



# ASAC

## INSOLVENCY TIMES



# ASC TIMES-DECEMBER

## Editorial



### Efforts to construct restructuring plan Outside IBC for a large account

As per newspaper reports, ICICI Bank-led consortium of lenders is finalizing a resolution plan for debt-ridden Jaiprakash Associates Limited (JAL) outside the bankruptcy process. JAL was among the second list of defaulters identified by the Reserve Bank to be sent to NCLT in 2017.

In June 2017, the lenders had approved a restructuring plan under which its land parcels would be divided and transferred to a special purpose vehicle and sold off to investors on a long-term basis payment to reduce its debt.

The proposal, which is still being finalized, is similar to the earlier restructuring proposal. It involves splitting the company's approximately INR 15,000 crores of bank debt into sustainable and unsustainable assets of the debt-laden company and then inviting bids for strategic sale. The real estate assets of the company and related loans of about INR 10,000 crores are proposed to be hived off as a separate subsidiary.

Jaiprakash Associates remaining cement businesses in northern and central India are proposed to be demerged into a separate company, and put on the block.

The objective appears behind this action is to go in for timely restructuring so that lenders can get back some of their dues from the debtors which are pending for a very long time, it is some sort of relief to the lenders as public sectors lenders are taking keen interest in this decision while most of JAL's lenders are on board with this plan and the remaining are also expected to give their approvals within a month, bankers cautioned that ultimately the Reserve Bank of India's approval would be needed to implement this plan. Is Covid-19 and consequent log-jam in NCLT forcing lenders to try innovative ways!

**Expect more vibrancy from Insolvency Resolution Process.**

**Stay Alert!**

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## **“Situation Demands that Loan Moratorium be extended till 31 March 2021”: Plea in Supreme Court Seeks Extension.**

Extensions in Insolvency regime has become a common request in the court of law. A recent amendment application praying to extend the moratorium period till March 31, 2021 has reportedly been filed in the Supreme Court. The Supreme Court is hearing the issue of extension of loan moratorium and waiver of accruing interest. One of the Petitioner(s) has sought modification of the original prayers which is related to extension of moratorium period up to December 31, 2020 stating that the current situation demands and necessitates that the moratorium be extended and granted up to March 31, 2021.

Further, the plea has sought directions to ensure that lending institutions shall not use any kind of illegal, violent, threatening and harassing methods against borrowers for the recovery loan instalments. Restructuring scheme introduced by the Reserve Bank of India is of no relief to the borrowers as the entire discretion has been given to the banks," it states.

## **Lavasa may go for liquidation: Lenders didn't even get INR 5 Cr**

Lenders to Lavasa Corporation, a bankrupt hill city near Pune, have been left disappointed as none of the bidders for the company submitted a viable financial plan. The final bids were opened recently. "There was not even INR 5 crore upfront cash on the table," said a source close to the development. "The auction was a total disaster. The banks will have to now consider sending the company for liquidation." A last-minute bid was made by Royal Partners, a Dubai-based fund, but this was not encouraging for the lenders as the fund had earlier backed out of similar.





# JUDICIAL PRECEDENTS

## **Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminum Industries Pvt. Ltd. & Anr.**

This appeal under S.62 of the Code is directed against the judgment and order passed by NCLAT whereby, the Appellate Tribunal rejected the contention that the application made by respondent under S. 7 of the Code, seeking initiation of Corporate Insolvency Resolution Process (CIRP) in respect of the debtor company is barred by limitation.

NCLAT in its interim order directed to implement the resolution plan. On further appeal made to the Supreme Court, it agreed to the request of the parties that the appeals pending before the NCLAT should be withdrawn and be heard along with the appeals before the Supreme Court. It directed the Interim Resolution Professional (IRP) to continue to manage the affairs of the Corporate Debtors and stayed the operation of the interim order passed by the NCLAT.

The court gave the reasoning that the application made in 2018 is within limitation as the mortgage security provided by the corporate debtor for 12 years is available for the claim as per the Limitation Act.

Supreme Court set aside the order of Appellate authority stating that the application is barred by limitation stating the reason that the period of limitation for an application seeking initiation of CIRP under section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues. The date of default shall be taken as the date for calculation of limitation period and the default shall be the actual non-payment when the debt becomes due and payable. Section 7 application is not for enforcement of mortgage. Supreme Court has beautifully distinguished the role of insolvency and bankruptcy law from that of recovery laws through this case.

## **Venus Recruiters Private Limited Vs. Union of India (Del HC)**

The corporate debtor M/s Bhushan Steel Ltd. was the subject of Corporate Insolvency Resolution Process (CIRP) before the NCLT, initiated by the State Bank of India by a petition, Interim Resolution Professional was appointed and public announcement was made along with the submission of a plan before NCLT. According to the forensic audit report there were many preferential transactions and allegation was made that a 10% service charge paid to the Petitioner, therefore, Resolution Professional filed the avoidance application in the tribunal.



