

Restructuring & Insolvency

Monthly Newsletter

March 2023

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RECENT JUDGMENTS

Noble Marine Metals Co WLL v. Kotak Mahindra Bank Ltd & Ors

National Company Law Appellate Tribunal, Principal Bench, New Delhi | Judgment dated February 09, 2023 | Company Appeal (AT) (Insolvency) No. 653 of 2022

Background facts

- The Resolution Professional filed an Application for approval of the Resolution Plan. Meanwhile, the Financial Creditor, Kotak Mahindra Bank filed an Application for rejecting the Resolution Plan qua the Resolution Plan having mandatory clause of release of personal guarantee of the promoters.
- Appellant contended that Resolution Plan having been approved by the Adjudicating Authority, there is no jurisdiction in the Adjudicating Authority to send back the Resolution Plan for reconsideration at the request of Financial Creditor as laid down in ***Ebix Singapore Pvt Ltd & Ors v. Committee of Creditors of Educomp Solutions Ltd & Ors***¹.
- IDBI Bank, who approved the Resolution Plan, was directed by the Adjudicating Authority to file an affidavit. The affidavit was subsequently filed and, furthermore, an Application was filed seeking permission of the Adjudicating Authority for placing Resolution Plan before the CoC for withdrawal of consent to Clause 4(b) and sub-Clause 4(iii) of the Resolution Plan dealing with relinquishment of the rights of the secured creditor to enforce personal guarantee.
- The Adjudicating Authority passed an order sending back the Resolution Plan to CoC for reconsideration.
- An Appeal was filed challenging that the Adjudicating Authority has no jurisdiction to send back the Resolution Plan at the request of the Financial Creditor.

Issue at hand?

- Whether the Adjudicating Authority can send back the Resolution Plan on the request of the Financial Creditor?

Decision of the Tribunal

- The NCLAT observed that the judgement of the Supreme Court in ***Ebix Singapore Pvt Ltd*** (supra) categorically lays down that Resolution Plan approved by CoC is binding between the Successful Resolution Applicant and the CoC.
- However, the NCLAT also placed reliance on the judgment of ***Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta & Ors***² wherein the Supreme Court held that if the Adjudicating Authority finds that parameters under Section 30(2)(e) have not been kept in view,

HSA Viewpoint

In this present case, the NCLAT has rightly observed that the clause which deals with relinquishment of the rights of the secured creditor to enforce personal guarantee violates the provision of Section 128 of Contract Act, and has to be treated to be violation of Section 30(2)(e) of the Code. Hence, if the Adjudicating Authority finds that parameters under Section 30(2)(e) have not been kept in view, the Resolution Plan can be sent back to the CoC to review such Resolution Plan after satisfying the parameters.

¹ 2022 2 SCC 401

² 2020 8 SCC 531

the Resolution Plan can be sent back to the CoC to review such Resolution Plan after satisfying the parameters.

- The NCLAT observed that in the present case, the CoC is not asking to withdraw from the Plan or asking for reviewing the entire Resolution Plan; rather, CoC has asked for leave of the Court for deleting clause in the Plan which sought to release the promoters from personal guarantee given to the Financial Creditors.
- In view of the same, the NCLAT disposed of the Appeal by observing that there is no ground to interfere with the Impugned Order.

Rourkela Steel Syndicate v. Metistech Fabricators Pvt Ltd

National Company Law Appellate Tribunal, New Delhi | Judgment dated February 06, 2023 | Company Appeal (AT) (Ins) No. 924 of 2022

Background facts

- The Appeal has been filed against the order dated June 09, 2022 passed by the Adjudicating Authority by which order the Application filed by the Appellant (the Operational Creditor) under Section 9 of IBC has been rejected on the ground that the Application is barred by Section 69(2) of the Partnership Act.
- The Adjudicating Authority took the view that Section 69(2) of the Partnership Act bars a suit by an unregistered partnership, hence the present Application which was filed by the Appellant against the third party for enforcing a right arising **out of contract is barred**.

Issue at hand?

- Whether an application under Section 9 be treated as a suit and therefore, will an insolvency petition by an unregistered partnership be maintainable?

Decision of the Tribunal

- NCLAT held that to ascertain whether an insolvency petition can be filed by an unregistered partnership, it needs to be ascertained whether an Application under Section 9 of IBC can be said to be a suit.
- The NCLAT observed that it is well settled by the judgment of the Supreme Court in ***BK Educational Services (P) Ltd v. Parag Gupta and Associates***³ and ***Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd***⁴ and Anr that provisions of Section 5 of Limitation Act are fully applicable to Section 7 & 9 IBC applications.
- The rationale for relying on this judgment was that Section 5 of Limitation Act is not applicable in a suit.
- By virtue of the above judgment, it can be logically deduced that insolvency proceedings under Section 7 or Section 9 are not suit proceedings.
- Therefore, the embargo under Section 69(2) of the Partnership Act, which prevents unregistered partnerships from filing a suit, will not apply to insolvency proceedings.
- In view of the same, an insolvency petition filed by an unregistered partnership is maintainable.

