

ACUITY **LAW**

**INSOLVENCY LAW**  
**NEWSLETTER**

**April 2022**  
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## ABOUT ACUITY LAW

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers/ professionals led by Souvik Ganguly, Gautam Narayan, Deni Shah and Renjith Nair who have deep and diverse experiences in their chosen areas of practice. We advise 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 three departments. The Corporate practice is led by Souvik Ganguly, the Global Trade and Tax practice is led by Deni Shah and the Disputes practice is led by Gautam Narayan with assistance from Renjith Nair.

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

As part of the Global Trade and Tax practice, Acuity Law advises on:

- Cross-border tax planning and jurisdiction analysis
- Strategies for acquisitions, mergers, divestitures, diversification or consolidation of businesses
- Inbound and outbound investment structuring
- Endowment planning / wealth management strategies
- Global Trade & Customs laws, including foreign trade policy
- International supply chain optimization
- Goods & Services Tax and other Indirect taxes

As part of the Disputes practice, Acuity Law advises and represents clients on domestic and cross - border:

- Civil disputes;
- Criminal law matters; and
- Arbitration matters

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 [acuitylaw.co.in](http://acuitylaw.co.in) or write to us at [al@acuitylaw.co.in](mailto:al@acuitylaw.co.in).

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## INTRODUCTION

This newsletter covers key updates about developments in insolvency law during the month of April 2022.

We have summarized the key judgments passed by the Supreme Court (“**SC**”), the High Courts (“**HC**”), the National Company Law Appellate Tribunals (“**NCLAT**”) and the National Company Law Tribunal (“**NCLT**”). Please see the summary of the relevant regulatory developments below.

### 1) PROMOTER OF A COMPANY IS NOT A FINANCIAL CREDITOR.

**Matter:** Jagbasera Infratech Private Ltd. v. Rawal Variety Construction Ltd.

**Order dated:** 04 April 2022

#### **Summary:**

A Memorandum of Understanding (“**MoU**”) was entered into between Jagbasera Infratech Private Ltd. (“**Jagbasera**”) and Rawal Variety Construction Ltd. (“**Rawal Constructions**”). Pursuant to the MoU, Jagbasera became a promoter of Rawal Constructions. Later, Jagbasera filed an application under the Insolvency and Bankruptcy Code (“**Code**”) for initiating Corporate Insolvency Resolution Process (“**CIRP**”) against Rawal Constructions before the NCLT. However, the application was dismissed by the NCLT which held that a promoter would not fall within the definition of the term financial creditor under the Code. The order was challenged by Jagbasera before the NCLAT.

Adjudicating on whether Jagbasera is a financial creditor, the NCLAT placed considerable reliance on the MoU and the joint-venture agreement entered into between the parties for development of a real estate project. The NCLAT opined that it was clear from a bare reading of these documents that the relationship between Jagbasera and Rawal Constructions was not one of a real estate allottee and developer. NCLAT ruled that a profit-sharing party in a joint-venture agreement, which in the event of success of the project would receive residual gain, cannot be said to be financial creditor under the Code. The NCLAT opined that considering the amount invested by Jagbasera is not in nature of a financial debt, it cannot be said to be a financial creditor of Rawal Constructions and consequently, the appeal stood dismissed by the NCLAT.

### 2) A DECREE-HOLDER CANNOT BE TREATED AS A FINANCIAL OR AN OPERATIONAL CREDITOR.

**Matter:** Sri Subhankar Bhowmik v. Union of India and others.

**Order dated:** 11 April 2022

#### **Summary:**

In the present case, the SC upheld the view of the Tripura HC that decree-holders cannot be treated at par with operational or financial creditors under the Code. Therefore, decree-holders *per se* cannot initiate insolvency resolution process against a corporate debtor. To read our article on the issue of the status of a decree-holder under the Code, please click [here](#).

### 3) A THIRD VALUATION REPORT OF THE CORPORATE DEBTOR CAN ONLY BE CALLED FOR IN CASE OF INCONSISTENCY BETWEEN THE FIRST TWO VALUATION REPORTS.

**Matter:** Rana Saria Poly Pack Pvt. Ltd. v. Uniworld Sugars Pvt. Ltd.

**Date:** 12 April 2022

CIRP was initiated against Uniworld Sugars Pvt. Ltd. (“**Uniworld**”). In order to determine the fair value and the liquidation value of Uniworld, two registered valuers were appointed. The registered valuers gave a liquidation value of INR 1.26 billion and INR 1.21 billion respectively, leading to an average value of INR 1.23 billion (“**Average Valuation**”). The Committee of Creditors (“**CoC**”) appointed a third valuer who came up with a liquidation value of INR 0.5 billion (“**Third Valuation**”). Under the Code, the liquidation value is to be used to ensure minimum payment guarantees to certain classes of creditors under the resolution plan. On the basis of the Third Valuation, the successful resolution applicant provided for payment of INR 0.02 billion to such class of creditors against an admitted debt of INR 1.3 billion. These creditors approached the NCLAT challenging the approval of the resolution plan.

