ASC

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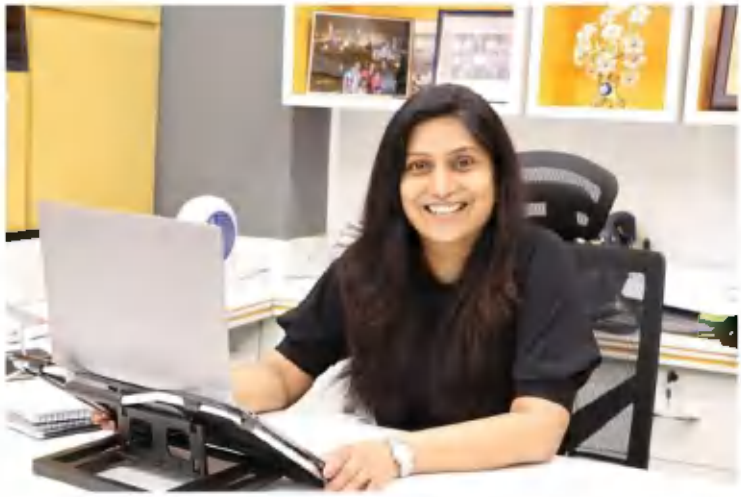
Editorial



Now Omicron impeding IBC progress

After enormous efforts at the level of Ministry of Corporate Affairs, long outstanding vacancies at various NCLTs across India were filled, Omicron, the mutant variant of Covid -19 has put a virtual halt to hearing process. We have another notification from the registrar of NCLTS that only urgent matters will be heard in the coming days due to staff at NCLTs catching deadly virus. it's been almost two years now that NCLTs have not functioned normally. The revival of toxic assets is getting delayed leading to further deterioration.

The plan at NCLTs is to switch back to 100% virtual hearing. Its time that we have to adopt virtual processes and achieve sufficiency & performance but, the courts in India have predominantly worked in paper book mode.
Some innovative thinking is required towards revival of sinking assets of the Corporate Debtor.

Expect more vibrancy from the Insolvency law.

Stay Alert!

Anju Agarwal
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Government seeks comments on proposed changes to Insolvency Law

Changes have been proposed to enable a swift admission process, streamlining provisions pertaining to avoidable transactions and wrongful trading and norms

The Government has invited comments on various amendments proposed to the Insolvency law, including provisions relating to the time period for approval of resolution plans as well as avoidable transactions and wrongful trading. The amendments have been proposed by the Insolvency Law Committee (ILC).

As per the public notice issued by the government in this regard, changes have been proposed to enable a swift admission process, streamline provisions pertaining to avoidable transactions and wrongful trading and norms relating to the time period for approval of resolution plans. Besides this, amendments have also been sought in connection to the closure of the voluntary liquidation process and the Insolvency and Bankruptcy Fund.

As per the government sources, the proposed amendments are for the Corporate Insolvency Resolution and Liquidation Framework, which is being administered by the Ministry of Corporate Affairs. To make the admission process for the insolvency cases faster and more efficient, it has been suggested that Financial Creditors should be asked to rely on Information Utility records to establish default. Then the Adjudicating Authority would only be required to consider the Information Utility- authentic records as evidence of default for section 7 applications filed by such Financial Creditors as prescribed.

Under the Code, the provisions on avoidable transactions provide certain look-back periods. Currently, the threshold for such period is the date of admission of a application for initiation of the process. The proposed amendment is to change the threshold for the look-back period from the date of commencement of CIRP to the date of filing of the application for inititation of CIRP.

NCLAT Chennai stays Corporate Insoivency Resoiution process in respect of Tata Projects Limited

The Chennai Bench of the NCLAT has stayed the order initiating Insolvency upon being informed that the parties have entered into a settlement agreement

The Chennai Bench of the Nationai Company Law Appellate Tribunal (NCLAT) has stayed the order initiating Corporate insolvency Resolution Process against Tata Projects Limited upon being informed that the parties have entered into a settlement agreement. The NCLAT also directed the insolvency Resolution Professional (IRP) to file an application for the withdrawal of the corporate insolvency resolution process (CIRP) under Section 12A of the Code before the Adjudicating Authority within three days. Further, the Adjudicating Authority was directed to dispose off the said application filed by the IRP within three days without faii.

