



# ASC

## INSOLVENCY TIMES



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## Editorial



### Special efforts are required for disposing off pending matters of IBC

Numerous applications filed by Financial Creditors under Section 7 for admission of CIRP could not be cleared during the past two years due to Covid 19. Similarly, many COC-recommended resolution plans are awaiting final disposal from Hon'ble NCLTs. Many matters of Corporate Debtor which could not achieve resolution during CIRP are awaiting Liquidation orders.

The extraordinary time taken in disposal of applications is leading to evaporation of asset value of the Corporate Debtors. Besides, the prospective Resolution Applicants whose Resolution Plans are under approval are getting disgruntled. The elongated CIRP costs are pinching the Financial Creditors to the extent that there is a tendency to lose faith in the insolvency & Bankruptcy Code, 2016. Hundreds of qualified insolvency Professionals are waiting for their first assignments.

All this does not augur well for the IBC ecosystem. All the stakeholders, especially the Ministry of Corporate Affairs are requested to pay special attention to prevent degradation of benchmarks set up during the early years of IBC, 2016.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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## **NCLT orders criminal prosecution against Indu Projects' Successful Resolution Applicant Earthin Projects**

***The Adjudicating Authority rejected the application of the Successful Resolution Applicant for an extension of time to execute the Resolution Plan***

The National Company Law Tribunal, Hyderabad Bench (NCLT) has ordered criminal proceedings against Earthin Projects Ltd and K Ramachandra Rao Transmission and Projects Pvt Ltd, the consortium that emerged as the successful resolution applicant for Indu Projects Ltd but failed to honour the commitments involving a willful violation of Resolution Plan.

The Tribunal, while rejecting the application filed by the successful resolution applicant for an extension of time to execute the resolution plan, has also ordered forfeiting Rs 5 crore of earnest money deposit (EMD) by the successful resolution applicant which promised to pump in over Rs 600 crore to revive Indu Projects.

While ordering criminal proceedings against the successful resolution applicant under Section 74 (3) of the Insolvency and Bankruptcy Code, 2016 (IBC), the Tribunal also raised doubts over the "fairness of the Monitoring Committee with regard to the implementation of the Resolution Plan." Section 74 of IBC deals with the provisions to penalize the Corporate Debtor, its officials, creditors and bidders for willful violation of Resolution Plan wherein the guilty will be punishable with imprisonment of not less than one year but may extend to five years, or with a fine not less than Rs 1 lakh but may extend to Rs 1 crore, or both.

Earlier, the Insolvency and Bankruptcy Board of India (IBBI) had initiated criminal proceedings against Liberty House Group, Krish Steels, and Formation Textiles LLC among a few others under Section 74 (3) of IBC for alleged willful violation of the Resolution Plan.

## **Claim not forming part of the approved Resolution Plan under the Code, not maintainable: Supreme Court**

***Admittedly, the Claims which were the subject matter of the proceedings were not lodged after Public Announcement were issued under Sections 13 and 15 of iBC***

The Hon'ble Supreme Court has held that on the date on which the Resolution Plan was approved by the Ld. National Company Law Tribunal (NCLT), all claims stood frozen, and no claim which is not a part of the Resolution Plan would survive. In view of the matter, the Appeal was allowed by the Apex Court and the amount deposited by the Appellant at the time of admission of the appeal along with interest accrued thereon was directed to be refunded to the Appellant.

In the instant case, the Apex Court was dealing with the Claim of the Central Government arising out of a notification issued by the Department of Revenue, Central Board of Excise and Customs, Union of India imposing a tax on certain imported goods. However, the claim was not lodged before the Resolution Professional after public announcements under Section 13 and 15 were issued under the Insolvency and Bankruptcy Code, 2016 (IBC).