HSA Viewpoint

After placing reliance on the judgments of the Supreme Court and relevant provisions of various statutes, the NCLAT has rightly come to the conclusion that an application filed under Section 7 or 9 of the Code initiating CIRP of the Corporate Debtor are not a suit and therefore an unregistered partnership can also file an insolvency petition.

Welspun Steel Resources Pvt Ltd v. Union of India

Gujarat High Court | Judgment dated February 17, 2023 | R/Special Civil Application No. 19387 of 2022

Background facts

- The Supreme Court directed an auction to take place in order to sell the assets of the Corporate Debtor i.e. ABG Shipyard Ltd.
- The successful bidders in this case, who paid the full sale consideration and received sale certificates, are the Petitioners. The Deputy Director of the Directorate of Enforcement issued a Provisional Attachment Order dated September 21, 2022 on the particular assets that were sold to the Petitioners.
- Petitioners filed a Writ Petition for quashing and setting aside the order of attachment dated September 21, 2022, to the extent that it attaches the assets that were sold to the Petitioners.

Issue at hand?

- Whether the assets acquired by the Petitioners can in any way be considered proceeds of crime under Section 2(1)(u) of the Prevention of Money Laundering Act, 2002?

³ (2019) 11 SCC 633

⁴ (2019) 10 SCC 572

Decision of the Court

- The High Court noted that the assets that the Petitioners have acquired are those assets that are not acquired as a result of criminal activity and, as a result, cannot be said to be proceeds of crime while quashing and setting aside the order of attachment with regard to the properties of the Petitioners.
- It was further noted that allowing the authorities to attach properties bought by a successful bidder in a liquidation process on the presumption that such an acquisition was the result of criminal activity might be against the interests of maximising the value of the Corporate Debtor's assets by significantly lowering the chances of finding a willing resolution applicant or a bidder in liquidation.
- It was decided that the authority must have reason to believe, based on the information in its possession, to conclude that the assets are the proceeds of crime. Reason to believe cannot come from unfounded rumors, suspicion, or gossip and there must be cogent evidence to back the same.
- Just alleging illegal transactions and money-diversion cannot prove that the properties the Petitioners have obtained are the profits of crime. The simple claim that Corporate Debtor engaged in circular transactions with several group entities and made investments abroad using the loan obtained from the bank for purposes other than those intended cannot meet the high standards of establishing proceeds of crime.
- The High Court observed that the specific assets of the Petitioners that were sold should not be regarded as assets that could be considered to have been obtained from proceeds of crime, and the Deputy Director of the Directorate of Enforcement was ordered to release the properties from such attachment.

HSA **Viewpoint**

The High Court has rightly quashed the order of attachment which the Petitioners have acquired in an auction. Since those assets are not acquired as a result of criminal activity, they cannot be said to be proceeds of crime.

Shri Guru Containers v. Jitendra Palande

National Company Law Appellate Tribunal, New Delhi | Judgment dated February 22, 2023 | Company Appeal (AT) (Insolvency) No. 106 of 2023

Background facts

- The Adjudicating Authority had initiated the CIRP on the request of the Operational Creditor against Tarang Exports Pvt Ltd, the Corporate Debtor, by orders dated February 17, 2020.
- However, further steps could not be carried out in the absence of financial information since the CoC could not be formed due to a lack of claims submission. The actions taken by IRP, including filing an application under Section 19 of the Code to get information from the Operational Creditor and the suspended directors, were unsuccessful.
- As a result, the IRP filed a request to terminate the CIRP against the Corporate Debtor and requested for release from responsibility and payment for the costs associated with the completed responsibilities.
- The Adjudicating Authority approved IRP's application and instructed the Operational Creditor to pay the IRP for all CIRP expenses incurred while performing his obligations.

Issue at hand?

- Whether the IRP is entitled to claim fees and expenses incurred in the CIRP proceedings and, if so, whether it is incumbent upon the Operational Creditor/Respondent to bear such fees/expenses subject to their being reasonable?

Decision of the Court

- Before deciding the Appeal, NCLAT noted that the IRP had taken action to safeguard information in accordance with the Code's provisions and that the Operational Creditor had been informed of these actions.
- Notwithstanding the IRP's diligence in performing his duties, the scope of the CIRP-related work was limited since no information was forthcoming. As a result, no claims were lodged. In the creditor-driven Code, the creditors have a decisive, conscientious role in the resolution, and it was stated that it does not appear to be justified to place the entire burden on the IRP due to his failure to perform his duties.
- Regarding the payment of IRP's fees, NCLAT permitted payment with a revision to the amount of fee and noted that failure to refund fees or costs of an IRP directly violates regulations. Whether a price is acceptable depends on the circumstances, but it should be reasonable in light of the job that the IRP has correctly performed in accordance with the law.

