dispute was of civil nature and no state or public authority was involved. NCLT order that was challenged, was restraining order against the MD of company from convening any meeting or carrying out any financial transaction. NCLT had passed order towards the application filed by shareholders for oppression and mismanagement.

MD raised the issue that due to pandemic, approaching NCLAT was not possible. This petition can be filed for enforcement of fundamental rights or against any duty envisaged by the public authority. There are no pleadings to substantiate the same.

SOME INSIGHTS AND FOOD FOR THOUGHT

indian Overseas Bank Vs. Arvind Kumar RP/ Liquidator Ms/ Richa industries NCLAT New Delhi

"The Corporate Debtor had no right to claim the margin money after the invocation of Bank Guarantee durlng the Moratorlum under Section 14 of IBC"

Facts

The Appellant is one of the Financial Creditors of the CD from whom the CD had availed various loans including an irrevocable Bank Guarantee. The CD deposited margin money of Rs.40, 50,000/- in the form of FDR to secure the said Bank Guarantee. The Bank Guarantee in question was issued in favour of M/s Tata Steel Processing & Distrlbution Limited. One of the Operational Creditor M/s Tata Blue Steel Limited initiated the CIRP against the Corporate Debtor. The Application was admitted by order of the Adjudicating Authority and the Bank Guarantee was invoked Moratorium declared under Section 14 of the IBC. During the CIRP, the Respondent demanded the aforementioned margin money from the Bank and the Appellant Bank adjusted the margin money.

Then an application was filed by the Resolution Professional seeking direction against the Appellant Bank to release all funds of the CD which were retained by the Appellant bank In violation of the IBC. National Company Law Tribunal, Chandigarh (NCLT) passed the impugned order ordering the Appellant Bank to release the margin money amount. The appellant then filed the instant appeal.

Court held:

Section 14(1) (c) read with 3(31) clearly specifies that "security interest" does not include 'performance bank guarantee', reading the decision in Gail (India) Limited Vs. Rajeev Manaadiar & Others [2018] of NCLAT along for the purpose of Moratorium. NCLAT held that invocation of the guarantee during moratorium under Sec. 14 could

not be stopped by the Bank. The Performance Bank Guarantee is not covered by Section 14 of the Code.

It is pertinent to mention that the 'margin money' is not a security as has been argued by the Respondent and does not require any registration of charge. Oniy the assets gave by the Company as securities are required to be registered under Section 77 of the Companies Act, 2013. The 'margin money' is the contribution on the part of the borrower who seeks 'Bank Guarantee'. The said margin money remains with the Bank, as iong as the Bank Guarantee is alive. If the Bank Guarantee expires without being invoked, then the margin money reverse back to the borrower, and in case the bank guarantee is invoked by the beneficiary, the margin money goes towards payment of bank guarantee to the beneficiary, and nothing remains with the financiai institutions, which can be reversed to the Corporate Debtor.

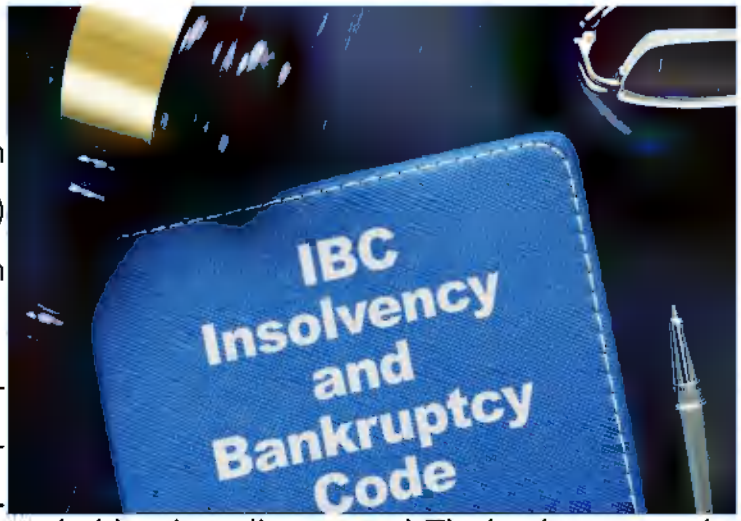
Out-of-court settlements be part of IBC?