Looking at the provisions of the Code and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Regulations**”), NCLAT ruled that though the CIRP Regulations do not expressly give power to the CoC to call for any valuation of fair and liquidation value, there is no bar for the CoC to call for a fresh valuation report. However, the appointment of the registered valuers is to be done in accordance with the stipulated procedure in the CIRP Regulations. Furthermore, NCLAT also opined that a third valuer should only be appointed in the event the first two estimates of valuations vary significantly.

In the present case, the NCLAT held that the first two valuation reports were not inconsistent and therefore the third valuation report should be discarded. Accordingly, the NCLAT observed that the resolution plan should consider the Average Valuation as the liquidation value for the purpose of payments to certain classes of creditors. The NCLAT, noting that the successful resolution plan was approved by the NCLT over a year ago and that the successful resolution applicant had already started implementation of the resolution plan, directed that the successful resolution applicant should revise the payments to be given to stakeholders and creditors of resolution plan in light of the Average Valuation. Accordingly, the NCLAT set aside the NCLT order approving the resolution plan to the extent which relates to allocation of payments to the stakeholders and creditors and further directed that the revision of payments and subsequent approval of the revised resolution plan should be completed within a period of two months.

**4) STATUTORY DUES OF ERSTWHILE COMPANY CANNOT BE CLAIMED AS A MATTER OF FIRST CHARGE OVER AN AUCTIONED PROPERTY.**

**Matter:** Alpesh Gems v. Surat Municipal Corporation

**Date:** 18 April 2022

Kohinoor Diamonds Pvt. Ltd. (“**Kohinoor Diamonds**”) went into liquidation as the CIRP process failed. During the CIRP, the property tax claim of Surat Municipal Corporation (“**SMC**”) on certain units (“**Immovable Property**”) of Kohinoor Diamonds was admitted. In liquidation, the Immovable Property was put for sale in an e-auction in which Alpesh Gems (“**Alpesh Gems**”) emerged as the successful bidder. Thus, Alpesh Gems was put in possession of the Immovable Property. However, SMC continued claiming the property tax from the immovable property and withheld the property tax bills that should have been issued in the name of Alpesh Gems after the e-auction proceedings.

Alpesh Gems approached the Gujarat HC praying that SMC be directed to recover the property tax with regards to the Immovable Property from the Liquidator of Kohinoor Diamonds. SMC argued that it can claim precedence over the Immovable Property to recover the arrears towards property tax incurred by Kohinoor Diamonds.

While dealing with the present case, the HC observed that it is not in dispute that the claim of SMC from the erstwhile Kohinoor Diamonds are statutory dues towards the property tax. However, if the property tax is merely statutory dues without creating a charge on the property, then the auction purchaser cannot be obligated to make an investigation as regards the title or the liabilities of the erstwhile company. The HC ruled that at best, the statutory dues payable to SMC would be recoverable as unsecured debts for the proceeds of sale of the assets of Kohinoor Diamonds. The HC further clarified that a debt which is secured, or which becomes first charge over the property must prevail over a debt which is an unsecured one. On this premise, the HC directed SMC to put forward its claim with the Liquidator in the position of an ‘unsecured creditor’ and declared that SMC cannot claim first charge over the subject property.

**5) THE INSOLVENCY RESOLUTION COSTS OF A CORPORATE DEBTOR COULD ONLY INCLUDE WAGES/ SALARY DUES OF THOSE EMPLOYEES/ WORKMEN WHO HAVE ACTUALLY WORKED WHILE THE CORPORATE DEBTOR WAS A GOING CONCERN UNDER THE CIRP**

**Matter:** Sunil Kumar Jain and others v. Sundaresh Bhatt and others

**Order dated:** 19 April 2022

**Summary:**

Certain workmen/ employees of ABG Shipyard Ltd., which was undergoing CIRP, filed an application with the NCLT seeking payment of their salary for the period involving the CIRP. While the said application was pending adjudication, the liquidation of ABG Shipyard was ordered and the application of workmen/ employees claiming salaries/ wages was dismissed. The workmen/ employees approached the NCLAT which again dismissed their appeal, while allowing the workmen/ employees to file individual

claims before the liquidator. The liquidator was directed to determine the claim. Aggrieved by the NCLAT's order, an appeal was preferred before the SC.

The SC observed that the definition of 'insolvency resolution process costs' as provided under the Code includes any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern. Therefore, for the workmen/ employees, in order to claim payment of wages/ salaries for the work done during the CIRP period, they have to establish and prove that during CIRP:

- (a) the corporate debtor was a going concern; and
- (b) the workmen/ employees have actually worked during the CIRP.

Basis the above mentioned two qualifications, the SC held that the dues towards the wages/ salaries of only those workmen/ employees who have actually worked while the corporate debtor was a going concern during the CIRP are to be included in the CIRP costs.

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