AVM RESOLUTION PROFESSIONALS

# RESOLUTION TIMES

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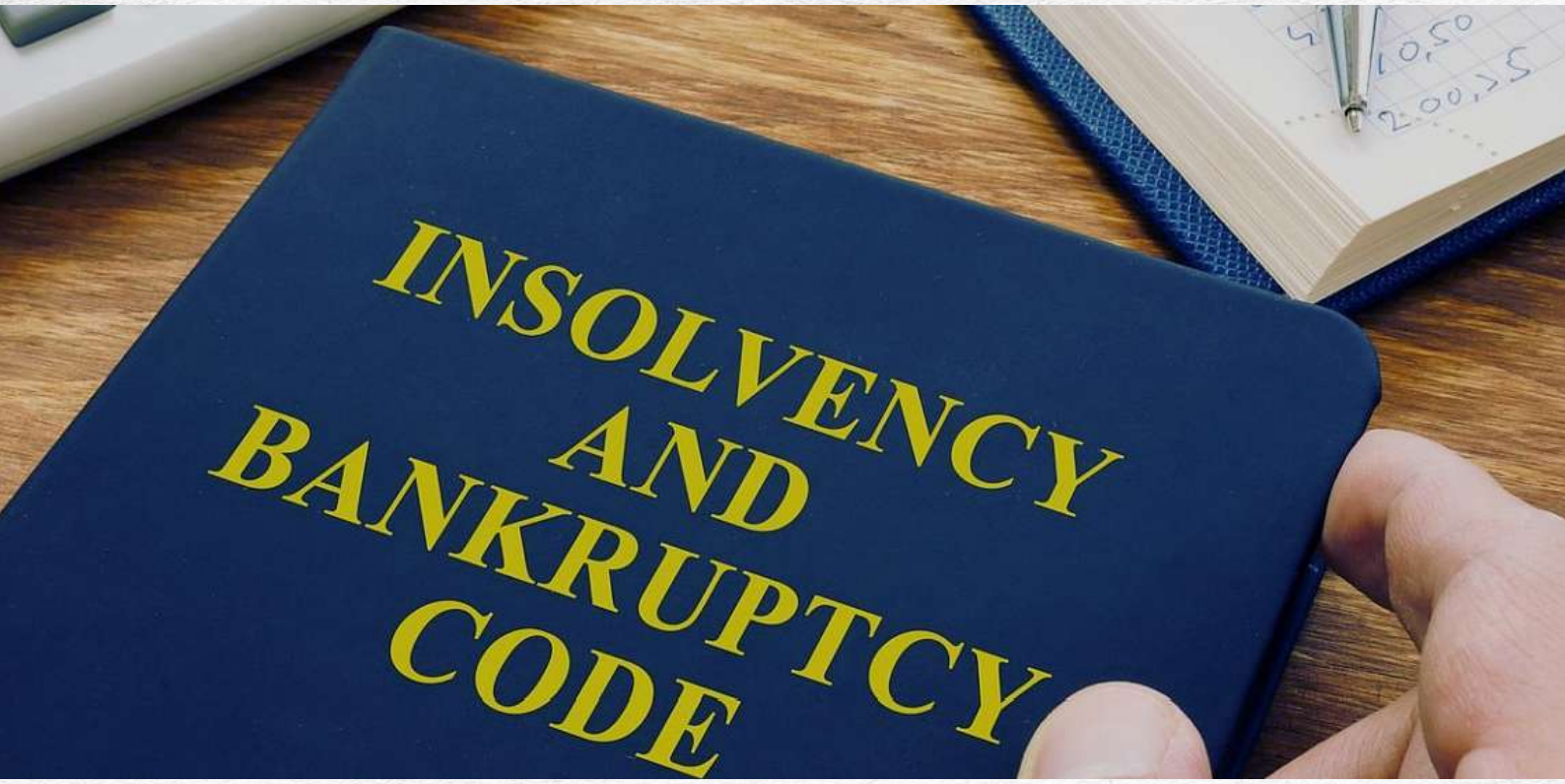


## UNDERSTANDING THE APPROVAL OF RESOLUTION PLANS INVOLVING COMBINATIONS BY CCI

With the introduction of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) corporate entities are actively taking this route to resolve or revive themselves from the financial distress. The process starts with an application to the Adjudicating Authority (NCLT for corporate entities) for initiation of the corporate insolvency resolution process when the debtor is unable to repay the minimum specified default. After such approval, a resolution plan is approved by the Committee of Creditors (CoC) and is finally taken up with the NCLT for approval. However, this is not the case with every resolution process under IBC. With the introduction of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (2018 Amendment Act), proviso to Section 31(4) was

## WHAT'S INSIDE THIS ISSUE:

specifically introduced to obtain approval of the resolution plan from the Competition Commission of India (CCI) in certain cases involving combinations.

