DEVELOPMENTS IN INSOLVENCY LAWS

IN DECEMBER 2018

ABOUT ACUITY LAW

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers led by Souvik Ganguly and Gautam Narayan, who have deep and diverse experiences in their chosen areas of practice. We have advised Indian and multinational companies, funds, banks and financial institutions, founders of companies, management teams, international law firms, domestic and international investment banks, financial advisors and government agencies in various transactions in and outside India.

Acuity Law takes pride in rendering incisive legal advice taking into consideration commercial realities. Our areas of practice are divided into two departments.

The Corporate practice is led by Souvik Ganguly and the Disputes practice is led by Gautam Narayan.

As part of the Corporate practice, Acuity Law advises on:

- Mergers and acquisitions;
- Distressed mergers and acquisitions;
- Insolvency Law;
- Private Equity and Venture Funding;
- Employment and labour laws
- Commercial and trading arrangements; and
- Corporate Advisory

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- Civil disputes;
- Criminal law matters; and
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Acuity Law actively follows legislative and policy developments in its chosen areas of practice and shares such developments with clients and friends on a regular basis.

If you want to know more about Acuity Law, please visit our website www.acuitylaw.co.in or write to us at al@acuitylaw.co.in.

INTRODUCTION

This newsletter covers developments with respect to the Insolvency and Bankruptcy Code, 2016 during the month of December 2018. We have covered orders passed by the Hon'ble Supreme Court of India, the National Company Law Appellate Tribunal and various benches of the National Company Law Tribunal. Please see below the summary of the relevant orders.

ABBREVIATIONS

Adjudicating Authority	AA
Committee of Creditors	CoC
Corporate Insolvency Resolution Process	CIRP
The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016	CIRP Regulations
Insolvency and Bankruptcy Code, 2016	Code
Insolvency and Bankruptcy Board of India	IBBI
National Company Law Tribunal	NCLT
National Company Law Appellate Tribunal	NCLAT
Resolution Professional	RP
Hon'ble Supreme Court of India	SC
The Sick Industrial Companies Act, 1985	SICA

1. THE TERM 'GOODS AND SERVICES' UNDER THE PROVISIONS OF 'MORATORIUM' DOES NOT INCLUDE GOODS AND SERVICES WHICH ARE DIRECT INPUT TO THE OUTPUT PRODUCED BY A CORPORATE DEBTOR

Matter: Sony Picture Network India Private Limited vs. Ortel Communications Limited

Order dated: 27 November 2018

Summary:

In this matter, an application was filed by Sony Picture Network India Private Limited ("**Applicant**") against Ortel Communications Limited ("**Respondent**") before the NCLT, New Delhi Bench ("**NCLT**"), for initiation of CIRP. The Respondent admitted that it was unable to pay the due amount and consented for getting the application admitted for CIRP. However, vide an affidavit the Respondent stated that in addition to the essential services prescribed under the Code such as electricity, water, telecommunication services and information technology services; the services of pay channels, conditional access systems, video links, internet bandwidth and its links are also essential services that should not be terminated or suspended or interrupted during the moratorium period in order to keep the corporate debtor as a going concern.

The Applicant contested the above view of the Respondent by submitting that the term 'goods and services' provided under the provision of 'moratorium' in the Code does not include goods and services which are direct input to the output produced by a corporate debtor. The NCLT agreed with the said submission of the Applicant and thereby rejected the prayer made by the Respondent and admitted the said application.

2. NCLT CANNOT ADMIT AN APPLICATION WHERE SETTLEMENT HAS BEEN ARRIVED AT BETWEEN THE PARTIES PRIOR TO PRONOUNCEMENT OF THE ORDER

Matter: Gaurav Pandey vs. Eternity Investment Services Private Limited & another

Order date: 30 November 2018

Summary:

An application was filed by Eternity Investment Services Private Limited ("**Applicant**") against Blue Coast Infrastructure Development Private Limited ("**Corporate Debtor**") before the NCLT, Chandigarh Bench ("**NCLT**"), wherein the said application was admitted by the NCLT vide order dated 13 November 2018. On the date of pronouncing the said order, it was brought to the attention of the NCLT that a settlement had been arrived at between the parties and that the parties wished to withdraw the said application. However, the NCLT declined to allow the withdrawal of the said application on the ground that the matter had been fixed for pronouncement.