HSA **Viewpoint**

While deciding the Appeal, the NCLAT observed that CIRP related work became limited and restricted by the fact that progress got stonewalled due to lack of flow of information and lack of claims. As such, this was not a result of any dereliction of duty by the IRP. Shifting the entire blame on the IRP on grounds of non-performance of duty and making him a scapegoat does not appear to be justified. Further, it is equally important for the creditors to play a catalytic role in the insolvency resolution process given the present regime of creditor-driven IBC.



RECENT DEALS

Resolution of QVC Exports Pvt Ltd

- The NCLT, Mumbai Bench IV, vide an order dated March 03, 2023, approved the Resolution Plan submitted by QVC Exports Pvt Ltd (**Successful Resolution Applicant**), in the CIRP of Karthik Alloys Ltd, the Corporate Debtor.
- Vide order dated December 17, 2019, the NCLT, Mumbai Bench admitted the Company Petition filed by Vedanth.com Worldwide Ltd under Section 9 of the Code and ordered for initiation of the CIRP of the Corporate Debtor thereby appointing Mr. Anneel Saraogi, as the Interim Resolution Professional.
- In the 2nd meeting of the CoC held on February 25, 2020, Mr. Anneel Saraogi was appointed as the Resolution Professional.
- After issuance of Form G on March 1, 2020, in terms of Section 25(2)(h) of the IBC read with Regulation 36A (1) of the CIRP Regulations, 2016, the Applicant received EOI from 5 Prospective Resolution Applicants (**PRAs**) within the stipulated time period. After due discussion and deliberation, the Resolution Plan received from the Successful Resolution Applicant was approved with 100 % voting share by the CoC in the 20th meeting held on July 13, 2021.
- Pursuant to approval of the Resolution Plan, the Resolution Professional issued a Letter of Intent on July 16, 2021 in favor of the Resolution Applicant and also sought for Performance Bank Guarantee of INR 50 lakh, which was duly complied by the Resolution Applicant on July 16, 2021.
- A perusal of the order of approval of Resolution Plan shows that the Resolution Applicant proposes a total consideration of INR 21.726 crore to all the stakeholders to be paid within a period of 18 months from the effective date of this Resolution Plan. Further, the Resolution Applicant undertook to prioritize payment of dues to Operational Creditors over the Financial Creditors under the Resolution Plan.
- While approving the Resolution Plan, the Adjudicating Authority directed that the Memorandum of Association (**MoA**) and Articles of Association (**AoA**) shall accordingly be amended and filed with the Registrar of Companies (**RoC**), concerned for information and record. The Resolution Applicant, for effective implementation of the Plan, shall obtain all necessary approvals under any law for the time being in force within such period as may be prescribed.
- Lastly, the Adjudicating Authority held that in terms of the judgement of Supreme Court in the matter of **Ghanshyam Mishra & Sons Pvt Ltd v. Edelweiss Asset Reconstruction Company Ltd**⁵ on the date of approval of the Resolution Plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim which is not part of the resolution plan.

⁵ 2022 LiveLaw (SC) 771

Resolution of K & K Foundry Pvt Ltd

- The NCLT, Mumbai Bench V, vide an order dated March 02, 2023, approved the Resolution Plan submitted by a Mr. Samir Uttamrao Kale, the Successful Resolution Applicant, in the CIRP of K & K Foundry Pvt Ltd, the Corporate Debtor.
- Vide order dated March 20, 2020, the NCLT admitted the Company Petition filed Mr. Sudhir Kamble under Section 9 of the Code and ordered for initiation of the CIRP of the Corporate Debtor thereby appointing Mr. Dinesh Gopal Mundada, as the Interim Resolution Professional.
- After issuance of Form G in terms of Section 25(2)(h) of the IBC read with Regulation 36A(1) of the CIRP Regulations, 2016, the Applicant received Resolution Plan from two Resolution Applicant. The Resolution Plan submitted by Mr. Samir Uttamrao Kale (**Successful Resolution Applicant**) after due discussion and deliberation, was approved with 100 % voting share by the CoC in the 7th meeting.
- While approving the Resolution Plan, the Adjudicating Authority observed that Resolution Applicant is eligible to submit the Resolution Plan in terms of the affidavit satisfying the eligibility criteria as per the provisions under Section 240A read with. 29A of the Code since the Corporate Debtor is registered as an MSME. Further, the Resolution Plan provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the Corporate Debtor.
- Further, the amount due to the operational creditors under the Resolution Plan has also been given priority in payment over financial creditors in accordance with the Code and the Regulations.
- While approving the Resolution Plan submitted by the Successful Resolution Applicant, NCLT has relied upon *K. Sashidhar v. Indian Overseas Bank & Ors*⁶ and *Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta & Ors*⁷ wherein it was held that the NCLT is not required to interfere with the decision taken by the CoC in its commercial wisdom, save and except the circumstances referred to in Section 30(2) of the IBC, 2016.

