



CENTRE FOR INSOLVENCY AND BANKRUPTCY STUDIES

NATIONAL LAW UNIVERSITY, JODHPUR

[MAY – JUNE 2021 NEWSLETTER]

MAY 2021

JUDGMENTS/JUDICIAL PRONOUNCEMENTS:

I. SUPREME COURT

1. *Lalit Kumar Jain v. Union of India & Others.*

Order Dated: 21st May 2021

Summary: The Government of India, *vide* a notification dated 15 November 2019 (Notification), provided for insolvency resolution and bankruptcy of individuals and partnership firms. However, the Notification enforced such provisions only in so far as they relate to personal guarantors to corporate debtors, and not to all individual and partnership firms. The validity of the Notification was challenged in several petitions on the following grounds;

- a) Indian Government cannot selectively apply provisions of the IBC on a sub-category of individuals i.e., only personal guarantors of the corporate debtor;
- b) The Notification does not expressly repeal extant laws relating to insolvency of individuals; and
- c) Personal guarantor's liability gets absolved after approval of resolution plan of the corporate debtor.

The SC observed that under IBC there was no mandate that it should be made applicable, at the same time, to all individuals (including personal guarantors) or not at all. IBC contemplates that the asset of a corporate debtor and its personal guarantor can be dealt with in an identical manner during insolvency proceedings. IBC contains a *non-obstante* clause which gives it an overriding effect over other prevailing and contradictory laws. Therefore, the Notification need not expressly repeal existing laws, and any proceeding to be initiated against personal guarantors must be under IBC only. The approval of a resolution plan does not discharge the personal guarantor of his/ her liability because this liability arises out of an independent contract.

II. NCLAT

1. *Vivek Raheja Resolution Professional v. NA*

Order Dated: 4th May 2021

Summary: In the instant matter, Hon'ble NCLAT extended the Corporate Insolvency Resolution Process for a period beyond 330 days on account of the lockdown. Holding that the country faced a pandemic situation due to which proceedings came to a standstill, it further observed that the Adjudicating Authority (“AA”) ought to have considered the situation as an exceptional circumstance, for this prevailing reason the CIRP process was still at a nascent stage.

Relying on the Essar Steel India Ltd. judgment of the Apex Court, the Hon'ble NCLAT held that the AA and the Tribunal may extend the time beyond 330 days in exceptional cases. Accordingly, the appeal was disposed of without any cost.

2. *Kanwar Raj Bhagat suspended Director of Gujrat Hydrocarbons and Power SEZ Ltd. v. Gujrat Hydrocarbons and Power SEZ Ltd. through Insolvency Resolution Professional, Rakesh Kumar Agarwal*

Order Dated: 11th May 2021

Summary: Appeal arose before the NCLAT against the order of the NCLT, New Delhi Bench, admitting the application filed by SREI Infrastructure Finance Ltd., (“**Financial Creditor**”) and initiating corporate insolvency resolution process (“**CIRP**”) against Gujarat Hydrocarbons and Power SEZ Ltd., (“**Corporate Debtor**”) for default in payment of outstanding debt.

One of the issues before the NCLAT was that the Financial Creditor had already initiated CIRP against Assam Company India Ltd. (“**Corporate Guarantor**”) who had provided guarantee for the same debt for which CIRP was initiated against the Corporate Debtor. It was contended that CIRP cannot be initiated against the Corporate Debtor when similar proceedings have already been initiated against the Corporate Guarantor to recover the outstanding debt.

The NCLAT opined that IBC has no aversion to simultaneous proceedings against a corporate debtor and corporate guarantor and held that a financial creditor can simultaneously, or one after another, initiate CIRP against a corporate debtor as well as the corporate guarantor. NCLAT further observed that the Financial Creditor had not accepted the payment provided in the resolution plan of the Corporate Guarantor as full and final settlement of all its dues. Therefore, CIRP can be initiated against the Corporate Debtor for the same debt and default, and the Financial Creditor can recover the remaining dues from the Corporate Debtor.

III. HIGH COURTS

1. *M/S Dreamz Infra India Pvt. Ltd. v. The Competent Authority, Dreamz Infra India Pvt. Ltd., and Other Allied Companies/Entities*

Order Dated: 24th May, 2021

Authority: High Court of Karnataka Case

Summary: Dreamz Infra India Pvt. Ltd. (“Corporate Debtor”) was a real estate company that asked homebuyers to deposit a certain amount for booking apartments and these homebuyers were given agreements of sale and MoUs. However, after this said advance deposit, the corporate debtor failed. The Homebuyers (“Financial Creditor”) filed a petition under section 7 of the code before the NCLT Bengaluru Bench. The Respondent later initiated proceedings under section 7 (1) of Karnataka Protection of Interest of Depositors in Financial Establishments Act, 2004 (“Act”). The Karnataka High Court came into the picture to decide the legality of the parallel proceedings by way of a writ petition filed under Article 226 and Article 227 of the Constitution.