Being aggrieved by the decision of the NCLT, the representative of the Corporate Debtor filed an appeal to the NCLAT. The appellant referred to the settlement deed entered into between the parties which clearly showed that settlement had been entered into between the parties prior to pronouncement of the said order.

In view of the above, the NCLAT *inter alia* held that there being no default of payment the NCLT had no occasion for admitting the application. Further, the NCLAT also held the appointment of the interim resolution professional, declaration of moratorium, freezing of account and all other orders passed by the NCLT as illegal and accordingly set aside the order passed by the NCLT.

3. APPLICATION UNDER THE CODE CAN ONLY BE BROUGHT IN RESPECT OF AN 'OPERATIONAL DEBT' AS DEFINED UNDER THE CODE

Matter: Usha Holdings LL.C. and another vs. Francorp Advisors Private Limited

Order dated: 30 November 2018

Summary:

In this matter, Usha Holdings LL.C and another ("**Appellants**") had entered into a 'license agreement' with Franchise India Holdings Limited for a total sum of USD 300,000. Subsequently another company, Francorp Advisors Private Limited was incorporated in India and began using the license under a 'commercial agreement' entered with the original holders of the license agreement. The Appellants filed a suit before a U.S. District Court for breach of 'license agreement' praying for a money judgment. The U.S District Court awarded the amount prayed for along with interest to the Appellants. However, this amount with interest awarded by the U.S District Court remained unpaid by Francorp Advisors Private Limited.

Subsequently, the Appellants filed an application before the NCLT, New Delhi Bench ("**NCLT**") against Francorp Advisors Private Limited. The basis of the unpaid operational debt was stated to be the order delivered by the U.S. District Court. The NCLT rejected the application for reasons of not having fulfilled the qualifications that a foreign decree must fulfill for being recognized as valid in India *inter alia* being i) the decree placed on record was not a certified copy ii) the decree was not made a rule of the court before the District Court of India, in case it was executable and iii) the Appellant did not show any notification of reciprocation between the United States and India as required under the Civil Procedure Code.

An appeal was preferred by the Appellant before the NCLAT, which held that the NCLT had no jurisdiction to decide the legality of the foreign decree and that all observations with regards to the decree were a nullity before the law. It also held that the debt due to the Appellants as a result of the judgment of a foreign court does not come within the meaning of 'operational debt' as a money claim does not relate to supply of goods or services and therefore the application filed by the Appellant was not maintainable.

4. CIRP MAY BE INSTITUTED AGAINST A CORPORATE DEBTOR EVEN IF AN ORDER OF LIQUIDATION HAS BEEN PASSED BY A HIGH COURT UNDER THE COMPANIES ACT, 1956

Matter: Bank of Baroda vs. Topworth Pipes & Tubes Private Limited

Order dated: 11 December 2018

Summary:

In this matter, Bank of Baroda ("**Applicant**") filed an application against Topworth Pipes & Tubes Private Limited ("**Corporate Debtor**") before the NCLT, Mumbai Bench ("**NCLT**"). Though the Corporate Debtor did not object to the admission of the said application it brought to the attention of the NCLT that an order of liquidation had already been passed against it by the Bombay High Court and accordingly a provisional liquidator had already been appointed.

The NCLT agreed with the view of the Applicant that an order of winding up or liquidation in no manner means a culmination of proceedings and it is only after an order under section 481 of the Companies Act, 1956 is passed, shall the proceedings reach culmination. Further, the NCLT also held that not only can a company be revived post an order of winding up, but the proceedings of winding up were to be stayed upon the admission of an insolvency application under the Code. The NCLT also agreed with the Applicant's submission that a company should not be wound up without giving it a chance for resolution of its insolvency and that such revival is possible as per the provisions of SICA even after a winding up order has been passed against the company.