#### **Issue:-**

Whether under the IBC, 2016, an application filed under Section 43 for avoidance of preferential transactions can survive beyond the conclusion of the resolution process and the role of the Resolution Professional in filing/pursuing such applications?

#### **Judgment:-**

As per the conjoint analysis of Sections 43 and 44 read with the applicable Regulations 35(a) and 39, The Delhi High Court has held that

Avoidance applications relating to preferential transactions of Insolvency & Bankruptcy Code do not survive beyond the conclusion of the insolvency resolution process.

The Resolution Professional cannot continue beyond an order under Section 31 of the insolvency And Bankruptcy Code, 2016, as the CIRP comes to an end with a successful Resolution Plan having been approved and the new management takes over, it is completely up to the new management to decide whether to continue a transaction or agreement or not

### Shubha Sharma Vs. Mansi Brar Fernandes, & Anr - Home buyer , Buy back agreement - Speculative Investor.

NCLAT (17.11.2020) in Shubha Sharma vs. Mansi Brar Fernandes, & Anr:

After hearing Learned Counsel for the parties, following issues arise for our consideration:

- 1) *Whether in view of the Insolvency And Bankruptcy Code, 2016(IBC) (Amendment) Ordinance 2019/Amendment Act 2020, the Application under Section 7 of the I&B Code by one allot-tee is not maintainable?*
- 2) *Whether the Respondent No. 1 is a genuine allot-tee or a speculative investor?*

#### **Issue 1:**

With the aforesaid observation of the Tribunal, "we are of the view that provision of Section 7 of the IBC as is obtained prior to the date of amendment, occupies the field as of now. Thus, we hold that there is no effect of the IBC, amendment Ordinance 2019 which was replaced by the IBC Amendment Act, 2020, on the present application under Section 7 of the IBC Therefore, it is not required to be considered whether in the light of the aforesaid amendment whether the respondent No. 1 has modified the application under Section 7 of the IBC or not."

#### **Issue 2:**

Adjudicating Authority is of the view that the "Respondent No. 1 is a speculative investor (on account of buy back agreement) and not a person who is genuinely interested in purchasing the apartments. Therefore, she cannot be termed as an allot-tee as per the explanation attached to clause (f) of Section 5(8) of the IBC and the light of observations of the Hon'ble Supreme Court in the case of Pioneer Urban Land & Infrastructure Ltd. (Supra). The respondent No. 1 is not a genuine allot-tee, therefore, the amount of Rs. 35 lacs paid to the Respondent No. 2 is not a financial debt and the respondent No. 1 is not a financial creditor."



## The Dy. Commissioner of Customs DEEC (Monitoring Cell) Vs. Ms. Vandana Garg – NCLAT New Delhi

Deputy Commissioner of Customs DEEC (Monitoring Cell) O/o the Commissioner of Customs (Export) New Custom House, is aggrieved of rejection of its application for condonation of delay of 1111 days in submitting proof of claim against the Corporate Debtor M/s Jyoti Structures Ltd., to accept and admit the claim of Appellant.

As Section 31 (1) of the Insolvency Bankruptcy Code, 2016 would come into play which provides that the Resolution Plan approved by the Committee of Creditors shall be binding on all stakeholders. After approval of the resolution plan by the Adjudicating Authority, the successful resolution applicant could not be allowed to be faced with claims filed or admitted after the resolution plan was submitted by such a successful resolution applicant.

### **Issue raised-**

Whether the Resolution Applicant can claim at a highly belated stage even when the resolution plan was approved by the Committee of Creditors?

### **Judgment:**

NCLAT held that in the instant case application is not maintainable though it is not disputed that the claim has been filed by the Appellant not only at a highly belated stage but also after approval of the Resolution Plan. In these circumstances, the Adjudicating Authority was right in rejecting the application.

## Sandeep Sharma & Anr. Vs. Sunil Kumar Jain, Resolution Professional

### **Brief of the case:**

Appellants, who are the members of the suspended Board of Directors of the Corporate Debtor sought conducting of de novo (from the beginning) Corporate insolvency Resolution Professional (CiRP) from the 7th meeting of the Committee of Creditors (CoC) onwards including issuance of fresh Expression of Interest (EOI).