"Till the disposal of the 12 A Withdrawal of Appiication, the implementation of the impugned order shall remain stayed. In the interregnum, there is no impediment for the Board of Directors of the Corporate Debtor to function independently", The Appellate Adjudicating Authority held.

The National Company Law Tribunal, Hyderabad had recently initiated the CIRP against Tata Projects for its failure to pay back the iegally established dues to Nexo Industries Private Limited. However, during the hearing of the appeal, it was brought to the notice of the Bench that the subject matter had been resolved between the parties amicable and accordingly a direction for withdrawal of the Insolvency petition was sought on the matter.

Insoivency Proceedings against Shipping company wouid not har Suit against Vessel: Bomhay High Court

Under the Admiralty Act, Vessel is treated as a separate Juristic entity which can be sued without joining the owner of the said Vessel to the proceeding

In a significant judgment, the Bombay High Court has held that a Shipping Company siipping into liquidation under the Insolvency and Bankruptcy Code will not impact an ongoing Admiralty Suit against its Vessel as the two are separate entities. The present case involved an interpiay between the bar against further suits and proceedings under Section 33(5) of the Insolvency and Bankruptcy Code (IBC), and the Admiraity Act and the effect that Insoivency proceedings would have on admiralty ciaims.

The proceedings involved a claim arising from timely bills raised as berthing charges aiong with other expenses which were paid by the Piaintiff for securing the ship during a storm. Meanwhile, the company that owned the ship went into liquidation under IBC and the Liquidator was appointed. Eventually, the Piaintiff instituted the present Admiralty suit to recover the berthing charges and other costs.

The Court observed that the bar under Section 33 (5) is appiicable only against the Corporate Debtor and not his property which wouid be a separate entity.

"The said provision prohibits the institution of a suit or other legal proceeding against the Corporate Debtor only. It does not in any way prohibit the institution of a suit or other legal proceeding against a ship/Vessel owned by the Corporate Debtor when invoking the Admiralty Jurisdiction of this Court. I say this because under the Admiralty Act, the Vessel is treated as a separate juristic entity which can be sued without joining the owner of the said Vessel to the proceeding", the High Court held.

The Court went on to explain further that the actions against Vessels under the Admiraity Act would be actions in rem and decrees could be sought against the Vessel in question wlthout suing the owner of the said Vessel (the Corporate Debtor in this case). The purpose of an action in rem against the Vessel is to enforce the maritime claim against the Vessel and to recover the amount of the claim from the Vessel by an admiralty sale of the Vessel and for payment out of the sale proceeds.

Hyderahad Company gets Mehui Chowksi's Firm after Resoiution Process

The Hyderabad Bench of NCLT approved the Resolutlon Plan submitted by Ace Developers

The Hyderabad based Ace Urban Developers Limited now owns AP Gems and Jeweliery Park Private Limited, earlier owned by fugitive diamantaire Mehul Chowksi. The Company has gone into the hands of Ace Urban Developers through corporate insolvency resolution process (CIRP) initiated and concluded in the National Company Law Tribunal, Hyderabad (NCLT). The Resolution Professional (RP) of AP Gems had filed an application before the Adjudicating Authority putting forward the Resolution Plan in respect of the company and the NCLT approved the Resoiution Plan of Ace Urban Developers.

The Company had gone into Insolvency in 2019 following an appllcation by Phoenix Tech Tower company for initiation of CIRP on account of dues payable to the iatter. Assets of AP Gems comprises of the company's two-acre land at Banjara Hills along with a five-storeyed building with 2 lakh square feet of constructed space which were attached by the Enforcement Directorate (ED) in 2018 while investigating Rs. 6,000 crore scam allegedly committed by Chowksi and his associates.