The Hon'ble Court after hearing both the parties and relying upon the judgment of Ghanshyam Mishra & Sons Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Company & Ors., held that the claim which was made by Union of India was not a part of the Resolution Plan and hence, does not survive and directed that the amount deposited by M/s Ruchi Soya Industries Ltd. in compliance of order dated 11.05.2021 ought to be refunded along with interest accrued thereon.

This judgment is significant as the Hon'ble Court made it clear that any authority which has made any claim against the Company concerned but failed to bring it to the notice of the resolution professional cannot be allowed to raise such demand at a later stage.

## **Supreme Court allows withdrawal of Insolvency Petition on account of Majority Homebuyers accepting Builder's Settlement**

***Out of the total 128 home-buyers, 82 were against the Insolvency proceedings and the original applicants had also settled their dispute, the Court noted***

The Apex Court has allowed withdrawal of the Corporate Insolvency Resolution Process (CIRP) against a Builder filed by three homebuyers on being paid a settlement amount along with applicable interest as agreed upon by the majority of them. The Apex Court, in the larger interest of the homebuyers, exercised power under Article 142 to permit withdrawal of the CIRP proceedings and set aside all matters pending between the parties. The Court observed that under Section 12A, the National Company Law Tribunal (NCLT) may allow withdrawal of the application admitted under Section 7 of the Code on an application filed by the applicant with approval of 90% voting share of the Committee of Creditors (CoC).

Taking note of *Swiss Ribbons Pvt. Ltd. and Anr. v. Union of India And Ors.*, in which the Court had permitted the original applicants to withdraw the CIRP proceedings in view of the settlement entered between parties, the Court noted that the COC comprises 91 members, of which 70% are the members of the Flat Buyers Association who are willing for the CIRP proceedings being set aside subject to the appellant and the Corporate Debtor – company honouring its undertaking given to this Court as per the settlement plan.

The Court also observed that out of the total 128 home buyers of 176 units, 82 homebuyers are against the insolvency proceedings and the original applicants have also settled their dispute with the Appellant and Corporate Debtor. Even the object and purpose of the IBC is not to kill the company and stop/stall the project, but to ensure that the business of the company runs as a going concern.

## **SARFAESI Act has over-riding effect on Central Excise Act**

### ***Dues of Secured Creditor has priority over dues of Central Excise Department***

In a judgment that will cheer lenders, the Supreme Court held that the dues to Secured Creditors (banks) will have priority over the Central or State Dues like Excise and Tax dues. While settling the law, the Apex Bench accepted the stand of the consortium of banks led by Punjab National Bank that Section 35 of the SARFAESI Act, 2002, provides that its provisions will have overriding effect on all other laws.

While noting that even the provisions in Section 11E of the Central Excise Act, 1944, are subject to the provisions contained in the SARFAESI Act, 2002, the Apex Court said that the dues of the secured creditor, i.e. the banks, will have priority over the dues of the Central Excise Department, as even after insertion of Section 11E in the Central Excise Act, the provisions contained in the SARFAESI Act will have an overriding effect on the provisions of the Excise Law.

Setting aside the Allahabad High Court judgment in favour of the Department, the Supreme Court said that the contention of the Department that a confiscation order cannot be quashed merely because a Security interest is created in respect of the very same property is “not worthy of acceptance”.

## **NCLT allows Withdrawal of Insolvency proceedings against Nirmal Lifestyle**

### ***The Company went into CIRP based on a Petition on behalf of Altico Capital after it defaulted on its dues worth Rs. 286 crores***

The National Company Law Tribunal (NCLT) has allowed withdrawal of insolvency proceedings against real estate development firm Nirmal Lifestyle and has also lifted a moratorium on the company. Nirmal Lifestyle has entered into a separate settlement agreement with the financial creditor.

The Mumbai bench of the NCLT had admitted the company under the Corporate Insolvency Resolution Process (CIRP) last year based on a petition filed by IDBI Trusteeship Services, on behalf of Altico Capital, after the company defaulted on its dues worth Rs 286 crore.