Considering the submissions of the Applicant, the fact that the debt and default were reasonably evidenced and that the Corporate Debtor had no objections regarding the admission of the petition, the petition was admitted by the NCLT.

5. THE PROFESSIONAL FEE TO BE PAID TO THE INTERIM RESOLUTION PROFESSIONAL / RP MAY NOT INCLUDE THE FEE OF THE INSOLVENCY PROFESSIONAL ENTITY

Matter: Bhasin Infotech and Infrastructure Private Limited vs. Gurpreet Singh

Order dated: 13 December 2018

Summary:

Bhasin Infotech and Infrastructure Private Limited i.e. the corporate debtor ("**Appellant**") filed an appeal before the NCLAT against the order of the NCLT, Principal Bench, New Delhi, whereby the said NCLT directed the Appellant to pay a lump sum fee of INR 500,000 in favour of the Respondent, who is the erstwhile interim resolution professional of the Appellant.

In this matter, the question before the NCLAT was whether the amount of INR 500,000 to be paid to the Respondent as per the order of the NCLT for performing his functions for a period of 30 days was excessive and arbitrary. It is pertinent to note that, before filing the application under the Code the financial creditor, after obtaining consent of the Respondent had agreed, vide email dated 22 December 2017, to pay to the Respondent a fee of INR 600,000 for a term of 30 days.

While addressing the said issue, the NCLAT observed that the amount of INR 600,000 agreed to be paid to the Respondent was charged jointly for the firm i.e. Ensemble Resolution Professionals Private Limited and for the interim resolution professional that was to be appointed and not solely towards the fee of said interim resolution professional. Further, no communication was specifically made between the Appellant and the Respondent as required under the Code and the regulations framed therein (including Form-2).

In view of the above, the NCLAT *inter alia* held that, the NCLT failed to notice that claim of INR 600,000 was made by the firm namely 'Ensemble Resolution Professionals Private Limited', payable to the Respondent. As the aforesaid firm is not eligible or entitled to receive any fees or any cut or commission from the fees of the Respondent, the demand of INR 600,000 could not be accepted. Further, the NCLAT also held that as the financial creditor had not fixed the expenses to be incurred by the Respondent, the NCLT was required as per the CIRP Regulations, to fix the expenses which includes the fee to be paid to the Respondent i.e. the interim resolution professional. Hence, the NCLAT found INR 500,000 to be excessive and reduced the amount to INR 175,000 (which includes travelling expense incurred by the Respondent) to be paid by the Appellant within two weeks.

6. AN APPLICATION COULD BE WITHDRAWN POST ISSUE OF THE INVITATION OF THE EXPRESSION OF INTEREST, DEPENDING ON THE FACTS AND CIRCUMSTANCE

Matter: Brilliant Alloys Private Limited vs. Mr. S. Rajagopal and others

Order dated: 14 December 2018

Summary:

In this matter, the promoters of the corporate debtor proposed to withdraw the insolvency application which got admitted against the corporate debtor in lieu of payment of the outstanding dues. However, the AA refused to admit the said withdrawal in view of regulation 30A of the CIRP Regulations, wherein a withdrawal of an application cannot be permitted after the issue of invitation for expression of interest.

Being aggrieved, an appeal was filed before the SC. The SC *inter alia* held that the provision under regulation 30A of CIRP Regulations which does not permit withdrawal of an application after the issue of invitation for expression of interest, should be treated as 'directory'.

Further, the SC also observed that the said provision is not stipulated in the Code but only in the CIRP regulations. In view of the above, the SC allowed for settlement i.e. withdrawal of the application.

7. AT PRESENT, AN OPERATIONAL CREDITOR CANNOT FILE AN APPLICATION UNDER THE CODE AGAINST ONE OF THE MEMBERS OF THE PARTNERSHIP FIRM

Matter: Gammon India Limited vs. Neelkanth Mansions and Infrastructure Private Limited

Order dated: 19 December 2018

Summary:

Gammon India Limited filed an application, as an operational creditor, under the Code for initiating CIRP against 'Neelkanth Mansions and Infrastructure Private Limited ("**Respondent**") before the NCLT, Mumbai Bench ("**NCLT**"). The NCLT vide order dated 23 August 2018 dismissed the said application on the ground that the same was not maintainable against a partnership firm.