**What are Combinations under Competition Act, 2002?**

India opened avenues for foreign direct investment by relaxing its existing policies of trade and investment in the year 1991. Actual globalization in the Indian market took place after such a major haul in the policies. Such reforms were aimed at protecting the country from defaulting and improving the condition of the balance of payment. The free trade in the country attracted countless foreign enterprises to invest and set up their industry in the country, ultimately resulting in the strategy of corporate restructuring adopted by the companies. Such a strategy allows the companies to eliminate competition in the market and foster more profitability as a result of a decrease in competition and increase in the area of practice.

This also created a burden on the Indian companies to match up with the multinational companies and in order to control the monopolistic practices and fair trade and pricing models, the Competition Commission of India as per the provisions of section 5 of the Competition Act, 2002 is tasked with providing approval for such combinations which breaches a particular threshold as notified.

As per the definition provided under section 5 of the Competition Act, 2002 a combination is an *"acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises".* To put it simply combination as per the Competition Act, 2002 means any acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act.

A combination that is in the form of an acquisition, merger, or amalgamation must be notified to and approved by the regulatory authority, Competition Commission of India (CCI), if it breaches the prescribed asset and turnover thresholds and does not qualify for any exemptions. The requirement to notify CCI is mandatory and combinations are subject to a 'standstill' or suspensory obligations.

**INSOLVENCY TRIVIA**

**1 Who shall bear the cost of proving the claims under the liquidation process?**

a) Claimant
b) Liquidator
c) Corporate Debtor
d) Creditors

**2)What is the available time period with the liquidator for verification of claims?**

a) within 7 days from the last date for receipt of claims
b) within 15 days from the last date for receipt of claims
c) within 30 days from the last date for receipt of claims
d)within 60 days from the last date for receipt of claims

**3) In which bank shall the liquidator open a bank account of the corporate debtor under the liquidation process?**

a) Any Bank
b) Any Commercial Bank
c) Any Scheduled Bank
d) Any Nationalized Bank

**4)Disciplinary Committee shall endeavour to dispose of the show-cause notice on an Insolvency Professional within a period of _____ months of the assignments.**

a) 3
b) 9
c) 6
d) 12

The present threshold limit for any combination to seek approval of CCI is provided in the table.

**Why do resolution plans need to be approved by the CCI?**

Under the scheme of the Code, a resolution plan submitted by the prospective resolution applicant is required to be approved by the Committee of Creditors by not less than sixty-six percent of the voting share of the financial creditors. Further, such a resolution plan is submitted to the Adjudicating Authority for their approval and implementation. However, when it comes to certain resolution plans which are above the threshold limit as defined under Section 5 of the Competition Act, 2002 they are required to be approved by the CCI as well.

Initially when the Code was enacted there was ambiguity regarding the timeline and stage at which such approval is sought from the CCI during the CIRP period. Regulation 37(1)(l) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, provides for necessary statutory approvals to be taken from the concerned authority but the timeline for such approval from CCI was not mentioned.

Later, with the enactment of the 2018 Amendment, such ambiguity is cleared. Presently, such approval from the CCI must be sought before the approval of the resolution plan by the Committee of Creditors. Such approval is to ensure that the resolution plan does not provide undue advantage to the resolution applicant with such takeover of the company through the resolution process.

However, the NCLAT in the matter of ***ArcelorMittal India Pvt. Ltd. v. Abhijeet Guhathakurta*** watered down the mandatory provisions as inserted by the 2018 Amendment Act. In this case, the CoC had approved the resolution plan before seeking approval from the CCI.

The Appellate Tribunal stated, "*It is always open to the 'Committee of Creditors', which looks into viability, feasibility and commercial aspect of a Resolution Plan to approve the 'Resolution Plan' subject to such approval by Commission".*

Therefore the requirement is now directory in nature. This was further affirmed in the matter of ***Makalu Trading v. Rajiv Chakraborty***, the

**ANSWER KEY FOR THE PREVIOUS QUIZ**

1.(C) **Pari passu with secured creditors and employees**
2.(A) **60**
3.(D) **Seven**

NCLAT held that a resolution plan will not fall foul of section 31(4) as long as the CCI approval is sought before the approval of the resolution plan by the Adjudicating Authority.

**Differential treatment for IBC: Necessity or not?**

One of the key objectives of the Insolvency and Bankruptcy Code, 2016 is the time-bound resolution and adherence to the timeline provided for completion of the CIRP process. Such a timeline ensures the value maximization of the assets of the corporate debtor which is already in distress. As per Section 12 of the Code, a CIRP process shall be finished under 180 days with a one-time extension of 90 days. Therefore, such a process shall be completed within 270 days.

