ACUITY LAW

INSOLVENCY

LAW NEWSLETTER

January 2022

acuitylaw.co.in

ACUITY LAW

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 or write to us at al@acuitylaw.co.in.

INTRODUCTION

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

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

1) ADVANCE EXTENDED BY A DIRECTOR TO THE COMPANY IS A FINANCIAL DEBT

Matter: Mrs. Jayanthi G. Ravi v. Chemizol Additives Pvt. Ltd.

Order dated: 03 January 2022

Summary:

In the present case, Mrs. Jayanthi G. Ravi (**Creditor**), a former director of Chemizol Additives Pvt. Ltd. (**Chemizol**) filed a petition before NCLT seeking initiation of insolvency proceedings of Chemizol on account of having advanced a loan to Chemizol. However, the NCLT dismissed the petition on the ground that there was a lack of clarity as to whether the amount advanced was financial debt. Another issue was that there was no loan agreement between Chemizol and Creditor and no prior approval of the board of directors or the shareholders of Chemizol was obtained for the alleged loan. The NCLT's order was challenged before the NCLAT.

NCLAT held that 'Financial Debt' has an inclusive definition and even if a transaction which does not fall under any of those described under the provision of the Insolvency and Bankruptcy Code, 2016 (**Code**), it can be classified as a 'Financial Debt.' Further, the NCLAT observed that as per the Companies (Acceptance of Deposit), Rules, 2014 amount received from the director of a company is not a deposit if the director has furnished a declaration in writing at the time of giving money, stating that "*the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report".* NCLAT observed that the Creditor had issued such a declaration and therefore the amount advanced by her to Chemizol would not be a deposit.

NCLAT further observed that the minutes of the meeting of the board of directors of Chemizol records such transaction as loan, which is also reflected in the balance sheet as the outstanding liability in favour of the Creditor. Additionally, in its reply to the Creditor's demand notice, Chemizol had requested that any legal action be deferred and that it will repay the entire loan amount at the agreed interest rate, thereby confirming its obligation for repaying the loan.

NCLAT held that the Creditor had established the existence of a financial debt and that the 'Loan' was clearly a 'Financial Debt'. Accordingly, NCLAT set aside the NCLT's order and directed that the petition of the Creditor be admitted.

2) NCLT SHOULD NOT RECORD ANY FINDING REGARDING DEFAULT AT THE TIME OF APPLICATION BY CREDITOR TO INITATE INSOLVENCY PROCESS

Matter: Kanchan Nanubhai Desai Personal Guarantor (Anoushka Medicare & Diagnostics Pvt. Ltd.) v. Finquest Financial Solutions Pvt. Ltd.

Order dated: 03 January 2022

Summary:

In the present matter, a petition was filed by Finquest Financial Solutions Pvt. Ltd., a creditor to initiate insolvency resolution process through the resolution professional against three personal guarantors of Anoushka Medicare & Diagnostics Private Limited being the corporate debtor. The NCLT passed an order directing the resolution professional to examine the application and submit a report to the NCLT recommending the acceptance or rejection of application with reasons. The present appeals were preferred on the grounds that i) even though the application was filed through the resolution professional, the Code mandated that NCLT obtain confirmation on the appointment of the resolution professional from the Insolvency and Bankruptcy Board of India (**IBBI**) and ii) in the absence of the resolution professional's report, there was no occasion to record any finding regarding default.

The NCLAT observed that the law prescribes that when an application is filed by the resolution professional, the NCLT must direct the IBBI within seven days of the date of the application to confirm whether any disciplinary proceedings are pending against the resolution professional and if so, nominate another resolution professional. However, since there was no contention that disciplinary proceedings are pending against the resolution professional, the NCLAT saw no purpose in directing the NCLT to send the recommendation to the IBBI for confirmation. Further, as more than three months had passed since the order of the NCLT which was being challenged, the NCLAT opined that the order of the NCLT does not need to be interfered with.

3) SHIPPING COMPANY UNDERGOING LIQUIDATION UNDER THE CODE WILL NOT AFFECT AN ONGOING ADMIRALTY LAWSUIT AS THEY ARE SEPARATE ENTITIES

Matter: Angre Port Private Ltd v. TAG 15 (IMO 9705550) & Anr.

Order dated: 03 January 2022

Summary:

Angre Port Private Ltd (**Plaintiff**) filed a provisional claim seeking summary judgment against TAG 15 (IMO. 9705550), the vessel owned by Tag Offshore Ltd. for a certain sum with interest. The Plaintiff stated that the vessel was moored at its port and they issued one-off invoices as berthing charges. The Plaintiff also paid other expenses to secure the ship during a storm. During this time, the company owning the vessel TAG 15, was put into liquidation under the Code and a liquidator was appointed. Subsequently, the Plaintiff filed an admiralty suit in the Bombay High Court (**Court**) to recover the mooring fees and other costs.