In the context of the prayer made before the Adjudicating Authority that the CiRP be relegated back to the stage of issuance of EOI, the Adjudicating Authority was justified in observing that the object of the appellants was only to defeat the timelines and protract the CiRP so that it does not reach its logical conclusion. The Adjudicating Authority took note of the fact that the copy of the proposed resolution plan had already been provided to the appellants prior to the approval of the resolution plan and in the event of there being any objection, the Appellants were at liberty to raise their objection before the CoC before approval of the resolution plan. The appropriate course left open to the Appellants, as of now, is to raise an issue before the Adjudicating Authority at the stage of consideration of the resolution plan.

### **Issue raised-**

Whether a suspended Board of Directors can raise their objection before the Committee of Creditors before approval of the Resolution Plan and in case of after approval, raise before the Adjudicating Authority at the stage of consideration of the Resolution Plan?





### Judgment:

NCLAT held that the issue raised, in the nature of material irregularity in the process of the CIRP, is bereft of substance. The appellants are at liberty to raise their grievances as regards the CoC approved resolution plan not conforming to law when such resolution plan is taken up for consideration by the Adjudicating Authority under Section 31 of the IBC, 2016.

### Mr. Sundaresh Bhat, Liquidator of ABG Shipyard Limited

Financial Creditor iCiCI Bank, under section 7 of IBC, 2016 filed for the initiation of CIRP against corporate debtors. Sundaresh Bhat was appointed and approved as Resolution Professional by the committee of creditors and since no Resolution Plan was approved but Liquidation application was filed and order was passed on 25.04.2019. The assets of the Corporate Debtor were up for sale through e-auction but failed for four consecutive attempts even after reduction of the reserve price of the assets of the Corporate Debtor, The time frame of payment of sale consideration within fifteen days on conclusion of the e-auction and declaration of the highest bidder is considered to be too short especially keeping in mind the quantum of sale consideration and the ongoing economic slow-down due to the COVID-19 pandemic.

### Issue raised:

- i. Whether the Liquidator, with respect to the assets of the Corporate Debtor (in liquidation) of which liquidation process had commenced before 25 July, 2019, **can be permitted to grant the benefit of the amendment regarding the payment of the balance consideration within 90 days to the highest bidder instead of 15 days, as applicable to the liquidation processes commenced before the date of amendment?**
- ii. Whether the Liquidator can be permitted to sell/dispose of the assets of the Corporate Debtor (in liquidation) by way of Private Sale after having failed to sell/dispose of the said assets by way of e-auction?

### Analysis -

1) - Legal consequences before the amendment 25th July 2019. i.e. clause 12 of schedule 1 of Insolvency Bankruptcy Board Of India regulations states that on the close of auction, the highest bidder shall provide the consideration balance within 15 days and on full payment the sale is completed and liquidator shall give away the Sale Certificate and Transfer the Asset.

-Legal consequences after the amendment 25th July 2019 i.e. the clause 12, 13 of the Regulations states that on the close of the auction, the highest bidder shall provide the consideration/payment balance within 90 days also the payment made after 30 days will be charged with 12% interest and if no payment made within 90 days then such sale is cancelled. Accordingly when payment is received, the sale will be completed and liquidator shall give away the Sale Certificate and Transfer the Assets.

2) It was decided that such amendments shall be applied only to those cases which are commenced or filed after 25th July 2019. In the present case the applicant was appointed as liquidator prior to the date of amendment further applicant had commenced the e-auction processes with effect from 17th September, 2019 and the COVID-19 pandemic had taken effect from 25th March, 2020.

Judgment: NCLT allowed the liquidator to sell/dispose of the assets of Corporate Debtor by way of private sale. And rejected the benefit of the amendment for the present application.



# AMENDMENTS IN



## 1. Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020.

1. A new regulation 30A has been inserted permitting a creditor who may assign or transfer the debt due to him or it to any other person during the liquidation process upon such assignment or transfer, both the parties to provide liquidator the terms of such assignment or transfer and the identity of the assignee or transferee.
2. Regulation 37A has been inserted enabling liquidator the assignment of not readily realizable assets through a transparent process, in consultation with the stakeholders' consultation committee. Our view is that the liquidator will have to make at least one attempt to sell such assets and upon failure of such an attempt, this step can be initiated by him.

## 2. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2016.

1. Regulation 2A has been inserted specifying the requirement to record the evidences of default by the financial creditor with the information utility under section 7(3) (a).
2. As per this insertion of Regulation 13(2) (ca) the list of creditors shall be filed by IRP/ RP with the IBBI in cases of ongoing matter or new CIRPs.
3. Regulation 39 (5A) has been instated casting duty upon RP to intimate each claimant of payment of dues (principle or formulae) within fifteen days of the order of AA on approval of resolution plan.

## 3. Insolvency and Bankruptcy Board of India (Information Utilities) (Amendment) Regulations, 2020

The IU () to disseminate every public announcement it receives to its registered users who are creditors of the CD undergoing CIRP.





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