Another financial creditor SREI Equipment Finance and a homebuyer had separately opposed the withdrawal of insolvency proceedings against the company. As per the Tribunal's order last year, the Mumbai-based builder had approached Aitico Capital to extend refinancing facilities of about Rs 300 crores through Non-Convertible Debentures (NCDs).

Nirmai Lifestyle had also availed a term loan of Rs 1,120 crores from Aitico and had issued a Guarantee in relation to the term loan of Rs 1,280 crores by another affiliate firm Nirmai Lifestyle Holdings. The company had now defaulted on this guarantee.

## **DHFL Resolution: Piramai Group files appeal in Supreme Court against NCLAT ruling**

### *DHFL has sought a stay on recent NCLAT order on 'illegal' stipulation in Resolution Plan*

The Piramai Group, which had acquired DHFL last September, has moved the Supreme Court in appeal against a recent NCLAT order that ruled as "illegal" a stipulation in the DHFL resolution plan as regards recovery of avoidance transactions.

Earlier, NCLAT had set aside the term in the Resolution Plan that permitted Piramai Group (Successful Resolution Applicant) to appropriate recoveries from avoidance transactions. The Appellate Tribunal had sent the authorised Resolution Plan back to the Committee of Creditors (CoC) to reconsider this aspect of the valuation of avoidable transactions that pertain to the recoverable belongings.

The CoC had as part of the resolution plan agreed to Piramai Group getting all future recoveries of bad loans (amounting to about ₹38,000 crore) falling under avoidance transactions and accepted ₹1 from Piramais as the value assigned for such a benefit.

63 moons (one of the creditors with ₹200 crore invested in DHFL NCD's) had challenged this CoC decision.





# LANDMARK JUDGMENTS

## **Aichemist Asset Reconstructions Company versus Mr. Deepak Puri: NCLT, New Deih**

***On demise of the Personal Guarantor, the proceedings against it abate; accordingly, Section 95 Application also has to be closed***

in this case, notice under Section 95 of the Insolvency and Bankruptcy Code, 2016 (IBC) was issued. At the time of enquiry in terms of Section 99 of IBC, it came to the notice of the Resolution Professional that the Personal Guarantor of the Corporate Debtor expired on during the time when the application was pending before NCLT.

The Adjudicating Authority held that the Personal Guarantor in this case is an individual, who stood guarantee to the Corporate Debtor and proceedings against him will have to be closed since on the death of the Personal Guarantor, proceedings will abate.

The NCLT further held that since the proceedings against the Personal Guarantor close, the application under Section 95 of IBC also has to come to an end.

## **Metals & Metal Electric Private Limited versus Goms Electricals Private Limited: NCLAT Chennai**

***Threshold limit under Section 4 of the IBC is applicable on the date of application and not on the date on which the Debt became due***

The NCLAT held that a mere running of the eye of the ingredients of Section 9 of the insolvency and Bankruptcy Code, 2016 (IBC) makes it lucidly clear that the date of initiation of Corporate Insolvency Resolution Process (CIRP) shall be on the date on which an application is made. To put it precisely, the date of default is not to come into operative play and the same ought not to be taken into account for anything but computing the period of limitation.

In this connection, the Appellate Adjudicating Authority relevantly pointed out that a litigant has no vested right to choose a particular Forum, although he has an actionable right. It cannot be gain said that a change in Law is a procedural one and a Litigant is to adhere to the letter and spirit of the Law, without any deviation whatsoever, in the considered of this Tribunal.

## Axis Bank Limited versus Value Infracon India Private Limited: NCLAT

### ***Whether a Bank/ Financial Institution advancing loans to homebuyers be considered as Financial Creditor qua the Builder ?***

The issue before NCLAT was as to whether the Appellant Bank can be considered as a Financial Creditor on account of its having sanctioned and releasing housing loans to some of the allottees who have purchased flats/ units in the project floated by the Corporate Debtor.