One of the issues dealt by the Court was whether an admiralty suit can be initiated against TAG 15, since the owner of the vessel, Tag Offshore Ltd., was already under liquidation. The Court observed that moratorium under the Code only bars suit / legal proceedings against the corporate debtor in liquidation and not any suit / proceeding against vessel / ship of the corporate debtor. This is because under the Admiralty Act the vessel / ship is treated as a separate legal entity. The Court also observed that under the Admiralty Act, a ship, or a vessel is a legal entity that can be sued without reference to its owner as it is the vessel that is liable to pay the claim. Accordingly, the Court passed a summary judgement and a decree in favour of the Plaintiff against the sale proceeds of TAG 15 vessel.

4) GOING CONCERN SALE INCLUDES SALE OF LIABLITIES

Matter: Visisth Services Ltd v. S.V. Ramani, the Liquidator of United Chloro-Paraffins Pvt. Ltd.

Order dated: 11 January 2022

Summary:

United Chloro-Paraffins Pvt. Ltd (**United**) was admitted into the insolvency process and subsequently an order of liquidation was passed. The liquidator invited bids for going concern sale (**GCS**) of United. Visisth Services Limited (**Successful Bidder**) sought clarifications, proposed different payment terms, and specified that its offer of acceptance was conditional to extinguish claims of various creditors and other contingent liabilities. The Successful Bidder was issued clarifications and was informed that the terms and conditions of the bid document cannot be revised after public notification. The Successful Bidder submitted the earnest money deposit (**EMD**) amount to the liquidator. Subsequently, a provisional sale letter was issued in favour of the Successful Bidder. The terms of the provisional sale letter were disputed by the Successful Bidder as being inconsistent with payment terms that was proposed by it in the resolution plan. The Successful Bidder filed an affidavit before the NCLT seeking approval for transfer without any liabilities. In case of any impediments to GCS without transfer of liabilities, the Successful Bidder sought withdrawal of the bid and refund of EMD.

The issues before the NCLAT were (i) whether sale as going concern in liquidation proceedings includes its liabilities and (ii) whether the Successful Bidder can seek to withdraw from the bid and request refund on the ground that it was a 'conditional offer'.

On issue (i), the NCLAT referred to the relevant provisions of the Code and the relevant discussion paper where it was specified that all assets and liabilities, which constitute an integral business of the corporate debtor would be transferred together. Accordingly, the NCLAT concluded that GCS means sale of assets as well as liabilities, if it is stated to be on 'as is where is basis'.

On issue (ii), the NCLAT referred to the terms of the bid document which mentioned that payment of all statutory and non-statutory dues owed by United to anybody in respect of the subject property shall be the sole responsibility of the Successful Bidder. Further, the liquidator also mentioned in the correspondence with the Successful Bidder that legal issues pertaining to e-auction cannot be changed after publication. The NCLAT observed that by paying the EMD amount and accepting the bid, the Successful Bidder had entered into a contractual arrangement. It was also noted that having participated, the Successful Bidder cannot propose certain conditions after their participation and putting in their bid. If the Successful Bidder is allowed to withdraw from the bid at this stage and seek refund on the ground that their conditional offer has not been accepted, then the liquidation process would be a never ending one, defeating the scope and objective of the Code. Accordingly, the NCLAT held that the Successful Bidder cannot be entitled to the EMD and the amount paid towards the bid purchase document, if it does not comply with the terms of the contract.

5) SIMULTANEOUS E-VOTING ON RESOLUTION PLAN BY COMMITTEE OF CREDITORS, FINANCIAL CREDITORS CONTRARY TO THE CODE AND INSOLVENCY RESOLUTIONS

Matter: Amit Goel v. Piyush Shelters India Pvt. Ltd.

Order dated: 18 January 2022

Summary:

In the instant case, Piyush Shelters India Pvt. Ltd. being corporate debtor was admitted to Corporate Insolvency Resolution Process (**CIRP**) and the resolution plan was initially submitted by Maya Buildcon Pvt. Ltd. (**Maya Buildcon**) which was withdrawn due to some defects. Maya Buildcon submitted an application before the NCLT seeking permission to submit a revised resolution plan. While this application was pending, the resolution professional allowed a resolution plan submitted by a consortium which included Maya Buildcon and placed it before the Committee of Creditors (**CoC**) for consideration and the same was approved by e-voting. While the resolution plan was pending consideration of the NCLT, an applicant (homebuyer / allotee) obtained an order from the NCLT for admission and consideration of his claim, as he could not file it in time. The homebuyers / allotees, preferred appeals against the judgment passed by the NCLT approving the resolution plan submitted by the resolution applicants as it created two separate categories of financial creditors- one consisting of claimants who filed their claims on time (claimants) and those who could not file their claims in time (non-claimants). The two categories were allocated different shares in the approved resolution plan. While the claimants received possession of the booked property, the non-claimants got just 10% of their booked amount after verification of their claims. The NCLT by its order directed the resolution professional to accept the claim of the applicants who were late at filing the claims and consider such claims on merits. The NCLT's order was not followed by the resolution professional, which resulted in discrimination between the financial creditors belonging to the same class.