The Code contains a non-obstante clause as a manifestation of the legislators' intent; there has been significant litigation regarding inconsistency between the Code and other laws. The High Court reaffirmed the primacy of the code and directed the said authority to quash the proceedings and release their properties under the Act, as the same would be covered under the Code.

STATUTORY UPDATES

1. *Insolvency Professional to act as Interim Resolution Professionals, Liquidators, Resolution Professional and Bankruptcy Trustees (Recommendation) Guidelines, 2021*

In accordance with the provisions of IBC, the Insolvency and Bankruptcy Board of India (“IBBI”) is required to recommend the names of Insolvency Professional (“IP”) to an Adjudicating Authority (“AA”) for appointment as Interim Resolution Professional (“IRP”) or Liquidator. However, at the time of directions received from the AA, the IBBI does not have information about the volume, nature, and complexity of the insolvency or bankruptcy process and the resources available at the disposal of an IP. In such a situation, the IBBI is unlikely to add much value by recommending an IP for the process. Further, it takes some time for a reference or a direction from the AA to reach

IBBI and thus the entire process from identifying to recommending the name of an IP becomes an extremely time-consuming process. To save time and have an efficient process, the IBBI has introduced the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals, and Bankruptcy Trustees (Recommendation) Guidelines, 2021 (Guidelines).

JUNE 2021

JUDGMENTS/JUDICIAL PRONOUNCEMENTS

I. SUPREME COURT

No cases were entertained in the Month of June

II. NCLAT

1. *State Bank of India v. Sangita Agarwal and Others*

Order Dated: 10th June, 2021

Summary: Herein, the applicant, SBI did not file an intervention application (“IA”) before the NCLT Kolkata Bench. The said IA was filed for the first time as it was not filed under NCLAT as well. The IA No. 966 of 2021 brought new facts before the Tribunal which is not permitted. Under rule 11, the said IA was not maintainable and thus, in these facts and circumstances the IA was dismissed as not maintainable.

Reference note;

Rule 11; Inherent powers. -Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal

2. *Dhan Prakash Gupta v Daehsan Trading India Private Ltd.*

Order Dated: 1st June, 2021

Summary: The Borrower challenged the legality of his property by a bank. It became thus, the duty of the Bank to show the Tribunal that it had sold the mortgaged property under all the relevant rules under the SARFESI Act, and if the banks fail to do so, the claims made by the Borrowers have to be admitted. The appeal is preferred by the successful Auction Purchaser under Section 61(1) of the Insolvency and Bankruptcy Code, 2016

Reference Note;

Section 61 (1) of the Code; Deals with the Appeals to the Appellate authority.

Notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

III. NCLT MUMBAI

1. SBI v Jet Airways

Approval of Jalan-Kalrock resolution plan

Timeline:

April 17, 2019 — Cash-starved Jet Airways suspends operations

June 20, 2019 — NCLT insolvency petition filed by SBI-led lenders' consortium.

March 13, 2020 — Jet Airways seek more time for resolution process from NCLT after failing to attract any bidders.

March 18, 2020 — NCLT allows more time for the resolution process

June 14, 2020 — NCLT allows Jet Airways to sell its premises in Bandra Kurla Complex (“**BKC**”), Mumbai to settle claims, clear overseas debt.

October 17, 2020 — The Committee of Creditors (“**CoC**”) approves Jalan Kalrock Consortium's resolution plan. The consortium also asks for restoration of slots based on historicity.

February 25, 2021 — NCLT grants more time to aviation regulator DGCA to respond to the airline's request for slots.

March 9, 2021 — DGCA and the civil aviation ministry refuses to give any assurances on slots in an affidavit submitted to NCLT

June 3, 2021 — Ministry tells NCLT that Jet Airways does not qualify for grant of slots based on historic precedence.

June 22, 2021 — NCLT approves Jalan Kalrock Consortium's resolution plan; says slot allocations will be decided by the ministry or appropriate authority.

Financial distress forced Jet Airways, which flew for more than two decades, to suspend operations on April 17, 2019. Consequently, a consortium of lenders, led by the State Bank of India (**SBI**), filed an insolvency petition in June 2019, to recover outstanding dues worth over ₹8,000 crores.

The Tribunal, while approving the resolution plan, made it clear that it will not give any direction on the issue of airport slots for the airline, citing that the matter will be handled by the government or the appropriate authority concerned. The window period of future credit to passengers and employees and workmen shall be one year from the effective date. The beneficiaries shall, however, get themselves registered within 180 days from the effective date to avail of the facility.

As per the terms of the approved resolution plan, a seven-member monitoring committee is required to be constituted. Three members each would be appointed by the consortium and the financial creditors, respectively. Also, there would be an “independent insolvency professional appointed by the financial creditors (preferably the existing resolution professional),” in the panel, as per the filing. The committee would supervise the implementation of the resolution plan.