Now the approval from the CCI is mandatory in nature as per the provisions provided under Section 31(4) of the Code. There are other statutory approvals also required to be taken while submitting the resolution plan for the approval of the NCLT. Such statutory approvals can be taken up within one year from the date of the approval of the plan by the Adjudicating Authorities. This is the departure from the mandate provided for the approval of the resolution plan involving CCI. This can cause several issues as follows:

1. Such approval may delay the CIRP process as the CCI can take time for approval of such a resolution plan. As per the provisions of Section 2(A) of the Competition Act, 2002 no combination can come into effect till the lapse of 210 days of such notice or CCI orders on the combination, whichever is earlier. Though it is understood that the approval of the resolution plan has been taken on priority by the CCI considering the strict timeline under IBC. But there may be instances that approval from the CCI will get delayed and would defeat the whole objective of the Code.

2. Further, if the CCI orders for rejection of the resolution plan or orders for modification of the resolution plan then in such a scenario the whole process would get frustrated and the CoC has to go through the entire process. Interestingly, the Code does not comprehend the situation where the CCI asks for the modification of the resolution plan.

3. Thirdly, if the resolution plan is approved by the NCLT itself and the approval from the CCI is still pending then whose primacy shall be binding is another issue. However, this precarious situation is now settled vide the 2018 Amendment Act, which specifically mentions that approval from the CCI shall be taken before the approval of the plan from CoC.

The above-mentioned situations carve out certain scenarios which justify the differential treatment of resolution plans to be approved by the CCI. Since the requirement of the Code is to complete the whole insolvency resolution process within the timeline mentioned.

**Conclusion:**

The Corporate Insolvency Resolution Pro-

-cess is largely dependent on the commercial wisdom of the committee of the creditor. Even the Supreme Court in catena cases of judgments[i] highlighted the importance of the role of CoC in the resolution process. The approval of CCI before the approval of CoC would ensure that the whole CIRP process is not futile and also ensures that the resolution plan submitted to the CCI complies with the fair competition practices and does not lead to any monopoly or undue advantage in the competitive market to any specific resolution applicant.

# LATEST JUDGEMENTS AND NEWS

## SUPREME COURT JUDGEMENTS

### 1.Section 29A(h) requires guarantee which is to be invoked along with the CIRP against the CD.

The Hon'ble Supreme Court in the case of Bank of Baroda & Anr. v. MBL Infrastructures Limited & Ors. (Civil Appeal No. 8411 of 2019) discussed the legality of Section 29A(h) of the Code.

The Appellant in the present case is challenging the eligibility of the Resolution Applicant (RA) on the basis of its liability existing as a guarantor as per the unamended Section 29A(h) which was prevailing on the day of the application and has also challenged the approval of the resolution plan by the AA.

The Respondent, on the contrary, argued that since the decision of approving the resolution plan was the commercial decision of the COC, hence, the same cannot be challenged. It was also argued that the RA was not ineligible to submit the resolution plan as the provision of Section 29A(h) requires an invocation of guarantee against the guarantor along with the pendency of the insolvency proceedings against the CD, which was not invoked in the present case.

The Apex Court discussed the objective of the said section which is to avoid unwarranted elements entering the resolution process and prevent the entry of certain categories of people who are not in the position to lend credence to the resolution process because of their disqualifications. It further observed that the scope of clause (h) of Section 29A covers the ineligible guarantor against whom the guarantee has been invoked by the creditor along with the requirement of admission of CIRP proceedings against the CD in whose favour the guarantee was given. Hence, both the requirement for making the guarantor ineligible was satisfied and thus, the RA was held to be ineligible to submit the resolution plan. However, the Court took notice of the fact that the Respondent had infused the money into the CD and had made it run on the going concern, thus, reversing the decision based on eligibility will affect the interest of the shareholders and employees.

Further, on the issue of the RA earlier eligible and later ineligible, the Court obs-

-erved that if the eligibility of the RA changes by the operation of law which then continues till the plan is been approved by the COC and later by the AA, then the subsequently amended provision shall govern the eligibility of the RA to submit the resolution plan.

## 2.Orders passed by the Adjudicating Authority (AA) in upholding the remuneration of the IRP should have a reasonable basis.

The Hon'ble Supreme Court in the case of Devarajan Raman v. Bank of India Ltd. (Civil Appeal No. 3160 of 2020) has allowed the appeal of the Interim Resolution Professional (IRP) and observed that the orders passed by the Adjudicating Authority (AA) in upholding the remuneration of the IRP should have a reasonable basis.

The appeal has been filed by the IRP of the CD against whom the insolvency petition has been dismissed by the NCLAT. The Appellant/IRP has claimed the amount as CIRP cost and fees from the Respondent/ Financial Creditor (FC) which was partly paid by the latter. Against this, an application was filed in the NCLT for reimbursement of the remaining fees, i.e., Rs 9,08,993/- which directed the FC to pay a sum of Rs 5,00,000/- towards the fee of the IRP. The Appellant filed an appeal to the order of the NCLT in the NCLAT which observed that the fees of Rs 5,00,000/- allowed to the IRP was not unreasonable and the same to be fixed by the COC will not be a business decision depending upon the commercial wisdom of the COC.