India's bankruptcy ecosystem needs to be more efficient to develop a market for stressed assets in a post-covid world, chief economic adviser (CEA) to the government Krishnamurthy Subramanian said on Wednesday.

The bankruptcy framework can be improved by enabling bankers to take economicaiiy efficient decisions, which entail assessing the fair vaiue of sinking firms with the necessary haircut, Subramanian said at a webinar on 'investment opportunities in stressed assets' organized by the Federation of Indian Chambers of Commerce and Industry (FiCCI).

The CEA's suggestion is particuiarly relevant for pubiic sector banks, as executives may shy away from timely and bold decisions about the worth of an asset, fearing an inquiry into his actions at a later date by reguiatory or investigating agencies.

He said that corporate India needs to recognize that ceding control of failing firms may be an inevitabie part of equity contract. One of the major areas of litigation, which deiays resolution of bankruptcy cases, is the reiuctance of major shareholders in ceding control. The bankruptcy code aiiows majority ienders to take critical decisions on resolution or iiquidation of a company.



Subramanian said the ecosystem shouid take care of the distress that wiii invariabiy settle in businesses due to the pandemic, as was the case everywhere in the world.

Debt renegotiation, where the face vaiue of the debt is reduced, can heip bring in new investments, but that involves exercising significant amount of judgement by bankers, he said. "The ability to arrive at a fair vaiue of the ioan with necessary haircut invoives significant judgement."

Anaiysing such decisions without appreciating its nuances and with a hindsight bias couid lead to enormous risk aversion and can make it difficult for bankers to do what is economically efficient. Exercising such judgement is important for the stressed asset market, he said.

"The ecosystem of creative destruction is a very important part of any economy. Establishing a market for price discovery of stressed assets is aiso important," he said.

According to Nikhii Shah, managing director, Aivarez and Marsal india, a management consuitancy, the size of the stressed asset investment opportunity in India was ₹20,000 crore before covid-19.

Pre-packaged resolution schemes offer a quick corporate rescue option. it will be finaiized mostly in boardrooms than in courts to save time and to avoid iegai battles. Creditors and shareholders can approach a bankruptcy court with a pre-negotiated corporate reorganization pian as is prevaient in the US and UK.

Shukia said the bankruptcy code is a potent tooi and has heiped soive 270 cases invoiving $30 biiiion in capitai. Besides, over 50,000 cases worth $90 biilion of capitai under stress were withdrawn from bankruptcy proceedings. This indicates out-of-court settlements, he said.

Corporate Insolvency resolution professional in the Matter of M/s Neesa Infrastructure Limited

An authorised signatory, Mr. Sanjay Gupta on behalf of M/s. Neesa Infrastructure Limited fiied the petition under Section 10 of The Insoivency and Bankruptcy Code, 2016 read with Rule 7 of The Insoivency and Bankruptcy (Appiication to Adjudicating Authority) Rules, 2016, as operationai creditor/applicant.

The Nationai Company Law Tribunai (NCLT) dismissed the appiication for Corporate insolvency Resoiution Process under Section 10 of Insoivency Bankruptcy Code filed by M/s Neesa Infrastructure Limited on the grounds that no returns have been fiied by the company. On issuance of notice, the financial creditors nameiy State Bank of India, Centrai Bank of india, Indian Overseas Bank and Small Industries Development Bank of India (SIDBI) appeared through counsel and filed objections towards the tribunai after considering therecord noted that as per the record of the financial creditor – Centrai Bank of India, there are five directors. However, subsequently, when it is verified with the MCA portai it is

that the pattern and status of the Directors have been changed and the same has never been informed to the financiai creditors.

The tribunal, on perusai of the record found that no Board Resolution is ever passed by the company authorising Mr. Sanjay Gupta to fiie the instant application. Further, on perusal of the record it appears that Mr. Sanjay Gupta obtained Speciai Power of Attorney in his favour issued by Ms. Neelu Gupta fiouting aii the norms of the Companies Act, who is not even the director, thereby the very power given in favour of Mr. Sanjay Gupta is bad in the eye of iaw and as such the appiication is not maintainabie for want of proper authorisation.