Being aggrieved by the said order Gammon India Limited ("**Appellant**") filed an appeal before the NCLAT. It was the case of the Appellant that vide agreement dated 17 June 2005, a partnership firm in the style of 'M/s. Gammon Neelkanth Realty Corporation' was formed between the Corporate Debtor and two other entities namely, 'Neelkanth Realtors Private Limited' ("**NRPL**") and 'Gammon Housing and Estates Developers Limited' ("**GHEDL**") i.e. a group company of the Appellant. It is pertinent to note that, the Appellant had raised the relevant bills against the said partnership firm.

The NCLAT observed that, the bill was raised against the said partnership firm, wherein, the Corporate Debtor, NRPL and GHEDL were partners. The NCLAT *inter alia* held that as the amount is due from the partnership firm, even if one of the partners or more than one partner is the 'Corporate Debtor', an application under the Code cannot be maintainable.

8. THE OBJECTS OF THE CODE TO BE TREATED AS PARAMOUNT OVER ITS ALLIED REGULATIONS

Matter: Omkara Asset Reconstruction Private Limited vs. RP of Unimark Remedies Limited

Order dated: 21 December 2018

Summary:

In this matter, the CoC of Unimark Remedies Limited ("**Corporate Debtor**") in one of its meeting decided not to review the resolution plan submitted by Omkara Asset Reconstruction Private Limited ("**Applicant**") on the ground that the resolution plan was submitted beyond the time limit stipulated by the CoC. Thereby, the CoC returned the said resolution plan to the Applicant. Being aggrieved by the said decision, the Applicant filed an application before the NCLT, Mumbai Bench ("**NCLT**") against the RP of the Corporate Debtor.

Hence, the question before the NCLT was whether the resolution plan submitted by the Applicant beyond the time stipulated by the CoC should have been considered by the CoC or was the CoC right in rejecting the same even without reviewing it.

The NCLT observed that as per the provisions laid down under the CIRP Regulations, no proposal by a resolution applicant can be allowed beyond the date as fixed by the CoC. However, one of the main objects of the Code is to maximize the value of the assets and to ensure the best possible returns. Thus the action of the CoC in rejecting the said resolution plan would defeat the object of the Code.

In view of the above, the NCLT inter alia held that, when there is a conflict between the Code and its regulations (including CIRP Regulations), the object of the Code is to be treated as paramount and the regulations are formed only for implementation of the Code. Further, the rejection of the resolution plan by the CoC even without reviewing the resolution plan on the ground that the same was submitted after the expiry of the stipulated time fixed by the CoC, was certainly against the Code. Thus, the NCLT directed the CoC to consider the resolution plan of the Applicant.

9. INSOLVENCY PROFESSIONALS TO ACT AS INTERIM RESOLUTION PROFESSIONALS AND LIQUIDATORS (RECOMMENDATION) (SECOND) GUIDELINES, 2018

The IBBI issued the Insolvency Professionals to act as Interim Resolution Professionals and Liquidators (Recommendation) (Second) Guidelines, 2018 ("**IP Guidelines**") on 30 November 2018, which shall come into effect from 01 January 2019. The IP Guidelines shall replace the 'Insolvency Professionals to act as Interim Resolution Professionals or Liquidators (Recommendation) Guidelines, 2018'.

Following are some of the important amendments introduced through the IP Guidelines,

a) An insolvency professional in the panel i.e. panel of insolvency professionals, can now be appointed as the interim resolution professional or as Liquidator, at the sole discretion of the AA;

b) The submission of expression of interest will be an unconditional consent by the insolvency professional to act as an interim resolution professional or Liquidator, for any corporate debtor; and

c) An insolvency professional who declines to act as interim resolution professional or Liquidator, as the case may be, on being appointed by the AA, shall not be included in the panel for the next 5 years, without prejudice to any other action that may be taken by the IBBI.