To this, the Appellant filed the appeal in the Apex Court. It contended that the fees asked was based on the technical and financial bid submitted by the IRP which was ratified by the COC as the CIRP expenses. It was also submitted that the NCLT failed to verify the factual position and have awarded an ad hoc figure of Rs 5,00,000/- which was affirmed by the NCLAT. The Appellant referred to the case of Alok Kaushik v. Bhuvaneshwari Ramanathan and stated that the NCLT improperly exercised its jurisdiction by not applying its mind in reaching the figure of Rs 5,00,000/-. Lastly, it was argued that the claims of the IRP were not assessed based on the agreed terms submitted by the IRP in its bid.

The Supreme Court referred to the June 12, 2018 circular issued by the IBBI which provides for the reasonable remuneration to the RP and stated that the order of the AA does not reveal that the submissions made by the Appellant were considered.

It further observed that the AA merely directed the FC to pay the fees to the IRP without even giving the basis of the claims or its reasonability. It also negated the orders of the NCLAT stating the same to be made in an ad hoc manner. Hence, the Court concluded that the orders passed by the NCLT and the NCLAT does not have reasons based on which the payment of Rs 5,00,000/- is to be made by the Respondent. Thus, the appeal was admitted and the orders of the NCLT and the NCLAT were set aside with a direction to the AA to decide the matter afresh within one month.

## 3.In re Cognizance for limitation.

The Hon'ble Supreme Court in the case of In Re: Cognizance for Extension of Limitation (Suo Motu Writ Petition (C) No. 3 of 2020) has restored the earlier order passed by it for excluding the period from 15.03.2020 to 02.10.2021 and stated that the period from 15.03.2021 to 28.02.2022 shall stand excluded from the computation of the limitation period.

The Apex Court previously took suo moto cognizance dated 23.03.2020 and had excluded the period of limitation in the filing of petitions/ applications/ suits/ appeals/ other quasi-judicial proceedings due to the outbreak of Covid-19 pandemic till further orders. Later, the above order was brought to an end by another order dated 08.03.2021 which provided that the period from 15.03.2020 to 14.03.2021 shall not be counted for the purpose of limitation.Further, the Supreme Court on an application filed by the SCAORA restored the order dated 23.09.2020 and had extended the limitation period in all proceedings till 02.10.2021.

The Court observed that by way of this application, the SCAORA has again sought restoration of the order dated 23.03.2020. It directed that the order dated 23.03.2020 be restored and stated that the period from 15.03.2020 to 28.02.2022 shall be excluded from the count of limitation in respect of all judicial and quasi-judicial proceedings. Lastly, it directed that in cases wherein the period of limitation is going to get expired in between the excluded period, notwithstanding the actual balance period of limitation remaining, all such litigants shall have an additional period of 90 days from 01.03.2022 and if the actual period remaining is greater than 90 days, then such longer period shall prevail.

# NCLAT JUDGEMENTS

## 1.AA has to provide opportunity to the creditor to rectify the defects before rejecting the application.

NCLAT in the case of Mr Hardik Fakirchand Shah v. Male Square Retail Pvt. Ltd. (Company Appeal (AT) Insolvency No. 210 of 2021) has held that the petition under Section 9 of the Code cannot be rejected outrightly without giving the opportunity to the Operational Creditor (OC) to amend the same.

In the present appeal, the OC has challenged the rejection of his application by the Adjudicating Authority (AA). The OC claims that he has supplied goods to the Corporate Debtor (CD) and has raised 10 invoices out of which the OC has received only payments for the three invoices, latest on 26.11.2018. Against such default, the OC filed an application under Section 9. The AA rejected the application stating it to be barred by limitation observing that the last invoice was of the year 2015 and the application was filed in the year 2019 which is more than 3 years from the date of default. The NCLT also stated that the invoice dated 08.07.2017 was having a different format than the rest of the invoices and hence the creditability of the same was doubted.

The OC in his appeal argued that the AA failed to take notice of the invoice dated 26.11.2018 which was also the date of default upon which no observations were made by the AA. Further, the Appellant contended that the mere fact of the invoice having a different format cannot be a ground for not considering the validity and authenticity of the invoice.

The Appellate Tribunal observed that even if there were more requirements of documents to support the claim of the OC, the AA was under obligation to allow rectifying the defect by giving notice. Further, it was held that the AA failed to justify the finding of not admitting the 2017 invoice having a different format than the rest. Lastly, the NCLAT also observed that the last invoice dated 26.11.2018 was mistakenly left by the AA which ought to be considered for the calculation of the limitation and hence, the petition was well within the limitation period. Thus, the appeal was admitted and the impugned order was set aside.

## 2. Application against the PG can be filed independently without even filing for the application against the CD.

NCLAT in the matter of State Bank of India v. Mahendra Kumar Jajodia (Company Appeal (AT) Insolvency No. 60 of 2022) has held that it is not imperative for an application against a Personal Guarantor to the Corporate Debtor (PG) to have an admitted petition of insolvency against such Corporate Debtor (CD).