The NCLAT was of the view that once the question of filing claims, even with delay, has been accepted, there should not be two different categories of claimants and non-claimants. Since 251 allottees i.e., 53% of the homebuyers were excluded from the plan, the resolution of the corporate debtor was not done according to the Code. As per IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the notice of CoC meeting is to be given five days in advance whereas an authorized representative must circulate the agenda and give voting instructions to creditors in class he represents at least twenty hours in advance and keep the voting window for creditors in class open for at least twelve hours. Neither of these provisions were complied with. The e-voting on the proposed resolution plan by the financial creditors was held simultaneously with e-voting on the resolution plan by the members of the CoC leaving insufficient time to the financial creditors to discuss and vote upon it. It was held that since the resolution professional decided on his own motion to obtain a resolution plan from a consortium, which did not go through the expression of interests' route in time and was not placed before the CoC for consideration, the plan so approved was not per law. Therefore, a new round of expression of interests must be carried out according to legal provisions.

Moreover, the public notices were published in New Delhi whereas the project was situated in Faridabad and the registered office of Piyush Shelters India Pvt. Ltd. is in Meerut leaving the homebuyers to have no access to convey their views to the authorized representatives since both were closed. The NCLAT thus set aside the order passed by the NCLT and directed that the process be started afresh with claims of the homebuyers being accepted by the resolution professional and they be given a realistic time limit to file their claims followed by a revised memorandum and expression of interests. In the CIRP, the views of the financial

creditors in class should be elicited by the authorized representative prior to CoC meetings. The CoC shall consider the resolution plans so received within 90 days from the date of the order to complete the entire exercise.

6) GUARANTOR BARRED FROM BEING A RESOLUTION APPLICANT IF GUARANTEE IS INVOKED AND INSOLVENCY PROCEEDINGS ARE INITATED BY CREDITORS

Matter: Bank of Baroda & Anr v. MBL Infrastructures Limited & Ors.

Order dated: 18 January 2022

Summary:

MBL Infrastructures Limited (**MBL**), set up by one Mr. Anjanee Kumar Lakhotiya, obtained loans / credit facilities from the consortium of banks. On account of failure to repay the same, MBL was placed under CIRP. Further, the personal guarantees furnished by Mr. Lakhotiya for the loans furnished to MBL was also invoked by the lenders. Two resolution plans were received by the resolution professional, one of which was submitted by Mr. Lakhotiya. In the meantime, the Code was amended, and a provision was introduced which specified various categories of persons who would be ineligible to be a resolution applicant. On an application filed by Mr. Lakhotiya praying for a declaration that he was not disqualified from submitting a resolution plan, the NCLT held that he was eligible to submit a resolution plan. However, the NCLT was not made aware of the fact that the personal guarantees of Mr. Lakhotiya had been invoked by the lenders.

The order of the NCLT was challenged by certain creditors, including Bank of Baroda, before the NCLAT. The NCLAT allowed the resolution professional to place Mr. Lakhotiya's resolution plan for voting before the CoC and directed that the decision of the CoC would be subject to the outcome of the appeals. The plan was approved with a 68.50% voting share which was subsequently increased to 78.50%. Thus, the plan had been approved in compliance of section 30(4) of the Code. The NCLAT dismissed the appeals on the ground that the resolution plan had been approved with the requisite majority and that it was backed by a techno-economic report. Further, the NCLAT held that the decision of the NCLT regarding the eligibility of Mr. Lakhotiya to submit the resolution plan had attained finality.

The NCLAT's order was subsequently challenged before the SC. The SC observed that the main objective behind Section 29A was to avoid unwarranted elements to abuse the resolution process and to disqualify those persons who could adversely affect the credibility of the resolution process. It was held that section 29A(h) would disqualify a person if he has furnished a personal guarantee which has been invoked by a single creditor even though the application against the corporate debtor has been filed by another creditor.