The tussle over these assets is yet to attain a finality as the courts had on earlier occasions, upheld claims of ED that is investigating the case. As the attachment of assets was made first by the ED and the Insolvency process came later on, it is being perceived that the ED has an upper hand in relation to the assets.

Videocon Industries: Lenders to vote on restarting the Corporate Insoivency Process

Although the Appellate Adjudicating Authority has started the process, however lenders can go ahead with it only after a resolution on this is passed by the requisite majority

As per sources, Lenders of consumer durable company Videocon Industries and its 12 units have decided to vote on starting afresh the Resolution process of the Venugopal Dhoot-promoted group as directed by the Appellate Adjudicating Authority. However, lenders can go ahead with it only after a resolution for the said purpose is passed by the requisite majority. At least 66% of lenders would have to vote in order to restart the process.

Nationai Company Law Appeliate Tribunal (NCLAT) ordered that winning bidder Twin Star Technologies' Resolution Plan was not compiiant with the provisions of the insolvency and Bankruptcy Code, 2016 (IBC) and remitted the matter back to the Committee of Creditors (COC) to complete the Resolution process.

In December, 2020, 95% of lenders had voted in favour of the plan from Twin Star, the holding company of Vedanta Ltd. However, afterwards the CoC appeaied to the NCLAT that the Twin Star plan was not feasible, foliowing criticism that Videocon and its units were sold at a throwaway price. The recovery for lenders was 4.15% of the admitted claims.

Lenders are in the process of seeking a better resolution pian than the one submitted by Twin Star, however it is going to be chalienging to draw a finer Resoiution Plan since the liquidation vaiue and the offer by the winning bidder is aiready known. Aiso, as per sources, Twin Star is in the process of fiiing an appeal against the order of the Appeiiate Adjudicating Authority. It is likeiy to argue that once a plan is approved by the NCLT, it is binding on aii the stakehoiders in line with the iandmark Supreme Court order on Ebix Singapore, which stated that an NCLT-approved pian cannot be withdrawn or modified.

Sical Logistics has received bids from four appiicants in Resoiution Process: Lenders hope to recover atieast one-fourth of their dues

The company which began facing a iiquidity crunch after the sudden demise of promoter VG Siddhartha in July 2019

Lenders of Sicai Logistics, a subsidiary of iisted Coffee Day Enterprises has received four bids from Resolution Appiicants in its corporate insolvency resolution process(CIRP) of which, Ambey Mining and Pristine Maiva Logistics have separately made the highest offer, as per sources. Sicai Logistics received 26 expressions of interest aithough oniy four entities submitted firm Resolution Plans. Lenders are hoping to recover at ieast one-fourth of their dues from the company which began facing a liquidity crunch after the sudden demise of promoter VG Siddhartha in July 2019.

The Company has admitted claims worth 1,561 crores. After the demise of the promoter, the company faced a liquidity crunch due to its inability to execute projects it had won. As a result, these projects were put on hold. Bankers continued to withhold collections from operations towards debt servicing obligations, inciuding certain obiigations faliing due in the future.

Sicai Logistics got admitted for the corporate insolvency process in March 2021 after taiks of a debt-recast scheme between the company and ienders coiiapsed. In fact, tiii March 2019, Coffee Day Enterprise had infused Rs 281 crores as unsecured loans to the subsidiary for meeting various funding requirements of the businesses, according to a credit rating report. Sicai Logistics is in the business of mining, muiti-modai iogistics for buik and containerised cargo port terminais, port handiing, trucking and warehousing, ship agency, customhouse agency, offshore supply logistics and retail iogistics. On a consolidated basis, it has investments in port terminals, container freight stations, container raii and a dredger.