The appeal has been filed challenging the impugned order of the NCLT rejecting the application filed under Section 95(1) of the Code on the ground of it being premature.

The Respondent claimed that Section 60(2) of the Code provides that the insolvency or the liquidation proceedings against the CD be pending before the NCLT for admission of petition against the PG.

The NCLAT observed that the use of words "a" and "such" under Section 60(2) of the Code are for the matters wherein the application against the CD has been filed or admitted in a particular NCLT which will have the jurisdiction to deal with this matter also. It nowhere bars fresh insolvency proceedings to be admitted against the PG wherein no case has been admitted or pending against the CD. Further, it was observed that the use of the above-mentioned words are only to ensure that the insolvency proceedings against the CD and the PG run in the same NCLT. Also, it was held that the provisions under Section 60(2) are supplemental to Section 60(1) of the Code and an application can be made under sub-section 1 if the matter is outside the purview of sub-section 2. Hence, the Appellate Tribunal held that the decision of the NCLT in rejecting the application terming it premature was erred in law and was accordingly set aside.

## 3.Distribution of extra funds available as working capital can be made even before the liquidation of the assets during the liquidation.

NCLAT in the matter of Varsana Ispat Ltd. (Through Liquidator) v. Varsana Employee Welfare Association (Company Appeal (AT) (Ins.) No. 885 of 2020) has observed that

act of the liquidator in distributing the recoveries from the debtors during the liquidation process to the stakeholders is valid as per the provisions of the Code.

The present appeal was filed by the liquidator to challenge the impugned order of the NCLT which held that the disbursement made by the liquidator from the working capital of the CD before liquidating the assets was not in accordance with the provisions of the Code and to declare the distribution so made to be in consonance with the IBC.

**Contentions of the Appellant**

- Distribution made by him was after the discussion with the SCC and as per Section 53 of the Code.
- Distribution from the surplus working capital available made was with the undertaking taken from the creditors under Regulation 43 which provides for the return of the distribution if the creditors are not entitled to receive the same.
- It was also argued that the liquidator after the discussion with the KMPs of the CD distributed the extra funds available.
- The distribution so made was in consonance with Regulation 42 which provides for distribution to be made to the stakeholders within a period of 90 days from the receipt of the amount.
- Respondent no. 1 does not have the locus to challenge the distribution as their claims have already been duly met with.

**Contentions of the Respondent No. 1**

- The liquidator has made the illegal distribution from the working capital before the sale of assets of the CD.
- He has also violated Section 53 of the Code which provides for the sale of assets first and then the distribution of the proceeds arising from such sale.

**Observations by the NCLAT**

The Appellate Tribunal set aside the judgment of the NCLT and held the distribution made to the stakeholders to be valid.

## 4.Whether the lenders to the allottees can be considered as Financial Creditors?

The Hon'ble NCLAT in the case of Axis Bank Limited v. Value Infracon India Private Limited (I.A. No. 1502/1503 of 2020 in Company Appeal (AT) (Insolvency) No. 582) has answered this question in negative.

**Brief facts of the case:**

The Appellant/ Bank had given loans to the allottees of a real estate project which later has gone into insolvency. The Appellant had filed its claim with the Insolvency Resolution Professional (IRP) which was refused by the same. Against this action of the IRP, an application was filed in the NCLT under Section 60(5) of the Code which was rejected by the Adjudicating Authority (AA) by observing that the Bank cannot be called as the creditor to the Corporate Debtor (CD) as the loans were given to the homebuyers of the CD and not directly to the CD. By way of this appeal, it has challenged the impugned order passed by the NCLT which rejected the application for inducting the Bank as the secured financial creditor.

**Contentions of the Appellant:**

1. That the recovery certificate issued by the DRT was in favour of both the allottee and the bank which makes the bank a creditor as per Section 3(10) of the Code.
2. That there arises a possibility that the allottees won't deposit the amounts which they will receive under the resolution plan, despite the charge of the Appellant over the said flat.

**Contentions of the Respondent:**

1. That the liability to repay the loan was on the homebuyers and not the CD.
2. That the security interest to be created on the property has to be registered as per Section 77 of the Companies Act, 2013 and since, no charge was created, the Appellant cannot be categorised as a secured financial creditor.
3. That the definition of financial debt under the Code provides for allottees to be the Financial Creditors (FC) and not the banks advancing loans to the homebuyers. Reference can be made to the case of Pioneer Urban Land & Infrastructure Ltd. & Anr. v. Union of India & Ors. ((2019) 8 SCC 416).
4. That the recovery certificate obtained was by way of misrepresentation to the DRT and thus, none of the flats was mortgaged with the Appellant Bank.

**Observations of the NCLAT:**

The Appellate Tribunal after hearing to the parties referred to the case of Pioneer Urban in which it was observed that if the lenders are to be included in the Committee of Creditors (COC) on behalf of the homebuyers and they are to act on behalf of the allottees, then there arises no need for such inclusion and thus, the allottees themselves are best to be the part of the COC. Also, it was observed that the homebuyer should be considered as FC irrespective of the fact that he has self-finance the flat or has taken the loan from the lender for purchasing the flat.

