



## Notes

Article – 12/2022

# The Insolvency and Bankruptcy Code, 2016

## Important Judgements

The Insolvency and Bankruptcy Code 2016, (“Code”) a law enacted to consolidate the framework of existing insolvency and bankruptcy laws, will be turning five years old. The Code is a major reform that was introduced by the Government of India in the year 2016.

Prior to the commencement of the Code, the legislative framework in India dealing with the insolvency and restructuring procedures was very complex and fragmented across multiple legislations. With the enactment of the Code the resolution process of the distressed assets has been streamlined but also provided a time-bound one-stop solution to the parties involved.

Needless to say, the primary objective of the Code is to revive distressed debtors. The whole idea is to put the Corporate Debtor back on its feet for the larger benefit of all the stakeholders not just the creditors. The focal point of the Code is to stop the corporate death and ensuring generation of value to the economy.

There have been numerous important judgments /orders delivered by the various judiciary such as NCLT, NCLAT, Supreme Court etc explaining several conceptual issues, settling contentious issues and resolving grey areas of the Code. Few of the important judgments are laid under covering the virtuous interpretation of the Code and related issues.

### 1) Sri Bijay Kumar Agarwal Suspended .....vs State Bank of India And Anr, Hon’ble NCLAT, New Delhi - Company Appeal (AT) (Insolvency) No. 105 of 2022

**-Acknowledgment u/s 18 of the Limitation Act, 1963 made by the Principal Borrower is equally binding on the Corporate Guarantor.**

#### a) Facts of the Case

State Bank of India has extended financial facility to Gee Pee Infotech Pvt. Ltd - Principal Borrower in the year 2006. The Corporate Debtor executed a Deed of Guarantee for overall limit in the year 2006. Subsequently a Supplemental Deed of Guarantee for increasing overall limit was executed by Corporate Debtor in the year 2008, 2009 and 2010.



On becoming the account NPA of the Principal Borrower, State Bank of India invoked the Bank Guarantee against the Corporate Debtor and called upon the Principal Borrower to make payment.

Subsequently, an OA No.193/2015 was filed by the State Bank of India against the Principal Borrower, Corporate Debtor (Corporate Guarantor) before the Debt Recovery Tribunal, Kolkata for recovery of amount.

CIRP of the Principal Borrower commenced and later it went into liquidation and thereafter it was dissolved.

In the application filed under Section 7 against the Corporate Guarantor, the Adjudicating Authority by the impugned order dated 14.12.2021 admitted the Section 7 Application, against the Corporate Debtor- Corporate Guarantor.

This appeal has been filed by the Suspended Director of the Infra Tie-up Pvt. Ltd (Corporate Debtor) aggrieved by the above mentioned order dated 14.12.2021 of NCLT, Kolkata Bench directing the initiation of CIRP against the Corporate Debtor (Corporate Guarantor).

The Counsel appearing on behalf of the Respondent submitted that:

- i) the State Bank of India after the account becoming NPA of the Principal Borrower filed an OA before the Debts Recovery Tribunal, Kolkata, both against Principal Borrower and the Corporate Debtor and with effect from the date of filing of OA before the Debts Recovery Tribunal (DRT), period of limitation had stopped running. Hence, the Application under Section 7 filed by the State Bank of India is well within time as stipulated under the Code.
- ii) That within the period of three years from declaring the account of Principal Borrower NPA, there has been acknowledgement of debt by the Principal Borrower. The letters were for one-time settlement of account, which letters contained the acknowledgment of debt within the meaning of Section 18 of the Limitation Act. Hence, the Financial Creditor was entitled to file the Application under Section 7 within three years from the said acknowledgments.

What is urged by the Appellant is that the acknowledgment of liability to pay the amount in question was by the principal borrower and that acknowledgment cannot be the basis to proceed against the corporate guarantor (corporate debtor).

Section 18 of the Limitation Act, however, posits that a fresh period of limitation shall be computed from the time when the party against whom the right is claimed acknowledges its liability. The financial creditor has not only the right to recover the outstanding dues by filing a suit, but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is coextensive with that of the principal borrower and more so when it activates from the written Company Appeal (AT) (Insolvency) No. 105 of 2022 28 acknowledgments of liability and failure of both to discharge that liability.