LATEST JUDGMENTS

M/s. Visisth Services Ltd. Vs. Liquidator of United Cbioro-Paraffins Pvt. Ltd, NCLAT

Sale of a Company as a 'Going Concern' means saie of both assets and liabilities, if it is stated on 'as Is where is basis'

The Hon'bie NCLAT deait with the issue whether the Succesfui Bidder can withdraw from the Bid after payment of the EMD and seek for refund of the amount paid on the ground that the offer made by the Bidder was a 'conditional offer'.

On first issue, whether saie of Corporate Debtor as a 'Going Concern, in Liquldation Proceedings includes its liabilities, NCLAT holds that it can be seen from the Reguiation 32 A of the iBBi (Liquidation Process) Regulations, 2016 that Sale as a 'Going Concern' means saie of assets as weil as iiabiiities and not assets sans iiabiiities. We conclude that Saie of a Company as a 'Going Concern' means saie of both assets and iiabiiities, if it is stated on 'as is where is basis'.

On second issue, whether the Successfui Bidder can withdraw from the Bid after payment of the EMD and seek for refund of the amount paid on the ground that the offer made by the Bidder was a 'conditionai offer', NCLAT held that the Liquidator will carry on the business of the Corporate Debtor for its beneficiai Liquidation as prescribed under Section 35 of the Code. The Liquidator will oniy act and cannot modify/revise the terms of the contract. The Liquidator shaii endeavour to sell the Corporate Debtor Company as a 'Going Concern' oniy in accordance with the iaw.

If the Bidder is allowed to withdraw from the Bid at this stage and seek refund on the ground that their conditionai offer has not been accepted, then the liquidation process would be a never ending one, defeating the scope and objective of the Code, said the Appeliate Bench. In the deciaration signed, the Appellant-Bidder unconditionaiiy agreed to abide by the terms of the e-Auction which is inciusive of forfeiture of the EMD, in the event the Bidder did not perform their part of obiigation after the acceptance of the Bid in their favour.

The acceptance was conveyed to the Bidder. Clearly noting the terms and conditions that the Company was being sold as a 'Going Concern in an as is where is basis', the Bidder cannot now be permitted to turn around and plead that their offer was conditional.

Wittur Eievator Components India Pvt. Ltd. Vs. Axiomata Eievators Pvt. Ltd.

Section 17 of the Code can be interpreted as suspension of powers of the board of directors and not their duties & responsibilities, the Board is fastened with the responsibiiity of running & managing the company's affairs

The Nationai Company Law Tribunal (NCLT), Kochi Bench has held that on a carefui reading of Section 17 of the Code, this can be interpreted as suspension of powers of the Board of Directors (BOD) and not their duties and responsibilities. The NCLT went on to hold that the Board is fastened with the responsibility of running and managing the company's affairs. If the powers of the Board are suspended and the management of the affairs of the Corporate Debtor vests with the Interim Resoiution Professional (iRP) after his appointment, then the responsibiiity also iies with the iRP.

The suspension of the powers of the BOD means suspension of the role of directors, and responsibiiities emanating from such role. Section 20 mandates the interim Resolution Professionai to preserve and protect the vaiue of the property and to manage the operations of the Corporate Debtor as a going concern. But in this case, even though the RP is empowered to take possession of the Registered Office and records of the Corporate Debtor, he has taken only symbolic possession of the same and ailowed the suspended Directors to enjoy for their benefits. This, the Adjudicating Authority has heid, is against the provisions of the Code. On verification of records of this case, it was seen that only one meeting of Committee of Creditors (CoC) took piace with the presence of Resoiution Professional, and without making any endeavour for inviting Expression of interest, the CoC unanimousiy resolved to iiquidate the Corporate Debtor.

Everest Organics Ltd. Vs. Leesa Lifesciences Pvt. Ltd.