Lastly, it was also stated by the Appellate Tribunal that the objective and scope of the IBC will get defeated if such banks/financial institutions who have given loans to the allottees are considered as FCs and further went on to say that the presence of the tri-partite agreement between the bank, borrower and the CD will not affect the nature of the money borrowed by the homebuyer.

Hence, the appeal was dismissed and the impugned order was upheld.

## 5.Operational Debt does not have classification such as statutory dues and non-statutory dues.

NCLAT in the case of Government of India v. Ashish Chhawchharia (Company Appeal (AT) (Ins.) No. 02 0f 2021) has held that the Code does not differentiate between the statutory dues and other claims under the Operational Debt (OD).

The Appellant in the present appeal has challenged the impugned order by which the resolution plan of the successful resolution applicant (SRA) was passed. The Appellant contends that the plan has reduced the claim amount which was subm-

-itted by it and has failed to safeguard the interest of the statutory dues of the Appellant and other Operational Creditors (OC). It also contended that the claims under the statutory dues and of the OCs are different from each other as the former does not arise from the mutual agreement or contract but charges and obligations of the payer. Hence, the extinguishment of dues was not in conformity with the provisions of the Code.

Respondent/RP contended that the plan has been approved by the COC over which the AA has no judicial power and thus, has become binding on all the stakeholders including the Government.

Also, the payment as decided in the resolution plan has been given to the OC which is more than 36% of the liquidation value which came out to be nil. The RP further stated that the statutory dues come within the definition of OD and the Code does not provide for any difference between the statutory and non-statutory dues.

The NCLAT after hearing to the parties observed that the statutory dues of the Appellant shall come within the definition of OD under Section 5(21) of the Code.

Further, the Appellate Tribunal observed that the Code does not provide for special treatment for statutory dues and such debt shall be the part of OD as per the IBC. Lastly, it was held that the argument of the Appellant that its claim cannot be extinguished is against the ruling given in the case of Essar Steels and thus, it was observed that the claims of the creditors get settled and extinguish by operation of the IBC.

## 6.Whether the Resolution Plan is confidential document even after the approval by the Adjudicating Authority

In the matter of Association of aggrieved workmen of Jet Airways (India) Limited vs Jet Airways India & Anr, the NCLAT, New Delhi decided whether a Resolution Plan (Plan) approved by the Adjudicating Authority (AA) is a public document or not.

In the present matter an appeal is filed by the Applicant who is the association of the workmen of the Jet Airways India Ltd to direct the Respondent No.3 - Resolution Professional to produce records that is Resolution Plan and its annexures with full set of documents relating to Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor.

**Contentions of the Appellant**

The Appellant submits that confidentiality in the CIRP proceeding as mentioned in Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ‘Code’) is very limited and where confidentiality is required to be maintained, the Code and Regulation clearly provides for them. The reasoning behind such confidentiality is to ensure the maximisation of bids and to prevent the undue advantage to competitors from posing as applicants to surreptitiously use information for their own gain. Further, the appellant stated the Resolution Professional is required to submit the document to the Insolvency and Bankruptcy Board of India for recording keeping purpose

Hence, the information is not meant to be confidential after the CIRP has concluded. It was further submitted that in the impugned order, there is no discussion of compliance of Section 30, sub-section (2) and Regulation 37 and 38 and to effectively support the grounds taken in the Appeal, the Appellant is entitled for copy of Resolution Plan.

**Contentions of the Respondent**

The Respondent contended that the Resolution Plan is a confidential document and contains confidential information about the Corporate Debtor and the Successful Resolution Applicant, which are not available in the public domain. The Respondent further stated that only members of the Committee of Creditors shall be served with the copy of the plan. Whereas, the Appellant not being the member of CoC are not entitled to receive the copy. Respondent also stated that the submission of all records with IBBI is for record keeping purposes and cannot be construed as publicly available document.

**Decision of the Appellate Tribunal**

The NCLAT stated that the scheme of the Code indicates that after Resolution Plan is submitted to the Adjudicating Authority and it is approved by the Adjudicating Authority, it no longer remains a confidential document, so as to preclude Regulator and other persons from access the said document. Further, the tribunal referred to provision under Section 61 of the Code wherein an appeal can be filed to the tribunal for several grounds enumerated hence the contents of the resolution plan needs to be disclosed for such appeal.

NCLAT thus, are of the view that Resolution Plan after its approval by the Adjudicating Authority is no more a confidential document, so as to deny access to even a claimant. It is true that the Resolution Plan even though it is not a confidential document after its approval, cannot be made available to each and to anyone who has no genuine claim or interest in the process.