## **b) Findings**

During the course of proceedings several judgements were submitted by both the parties. The Supreme Court relied on the view taken by NCLT in Union Bank of India v. Surana Metals Ltd., 2019 SCC OnLine NCLT 9859 and which commended to NCLAT [Laxmi Pat Surana v. Union Bank of India, 2020 SCC OnLine NCLAT 217] -- that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower from time to time and in particular the (corporate) guarantor/corporate debtor vide last communication dated 8-12-2018. Thus, the application under Section 7 IBC filed is within limitation."

## **c) Conclusion**

The pronouncement by the Hon'ble Supreme Court in the above case, i.e. Laxmi Pat Surana is complete answer to submission made by learned Counsel for the Appellant that acknowledgement made by the Principal Borrower cannot be read as acknowledgement against the Corporate Guarantor. It was held that liability of Corporate Debtor is coextensive with that of the Principal Borrower.

## **2) Aditya Kumar Tibrewal [RP of Balaji Forest Products Private Limited] vs. Om Prakash Pandey & Ors., before Hon'ble NCLAT, New Delhi - Company Appeal (AT) Insolvency No. 583 of 2021**

**- Time Period Under Regulation 35A is Directory and Not Mandatory**

### **a) Facts of the Case**

Resolution Professional (RP) of the Corporate Debtor has filed an appeal under Section 61 of the Code, aggrieved by the Order dated 26th February 2021 of the Hon'ble NCLT, Kolkata, wherein the Tribunal rejected the application filed by the RP under Section 43, 45, 49 & 66 of the Code on the ground that the application filed by the Resolution Professional is not within the time limit as stipulated in Regulation 35A of the CIRP Regulations 2016.

### **b) Findings**

In the instant case, the Suspended Board of the Corporate Debtor were not extending any cooperation to the Resolution Professional and therefore an application under Section 19(2) was filed by Resolution Professional against the Suspended Board of Directors and an order dated 09.12.2019 was passed in 19(2), wherein NCLT directed the Suspended Directors to cooperate with Resolution Professional but still numerous hindrances were created in CIRP by the Suspended Directors. Thereafter after receiving the information Resolution Professional filed an application under Section 43, 45, 49 and 66 of the Code.



It was contended by Resolution Professional that Regulation 35A of CIRP Regulations is directory in nature and not mandatory and NCLT cannot dismiss the application filed by RP merely on the ground of non-compliance with the timeline mentioned under Regulation 35A of the CIRP Regulations 2016.

It was contended by the Suspended Directors that the Resolution Professional has failed to comply with the requirement of Regulation 35A of the CIRP Regulations and therefore, the application filed by the Resolution Professional was rightly rejected by the NCLT.

### **c) Conclusion**

The Hon'ble NCLAT is of the view that the timeline prescribed in Regulation 35A of the CIRP Regulations is only directory and any action taken by the Resolution Professional beyond the time prescribed under Regulation 35A of the CIRP Regulations cannot be held to be non-est or void only on the ground that it is beyond the period prescribed under Regulation 35A of the CIRP Regulations.

One of the objectives of the Code is to maximise the assets of the Corporate Debtor. In event the actions taken by the Resolution Professional after the timeline prescribed in Regulation 35A of the CIRP Regulations are to be annulled, the undervalued and fraudulent transactions will go out of the reach of the Resolution Process, reach of the Court and shall cause great inconvenience and injustice to the Corporate Debtor.

There may be genuine and valid reasons for RP not to file an application for avoiding the transactions within the time prescribed which are questions relating to each case and have to be examined on a case-to-case basis and if there are reasons due to which RP could not file the application within the time, the same has to be examined on merit.

### **3) CBRE South Asia Pvt Ltd Vs United Concepts and Solutions Private Limited - New Delhi, CP (IB) No. 797/ND/2021**

*- "the Interest amount cannot be clubbed with the Principal amount of debt to arrive at the minimum threshold of Rs.1 Crore for complying with the provision of Section 4 of IBC, 2016.*

#### **a) Facts of the Case**

In the instant case an application has been preferred under section 9 of the Code for initiation of the Corporate Insolvency Resolution Process against the Corporate Debtor.

During the course of the preliminary hearing, it was observed by the Bench 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 amount can be clubbed together to reach the minimum threshold of Rs. 1 Crore as stipulated under Section 4 of Code.

## **b) Findings**

The Hon'ble Tribunal stated that since an application under Section 9 can only be filed on "occurrence of default", therefore, NCLT New Delhi Bench examined the definition of "default" as defined under Section 3(12) & "debt" as defined under Section 3(11) & "claim" as defined under Section 3(6) of Code. Further, the Hon'ble Bench also examined "Operational Debt" and "Financial Debt" as defined under section 5(21) & 5(8) of Code respectively and also referred to the finding given by the NCLT Chandigarh Bench in the matter of Wanbury Ltd. Vs. M/s. Panacea Biotech Ltd. in CP No. 8/2016 dated 18.04.2017.