2. The Approval of DHFL Resolution Plan

The NCLT, Mumbai Bench on June 07, 2021, approved the Resolution Plan submitted by Piramal Group for the resolution of beleaguered Dewan Housing Finance Ltd (**DHFL**), which has been reeling from the insolvency process since 2019. DHFL had gone bankrupt with more than INR 90,000 crore in debt to various lenders, including banks, mutual funds, and individual investors who kept fixed deposits with the company. The plan put forward by Piramal Group offers to pay INR 37,250 crore which includes INR 12,700 crore in upfront cash, INR 3,000 crore in interest income on DHFL’s books, and INR 19,550 crore worth of non-convertible debentures to be repaid over 10 years. The plan was approved by 94% of the voting share of the CoC.

The approval of the Resolution Plan comes after the stay order dated May 25, 2021, passed by the NCLAT on the order of the NCLT, giving a back door entry to the promoter of DHFL by asking the CoC of DHFL to consider the settlement offer of INR 91,000 Crores offered by Kapil Wadhawan, the former promoter of the DHFL. Aggrieved by the stay order of the NCLAT, Wadhawan has filed a plea before SC on May 31, 2021. The said plea before the Supreme Court is yet to be listed.

STATUTORY UPDATES

1. The Insolvency and Bankruptcy Board of India invites comments from the public on the Regulations notified under the Insolvency and Bankruptcy Code, 2016

IBBI invited comments from the public, including the stakeholders on the regulations already notified under the Code on 17 June, 2021. The comments received between June 17, 2021, and

December 31, 2021, shall be processed together and following the due process, regulations will be modified to the extent considered necessary. It has been stated that the IBBI will endeavour to notify modified regulations by March 31, 2022, and bring them into force on April 1, 2022. Public consultation enables collective choice and hence plays an important role in the evolution of the regulatory framework. The participation of the public, particularly the stakeholders in the insolvency ecosystem ensures that the regulations are informed by the legitimate needs of those interested in and affected by the regulations.

2. Amendment to the Securities Contracts (Regulation) Rules, 1957

On June 18, 2021, the Central Government issued Securities Contracts (Regulation) (Amendment) Rules, 2021 to amend the Securities Contracts (Regulation) Rules, 1957. According to the same, in Rule 19, in sub-rule (2)(b), in sub-clause (iii), after the words “four thousand crore rupees”, the words “but less than or equal to one lakh crore rupees” shall be inserted. Another amendment is to Rule 19A relating to Continuous Listing Requirement wherein in sub-rule (5)(i), in the proviso, for the word “eighteen”, the word “twelve” shall be substituted.

INSOLVENCY PROCEEDINGS AGAINST MAJOR COMPANIES

1. NCLT has raised doubts over "confidentiality" of the liquidation valuation of the assets of Videocon Industries

Videocon Industries was set to come under the fold of Anil Agarwal's Vedanta Group, with banks taking a substantial haircut of 95.85 percent from their total claims in the resolution plan approved by the banks and cleared by NCLT, after a two-member Mumbai bench of the NCLT comprising members - H P Chaturvedi and Ravikumar Duraisamy had approved the resolution plan by Twin-Star Technologies on June 9, 2021.

However, the Mumbai bench has now raised questions about Vedanta group company Twin Star Technologies' Rs 2,962 crore bid for 13 Videocon group companies, noting that the applicant was paying “almost nothing”. NCLT has raised doubts over the “confidentiality” of the liquidation valuation of the assets of Videocon Industries and its 12 group companies during the insolvency process. The tribunal has asked the IBBI “to examine this issue in depth” to ensure that the confidentiality clause is followed without any compromise. The resolution of the 13 companies of the Videocon group is the first group insolvency resolution completed under the IBC.

2. NCLAT calls for a stay on OYO proceedings

OYO is undergoing insolvency proceedings over a Rs 16 lakh claim. The Ahmedabad Bench of the National Company Law Tribunal admitted the petition to initiate insolvency proceedings in April and appointed an IRP permitted him to start collating creditor claims (Form A dated 03/04/2021).

The withdrawal of insolvency proceedings against a corporate debtor requires the approval of 90 percent of the financial creditors yet this only comes into the picture when the committee of creditors has been constituted. The NCLAT stated that the Supreme Court had previously held that when a CoC has not been constituted, “the tribunal may allow or disallow an application for withdrawal or settlement.”

3. Pramod Mittal’s bankruptcy case in the UK gets extended

Billionaire steel magnate Lakshmi Mittal’s younger brother Pramod Mittal was due to be automatically freed from bankruptcy in Britain but has had his bankruptcy extended by the London high court for failing to cooperate with the bankruptcy trustee. Mittal, 65, an Indian citizen, whose brother is one of the richest men in the world, was declared bankrupt by the high court on June 19, 2020, after failing to settle a judgment debt against him of 139 million pounds (Rs 1,433 crore), which led to Moorgate Industries UK, to whom he owes the debt, presenting the bankruptcy petition. An interim suspension of discharge order for Pramod Mittal was made in the high court on June 17, 2021. A final hearing for the suspension of discharge will be heard after October 4, 2021.