## 7.Majority decision of the CoC is final and cannot be overturned by the RP.

In the matter of CRPL Infra Pvt. Ltd. Vs. Shri Anil Agarwal, RP, Transafe Services Ltd, the NCLAT if the Committee of Creditors (CoC) has approved with sixty-six percent majority as per the provisions of Section 12(2) of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) then the Resolution Professional (RP) cannot take any contrary decision.

**Facts of the case:**

The present appeal is preferred under Section 61(1) of the Code against the impugned order of the Adjudicating Authority(AA) wherein the AA dismissed the by M/s. CRPL Infra Private Limited, the Applicant/Appellant herein against the Resolution Professional/(RP) and the Members of Committee of Creditors (CoC) praying to set aside the resolution passed at the 12th COC Meeting held on 10.09.2020, on the ground that the CoC had rejected the Applicant's request for extension of time to submit the Resolution Plan and to consider the Resolution Plan proposed to be submitted by the Applicant/Appellant.

**The Adjudicating Authority in its impugned order stated that:**

"*This is a case where the CIRP had commenced on 21.11.2019, the first invitation to EoI was published on 18.01.2020. The last date of submission of resolution plan had been extended four times at the instance of prospective resolution applicants including the Applicant herein.*

*Upon receiving an email from the RP, the resolution applicants, including the Applicant herein, had submitted their revised resolution plans before the eleventh CoC meeting was held on 03.09.2020. In the meeting the extension was again sought by the applicant. However, CoC declined the request for another extension for the submission of the Resolution Plan."*

The NCLAT further stated that the Minutes of the 12th COC Meeting established that the CoC offered to the Appellant to continue to be a part of the ongoing process so that it may have an opportunity at any later stage. The Appellant had sought 15 minutes time for discussion and thereafter decided not to participate in the open bidding process and exited the Meeting. Thereafter the CoC went on to approve the Resolution Plan submitted by M/s. Om Logistics Ltd.

Therefore, the Appellate Court stated once the CoC has approved with 66% majority as provided under Section 12(2) of the Code and has decided not to extend the time, the RP cannot take any contrary decision. The decision of the CoC is final and binding as per the scheme of the Code.

## 8.NCLAT dismissed application for CIRP due to material procedural irregularity and pre-existing dispute.

In the matter of M/s Essjay Ericsson Pvt. Ltd Vs. M/s Frontline (NCR) Business Solutions Pvt. Ltd., the NCLAT dismissed the appeal for the admission of application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) for the initation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor on grounds of pre-existing dispute and procedural requirement.

**Background of the Case:**

The appeal has been filed against the order dated 08.06.2021 passed by the 'Adjudicating Authority' rejecting the application u/s 9 of the Code filed by the Appellant on the ground that there is pre-existing dispute and further the notice which was served by the 'Operational Creditor' was in FORM – 3 although it ought to have been in FORM– 4.

Operational Creditor was given Purchase Order by the Respondent (Corporate Debtor) for supply of 'Hybrid Solar Power System, spare parts of Hybrid Solar Power System for their WiFi Project'. The Corporate Debtor has sent email on 25.07.2018, 03.08.2018, 14.08.2018 bringing it to the notice of the Appellant Company that the material supplied by them were of inferior quality and the same need to be replaced. There was a delay in supply of

the materials. A notice under Section 8 of the Code was issued to the Respondent and thereafter the application under Section 9 of the Code was filed in March, 2020. In response to Section 8 notice, reply was filed where dispute was raised in reply to Section 9 notice also, it was stated that there is a dispute regarding payment and with regard to which the Appellant was earlier informed.

The 'Adjudicating Authority' rejected the application on two grounds (i) that notice ought to have been in Form-4 whereas it was in Form – 3 and (ii) secondly there is pre-existing dispute.

**Decision:**

The NCLAT stated that submission of Learned Counsel for the Appellant that there was no dispute subsisting after 03.08.2018 does not appear to be correct. Admittedly, the bills which were issued to the Corporate Debtor were bills for 1,974 complete set whereas in the email dated 13.3.2019 which is at page 86 of the paper book, according to the e.mail sent by the Appellant, complete set with battery were only 1110. This mail is said to be sent by the Appellant with object of reconciliation of the material sent and receipt. The above is clearly a subject of dispute.

Hence, upholding the impugned judgement of the Adjudicating Authority on the above mentioned reasons, the NCLAT dismissed the appeal.

## 9. NCLAT asks CoC of DHFL to reconsider the valuation.

In a major update on the DHFL insolvency case which was acquired by the Piramal Enterprises Ltd. the National Company Law Appellate Tribunal (NCLAT) on Thursday asked the committee of creditors (CoC) to reconsider Piramal Capital and Housing Finance assigning a value of only ₹1 to the bad loans of Dewan Housing Finance Corp. Ltd (DHFL).

In the petition filed by the63 Moons Technologies Ltd which has an exposure to DHFL's Non-Convertible Debentures (NCDs) worth Rs 200 crore. 63 Moons was also classifed as a financial creditor . The petition questioned the "commercial wisdom" of the CoC in approving the resolution plan.