NCLT Ahmedabad bench heid that disqualified directors under Section 164 of Companies Act 2013 cannot file application under 10 as corporate appiicant.

Supreme Court to consider IBBI plea to transfer petitions challenging IBC provisions on personal guarantor from High Courts

The Bench of Justices L Nageswara Rao, Hemant Gupta and Ajay Rastogi issued notice in a batch of over 11 transfer petitions filed by IBBI. IBBI was represented by Additionai Solicitor General Madhavi Divan with Advocates Vikas Mehta, Apoorv Khator and Sahii Monga.

The Supreme Court recently agreed to consider the plea filed by Insolvency and Bankruptcy Board of India (iBBi) seeking transfer of a batch of petitions challenging the iBC provisions reiating to insolvency of personal guarantors (Insolvency and Bankruptcy Board of india v. Lalit Kumar Jain & Ors).

The Bench of Justices **L Nageswara Rao**, **Hemant Gupta** and **Ajay Rastogi** issued notice in a batch of over 11 transfer petitions filed by iBBI.

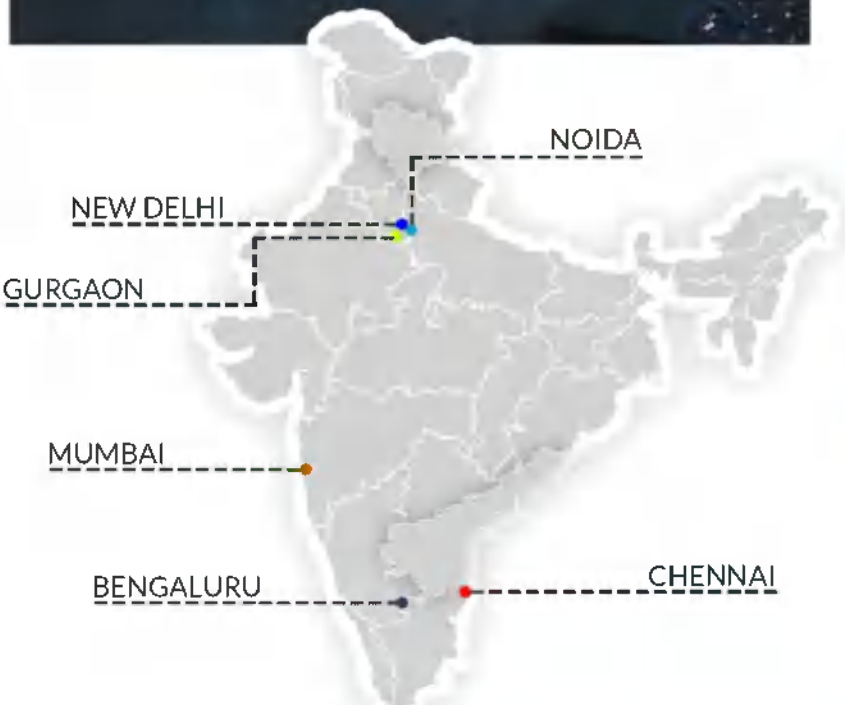
in its petition seeking transfer of these pending cases, iBBi has submitted that *"various writ petitions have been filed in more than one High Court which raise substantial questions of law of generai importance".*Ali of these pending writ petitions challenge the constitutional validity of Part iIi of the iBC, which deals with insolvency resolution for challenge the constitutional validity of Part III of the IBC, which deals with insolvency resolution for individuais and partnership firms. Sections 95, 96, 99, 100 and 101 along with rules frames by Central Government in 2019 under IBC are challenged in these petitions.

The Delhi High Court recently stayed the insolvency proceedings against Anil Ambani in his capacity as a guarantor. This stay was declined to be vacated by the Supreme Court and thus remains to be in force currently. IIBI ciaims that certain more such petitions from High Court couid be transferred in future. IBBI has prayed for the Supreme Court to transfer all the petitions to itself and hear the chailenge to the vires of the provisions itself.

Moreover, the Delhi High Court, where a large chunk of these petitions remain pending, earlier this month directed that the interim moratorium under Section 96 of iBC shall continue to be in effect in all cases where applications under Sections 94 and 95 have been filed. This prayer is also made to ease the confusion possibly arising due to conflicting judgments passed by different constitutional courts.

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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