CoC has the power to consider the eiigibility/ineligibility of the Resolution Appiicant whether they are eligible/ineligibie under Section 29A(e) of the Code

The National Company Law Appeilate Tribunai (NCLAT) holds that the Code and the Reguiations empowers the Committee of Creditors (CoC) approving the Resolution Plan and also empowers that It shali not approve a Resoiution Plan where the Resolution Appiicant is ineligible under Section 29A of the IBC. In this case, the Adjudicating Authority directed the COC to consider whether the 3rd Respondent is reaily ineligible under Section 29A(e) of the iBC and therefore directed the COC, which has the power to approve the Resoiution Pian and also consider the Resolution Appiicant's ineligibiiity under Section 29A.

In accordance with the above Provisions of Law and the Regulations made thereunder, the Adjudicating Authority held that the COC has the power to consider the eligibiiity/ineligibiiity of the Resolution Appiicant whether they are eligible/ineiigibie under Section 29A(e) of the Code. The stand of the Respondent was that the Resoiution Professional did not afford any opportunity to cure the defect and suo motu rejected on the ground of ineligibiiity which is mere technicaiity. The COC has power to take a decision with regard to approvai of the Resoiution Pian.

Further in accordance with the Regulations, the Committee has power to evaiuate the Resolution Pians received by the Resoiution Professionai. As per CIRP Reguiation 39(4), the COC has power to approve

the pian and after approving the Plan by the Committee the Resoiution Professional shaii submit to the Adjudicating Authority. Therefore, this Tribunai is of the view that the COC has power to decide and approve the Resolution Plan of the Resolution Applicants. Further, the COC aiso can consider the eiigibiiity/ineligibility of the Resolution Applicants under Section 29(A)(e) of the Code. This Tribunal in unequivocal terms stated that the order passed by the Adjudicating Authority has no legal infirmity or iiiegaiity.

Pboenix ARC Private Limited vs Vishwa Bbarati Vidya Mandir

Writ Petition By Borrowers Chalienging SARFAESI Proceedings Initiated By Private Banks/ARCs Not Maintainabie: Supreme Court

The Supreme Court observed that a writ petition chalienging proceedings under SARFAESi Act initiated by private banks/Asset Reconstruction Companies is not maintainabie. "If proceedings are initiated under the SARFAESi Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ petition wouid lie and/or is maintainabie and/or entertainabie. The court said that the activity of the bank/ARC (of lending the money to the borrowers) cannot be said to be as performing a pubiic function which is normaily expected to be performed by the state authorities.

The ARCs contended that the writ petitions against the private party – ARC and that too against the communication proposing to take action under the SARFAESi Act wouid not be maintainabie at ail, and, therefore, the High Court ought not to have entertained such writ petitions and ought not to have granted the interim protection to the borrower. On the other hand, the borrowers contended that the ARC to act fairly while dealing with the security so as to secure the interest of the borrower as well as public at large (depositors). As the ARC has not performed the statutory duty cast upon it and there is a contravention of the statutory duty imposed under the Security Interest (Enforcement) Rules, 2002, a writ would lie against ARC for such an iliegai action.

M/s Mantena Lahoratories Ltd. Vs. Union of India – Teiangana Higb Court

A pubiic announcement is requlred to be made immediately wlthin 3 days from the date of appointment. However, the Reguiation does not provide that in case the announcement is made after three days, it wili become nuliity

Hon'bie High Court after havlng carefuiiy gone through the provlsions of the Insolvency and Bankruptcy Code, 2016(IBC) and the Reguiations framed thereunder has heid that the statutory timeiine for making a public announcement under the Code cannot specificaliy be interpreted to mean that any pubiic announcement made after the iapse of the time period provided in the Act wouid make such announcement void. The Court observed that though it is true that a public announcement is required to be made immediateiy within three days from the date of appointment. However, the Reguiation does not provide that in case the announcement is made after three days, it wili become nullity.

The High Court further went on to hold that Section 60(5)(c) of the Code provides for an appeal in case of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings in respect of the Corporate Debtor. Therefore, there is an efficacious aiternative remedy availabie to the petitioners to prefer an appeai in the present set of facts and circumstances.

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,
- Hearing of Cases or any other enquiries

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