Assigning a value of ₹1 means that the amount will be written off by the lenders and recover as and when it happens, will be credited to the resolution applicant Piramal Group.

However, The Piramal Group on Friday said it is planning to move the Supreme Court to appeal against an order by insolvency appellate tribunal NCLAT, which sent back its winning bid for DHFL to the debt-laden finance company's lenders for reconsidering the valuation. Piramal Capital & Housing Finance Ltd in a statement said that "the Dewan Housing Finance Corporation Ltd (DHFL) acquisition by Piramal Group remains unaffected and the business integration continues as envisaged".

**The special case of Financial Service Providers:**

Financial service providers ("FSPs") were initially kept outside the purview of the IBC. FSPs have been defined in section 3(17) of the IBC and would include non-banking financial companies, microfinance institutions, etc.

The Central Government retained the power to notify FSPs whose insolvency and liquidation proceedings would be conducted under IBC. Such power of the Central Government is under Section 227 of the IBC ("Section 227"). It is under this provision that the Central Government notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 ("FSP Rules").

Unlike in the case of a corporate debtor where a financial creditor or an operational creditor or the corporate debtor itself can initiate a CIRP, in the case of an FSP, an application for initiation of a CIRP of an FSP can be made only by the 'appropriate regulator'.

## NCLT JUDGEMENTS

### 1. Whether a CIRP process can be initiated against the company whose name is struck off the register of RoC.

In the matter of Deepika Surana Vs. V.K. Aggarwal & Company Pvt. Ltd. the NCLT, New Delhi decided whether a proceeding under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor whose name has been struck off from the register of the Registrar of Companies (RoC).

The instant petition is filed by the Operational Creditor against the operational dues pending against the corporate debtor. The Corporate Debtor is a company registered under Companies Act, 1956, however, the RoC Delhi and Haryana under Section 248 of the Companies Act 2013 has struck off the name of the Appellant Company from its Register vide Notice No. ROC/DELHI 248(5)/STK-7/4865 dated 08.08.2018 at entry No.22691 for non-filling of annual returns.

While pursuing the petition for initiation of CIRP process, the NCLT noted that the name of the company (CD) has been struck off from the register of the companies and therefore a petition can be maintained against such company. In this context, the NCLT reproduced provisions under Section 250 of the Companies Act, 2013 which talks about the effect of the company notified as dissolved.

As per Section 250 of the Companies Act, 2013, the company which is struck off has been given an exception by the Legislature to not to be treated as dissolved in two circumstances i.e.,
(a) for the purpose of realising the amount due to the company and;
(b) for the payment or discharge of the liabilities or obligations of the company. Evidently, the Applicant is a Creditor of the Corporate Debtor, who had supplied goods

to the Corporate Debtor, therefore the Corporate Debtor is under an obligation to make payment of its dues.

Therefore, NCLT held that the Corporate Debtor, cannot be considered as dissolved for the purpose of realizing its unpaid dues through the present proceedings. Further, prior to the enactment of IBC 2016, when Section 271(a) and Section 433(e) of the Companies Act 1956 i.e., ground to wound up the Company on being unable to pay its debts, were in vogue, the Legislature had allowed the struck off Company to be wound up by virtue of Section 248(8) of Companies Act 2013.

That applying the same principal for the IBC Proceedings and in the light of the Section 250 of Companies Act 2013 & the Judgement of Hon'ble NCLAT passed in the matter of Mr. Hemang Phophalia Vs. The Greater Bombay Co-Operative Bank Limited & Ors. we are of the considered opinion that the present Application filed against the Struck off Company is maintainable.

## 2.Interest cannot be clubbed with principal amount to ascertain the minimum required operational debt.

In the matter of CBRE South Asia Pvt. Ltd. Vs. M/s. United Concepts and Solutions Pvt. Ltd., the NCLT New Delhi bench decided whether the principal amount and the interest can be clubbed together to reach the requisite default to file an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code).

In the instant case an application is preferred under Section 9 of the Code for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor (CD). While perusing the application submitted by the applicant NCLT noted that under Part IV of the application the applicant has claimed a total amount of Rs.1,39,84,400/- as Operational Debt, out of which Rs.88,50,886/- only is the Principal amount and the remaining Rs.51,33,514/- is the interest component.

Since the principal outstanding claimed by the Operational Creditor is less than Rs. 1 Crore, a query to the Applicant was raised by this Bench as to whether the Principal and Interest amounts can be clubbed together to reach the minimum threshold of Rs. 1 Crore as stipulated under Section 4 of IBC, 2016.

It is imperative to reproduce the definition of 'Operational Debt' as mentioned under Section 5(21). Operational debt means "a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

On the perusal of the definition provided under the Code, the NCLT stated that that since the Principal amount of operational debt claimed by the Applicant is less than Rs.01 Crore and the Application is filed in the year 2021, the Application is not maintainable under Section 4 of IBC, 2016 and is accordingly, dismissed.

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