⁶ CA No. 10719 of 2018, CA No. 10971 of 2018 and SLP(C) No. 29181 of 2018

⁷ (2019) SCC Online



COMPANIES ADMITTED TO INSOLVENCY IN FEBRUARY 2023

Companies admitted to insolvency

#	Name of Corporate Debtor	NCLT Bench	Industry
1	Kisan Mouldings Ltd	Mumbai	Spinning, weaving and finishing of textiles
2	Pala Decor Pvt Ltd	Chandigarh	Textile manufacturing
3	Frontage Media Pvt Ltd	Mumbai	Media and business activities
4	Harihar Infra Ventures (I) Pvt Ltd	Mumbai	Building completion and repairs
5	Vikarsh Stampings India Pvt Ltd	Mumbai	Manufacturing of special purpose machinery
6	Vaishnovi Infratech Ltd	Hyderabad	Real estate and construction activities
7	Horizon Outsource Solutions Pvt Ltd	Mumbai	Legal, accounting, book-keeping, auditing, tax consultancy and market research
8	Metalite Eco Future Labs (P) Ltd	New Delhi	Research and experimental development on natural sciences and engineering
9	Elly Realcon Pvt Ltd	New Delhi	Building of complete constructions or parts thereof and civil engineering
10	Bharath Hi-Tech Builders Pvt Ltd	Bengaluru	Building of complete constructions or parts thereof and civil engineering
11	Malind Properties Pvt Ltd	Bengaluru	Building of complete constructions or parts thereof and civil engineering
12	Pilot Mines & Minerals Pvt Ltd	New Delhi	Mining and quarrying
13	Innovatione India Projects LLP	New Delhi	Corporate Interior design and fit out projects
14	Vector Projects (India) Pvt Ltd	Mumbai	Manufacture of products of wood, cork, straw, and plaiting materials
15	Siddhali Steel and Strips Pvt Ltd	Mumbai	Manufacture of basic iron & steel
16	Sristi Hospitality Pvt Ltd	Mumbai	Hotels; camping sites and other provision of short-stay accommodation
17	Future Enterprises Ltd	Mumbai	Retail trade of new goods in specialized stores
18	Siddhali Steel and Strips Pvt Ltd	Mumbai	Manufacture of basic iron & steel
19	Chandigarh Overseas Pvt Ltd.	Chandigarh	Wholesale activities, including commission agents, commodity brokers, auctioneers and other wholesalers who trade on behalf and on the account of others
20	Vector Projects (India) Pvt Ltd.	Mumbai	Manufacture of products of wood, cork, straw, and plaiting materials
21	Shankeshwar Properties Pvt Ltd	Mumbai	Building of complete constructions or parts thereof and civil engineering
22	Balan and Chheda Developers Pvt Ltd	Mumbai	Real estate activities with own or leased property
23	Shree Ramrajya Cotex Respondent/Pvt Ltd	Ahmedabad	Agricultural and animal husbandry service activities, except veterinary activities
24	Colour Roof (India) Ltd	Mumbai	Manufacture of basic precious and non-ferrous metals
25	Sindhu Trade Links Ltd	New Delhi	Supporting and auxiliary transport activities including activities of travel agencies
26	Aadinath Polyfab Pvt Ltd	Mumbai	Manufacture of plastic products
27	Reliance Broadcast Network Ltd	Mumbai	Telecommunications including production of radio and television programs, whether or not combined with broadcasting
28	Forcefox Technologies Pvt Ltd	Chandigarh	Manufacture of electronic valves and tubes and other electronic components
29	Adgaonkar Saraf Pvt Ltd	Mumbai	Manufacturing activities
30	Black Pepper Technologies Pvt Ltd	Bengaluru	Hardware consultancy with or without associated software application
31	Divya Agro Chem Pvt Ltd	Mumbai	Manufacture of other chemical products

32	Shivam Continental Pvt Ltd	Chandigarh	Manufacture of tobacco products
33	Sapphire Hospitals Pvt Ltd	Mumbai	Human health activities
34	Prayag Polytech Pvt Ltd	Jaipur	Manufacture of other fabricated metal products and metal working service activities
35	Siti Networks Ltd	Mumbai	Telecommunications
36	Fairdeal Multifilament Pvt Ltd	Ahmedabad	Manufacture of plastic products
37	Sintex Plastics Technology Ltd	Mumbai	Legal, accounting, book-keeping, auditing, tax consultancy and market research

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