## **c) Conclusions**

On the perusal of the definition provided under the Code, Hon'ble NCLT stated that the "interest" can be claimed as the Financial Debt, but neither there is any provision nor any scope to include the interest to constitute as the Operational Debt. And the Application is filed in the year 2021, the Application is not maintainable under Section 4 of IBC, 2016 and is accordingly, dismissed.

The Interest amount cannot be clubbed with the Principal amount of debt to arrive at the minimum threshold of Rs.1 Crore for complying with the provision of Section 4 of IBC, 2016.

## **4) CFM Asset Reconstruction Pvt Ltd V/s SS Natural Recourses Pvt Ltd & Ors, Hon'ble NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 396 of 2022**

**Corporate Debtor cannot be sent into Liquidation just because liquidation value is more than the value of the Resolution Plan.**

### **a) Facts of the Case**

Ramsarup Industries Limited'-the Corporate Debtor was admitted into 'Corporate Insolvency Resolution Process' in the year 2018, wherein a Resolution Plan submitted by SS Natural Resources Pvt Ltd was approved by the CoC and was subsequently approved by the Hon'ble



NCLT Kolkata Bench by Order dated 04.09.2019. Thereafter, Monitoring Committee was constituted for implementation of the Resolution Plan.

CFM Asset Reconstruction Pvt Ltd (Assignee), Appellant herein purchased the debt from some of the Creditors of the Corporate Debtor.

Eight Appeals were filed challenging the Order dated 04.09.2019 before the NCLAT which was dismissed by Order dated 04.03.2021. Hon'ble NCLAT also directed the Monitoring Committee to start taking steps for implementation of the Resolution Plan.

This Appeal has been filed by an Assignee challenging order dated 06th April, 2022 of the Adjudicating Authority through wherein I.A. No. 538 of 2021 filed for Liquidation and I.A. No. 628 of 2021 filed by the Assignee for claiming compensation/interest from the SRA due to delay in implementation of the Resolution Plan was dismissed.

## **b) Findings**

The Hon'ble NCLAT noted that Monitoring Committee could not take decision for implementation of the Resolution Plan on account of pre-condition put by the Appellant himself that unless the payment of compensation/interest is made they shall not participate in discussion regarding the implementation of the Resolution Plan.

From the minutes of Monitoring Committee, it is clear that SRA only objected the claim of the Appellant for payment of Compensation/interest and it clearly mentioned its readiness and willingness to implement the plan. SRA had already incurred Rs. 59,85,00,000/- . towards the plan

It is submitted by the Appellant that for 21 months the plan has not been implemented and the SRA has lost its right to implement the plan and the Adjudicating Authority ought to have directed for liquidation.

Referring to the case laws of 'Swiss Ribbon (P) Ltd. Vs. Union of India', (2019) 4 SCC 17 and 'Babulal VrdharjiGurjar Vs. Veer GurjarAluminium Industries Pvt. Ltd. & Anr.', (2020) 15 SCC1, it was noted that the primary focus of the Legislation is to ensure revival and continuance of the Corporate Debtor. The Liquidation has been termed as Corporate Debtor's death.

The whole idea of the Code is to put the Corporate Debtor back on its feet for the larger benefit of all the stakeholders, not just the creditors. The present applications will have to be seen in the larger context of the objectives sought to be achieved.

Rather than the considering mathematically projected liquidation value which being more than the value offered by the SRA. It's better to acknowledge the value addition that will be provided by a running enterprise to the economy and various stakeholders. It is seen that Liquidation does not necessarily satisfy the projected liquidation value, and the liquidator has had to reduce the reserve bid in order to find buyers.

### c) Conclusions

The Hon'ble NCLAT finds not lack of intent on part of the SRA for implementation of the plan after the judgement of the NCLAT passed on 04.03.2021 including offer to deposit the entire amount in the Escrow Account.

Therefore, the Appeal filed by the Appellant wanting to push the Corporate Applicant towards Liquidation be dismissed as it cannot be the reason to allow this Appeal and the implementation of the Resolution Plan cannot be interfered with within the exercise of the Appellate Jurisdiction.



Anshu Agarwal  
Chartered Accountant  
Partner, KGRS & Co.