The NCLAT held that it is definitely not the scope and objective of the Insolvency and Bankruptcy Code, 2016 (IBC) to consider banks/ financial institutions which have advanced loans to homebuyers to be considered as Financial Creditors and include them in the Committee of Creditors (COC) of the Corporate Debtor.

The Appellate Bench, while paying attention to the fact that the liability to repay the home loan was on the individual homebuyers, held that if such a position is allowed and the banks/ financial institution can be allowed to be considered as a Financial Creditor of the Corporate Debtor, this would defeat the very spirit and objective of the Code which contemplates aiming at resolution and maximization of the assets of the Corporate Debtor.

## Reliance Asset Reconstruction Company Limited versus Narendra Plastics

### ***The Appellate Adjudicating Authority allows RARCL to start Insolvency proceedings against Narendra Plastics***

The National Company Law Appellate Tribunal set aside an NCLT order that rejected an application by Reliance Asset Reconstruction Company Ltd (RARCL) to initiate insolvency proceedings against Narendra Plastics. The NCLAT also directed NCLT to initiate the Insolvency proceedings against the company.

Earlier, NCLT had ruled that the RARCL's plea was barred under limitations as it was filed beyond the prescribed limit of three years after default. The Adjudicating Authority had further said that the RARCL had filed a petition under section 7 of the Insolvency & Bankruptcy Code on May 8, 2019, while Narendra Plastics' account was declared as NPA on June 30, 2014, which was prima facie filed after more than five years.

This was challenged by RARCL, which is registered as a securitization and reconstruction company, before the Appellate Tribunal contending that it was within the limitation period.

As per the Limitation Act, which is also applicable on the insolvency & Bankruptcy Code (IBC) cases, any insolvency plea filed over defaults occurred over three years prior to the date of filing of the application are barred under article 137 of the Act.



## **Go Airlines (India) Ltd. v. Sovika Aviation Services Pvt. Ltd. & Ors: NCLAT Delhi**

### ***No bar on Operational Creditor to recover claims if claims were not entertained in the Resolution Process***

The Appellate Adjudicating Authority at Delhi observed that since the Resolution Plan was withdrawn u/s 12A of the insolvency and Bankruptcy Code, 2016 and the claims of the Operational Creditor were not entertained, the operational Creditor is at liberty to file appropriate legal proceedings to recover his claims.

The Bench further remarked that insofar as claim of the Appellant, which has not been entertained in the Insolvency Resolution proceeding, it is always open for the Appellant to take recourse to appropriate legal proceedings before appropriate forum as permissible in law. The fact that claim of the Appellant has not been entertained in the Insolvency Resolution process, there shall be no bar for the Appellant to take appropriate legal remedy as permissible in law.

The court though made it clear that they have not expressed any opinion on the merits of the claim of the Appellant and it is for the appropriate forum to consider and take decision in accordance with law.

## **Vistra iTCL India Ltd. v. Satra Properties India Ltd.: NCLAT, Mumbai**

### ***Lack of Stamp duty irrelevant to proceedings pertaining to Section 7 under IBC***

The National Company Law Tribunal, Mumbai Bench has held that insufficiency of stamp duty is not to be considered in application filed under Section 7, more so when “debt” and “default” are proved otherwise than by looking into these documents.

The Corporate Debtor opposed the application on the ground that Secured Redeemable Non-Convertible Debenture Subscription Agreement and Debenture Subscription and Debenture Trust Deed cannot rely upon by the Financial Creditors till deficit stamp duty is paid on the abovementioned two instruments.

In words of Tribunal, “I am of the opinion that the above plea of Stamp Duty is not available to the Corporate Debtor in the present case when once the debt and default are proved without looking in the above documents and accordingly the first issue is answered in negative”.

**For enquiries related to:**

- **Insolvency Process,**
- **Bankruptcy Process,**
- **Filing petition with NCLT/DRT,**
- **[Redacted]**
- **[Redacted]**
- **Hearing of Cases or any other enquiries**



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