The SC held that since the personal guarantees furnished by Mr. Lakhotiya had been invoked by three of the financial creditors, he was disqualified to act as a resolution applicant and the plan submitted by Mr. Lakhotiya ought not to have been entertained. However, considering the fact that the resolution plan had been into operation since 18 April 2018 and the corporate debtor had raised substantial funds for its operations, which are of public importance, the SC held that no prejudice would be caused to dissenting creditors. In light of the Code's objective of putting the corporate debtor back on the rails, the SC decided to allow Mr. Lakhotiya to go ahead with the operations of the corporate debtor.

7) INTEREST AMOUNT CANNOT BE CLUBBED WITH THE PRINCIPAL AMOUNT OF DEBT TO ARRIVE AT THE MINIMUM THRESHOLD OF INDIAN RUPEES TEN MILION FOR COMPLYING WITH THE PROVISION OF THE CODE

Matter: CBRE South Asia Pacific Pvt. Ltd. v. United Concept and Solutions Pvt. Ltd.

Order dated: 19 January 2022

Summary:

Under the Code, insolvency proceedings can be triggered against a corporate debtor for a minimum default of Indian Rupees Ten Million. In the present case, the principal amount was less than the threshold of Indian Rupees Ten Million and when the interest was added to the principal amount, the same would be more than Indian Rupees Ten Million.

The NCLT relied upon the definitions of *'default'*, *'debt'*, *'clam'*, *'financial debt'* and *'operational debt'* and held that though "interest" can be claimed as a financial debt, there is no scope to include interest as part of the operational debt. Accordingly, NCLT held that the application was not maintainable as the minimum threshold of default was not met and dismissed the same.

8) RESOLUTION PLAN IS NOT CONFIDENTIAL ONCE APPROVED BY THE NCLT

Matter: Association of aggrieved Workmen of Jet Airways (India) Ltd. v. Jet Airways (India) Ltd. & Ors.

Order dated: 20 January 2022

Summary:

In the present case, the resolution plan submitted by the 'Kalrock-Jalan Consortium' (**Consortium**) for the insolvent Jet Airways (India) Ltd. (**Jet Airways**) was approved by the NCLT. The workmen and employees of Jet Airways, who are regarded as operational creditors under the Code, challenged the order of the NCLT approving the Consortium's resolution plan on several grounds. The limited question under consideration before the NCLAT was whether the aggrieved workmen and employees were entitled to a copy of the approved resolution plan.

The NCLAT observed that as per the NCLT rules, parties to any case may be allowed to inspect the "records" of the case. Additionally, a person, who is not a party to the proceeding, may also be allowed to inspect the "records" after obtaining the permission of the registrar in writing. So, once a resolution plan is placed before the NCLT, it becomes part of the "records" of the case and is open to inspection by the parties. Further, the NCLAT noted that as per the scheme of the Code, a party has a right to appeal the order of the NCLT approving a resolution plan. So, unless the appellant is aware of the contents of the resolution plan, he will be unable to satisfy the NCLAT on the grounds for setting aside the approval of the resolution plan. Therefore, the appellant cannot be denied a copy of the resolution plan approved by the NCLT. The NCLAT, looking at the provisions of the Code which also provides for submission of the approved resolution plan to the IBBI, opined that after a resolution plan is submitted to the NCLT and it is approved, it no longer remains a confidential document, and other persons cannot be precluded from accessing the resolution plan.

However, the NCLAT also noted that the resolution plan, even though it is not a confidential document after its approval, cannot be made available unless there is a genuine claim or interest in the process. Access to the approved resolution plan can be denied in appropriate case even if it is not a confidential document. Accordingly, the NCLAT opined that a direction to provide entire resolution plan to the workmen and employees cannot be issued, and rather passed directions that the relevant part of the approved resolution plan which related to claim of the workmen and employees be provided to them.

9) INITIATION OF INSOLVENCY PROCEEDINGS AGAINST THE CORPORATE DEBTOR IS NOT A PRE-REQUISITE TO INITIATE INSOLVENCY PROCEEDINGS AGAINST THE PERSONAL GUARANTOR

Matter: State Bank of India v. Mahendra Kumar Jajodia.

Order dated: 27 January 2022

Summary:

The State Bank of India (**SBI**) had filed a petition before the NCLT seeking initiation of insolvency proceedings against the personal guarantor. This petition was rejected as premature on the ground that no insolvency or liquidation process was pending against the corporate debtor of the personal guarantor. As per the provisions of the Code, for an insolvency process to be initiated against the guarantor, there must be pending insolvency or liquidation process against the corporate debtor. The NCLT's order dismissing the petition was challenged before the NCLAT.

The NCLAT held that petition filed by SBI was maintainable and could not have been rejected on the sole ground that no insolvency or liquidation proceeding of the corporate debtor are pending before the NCLT. The NCLT's order dismissing the petition was accordingly set-aside.

Our co-ordinates:

Mumbai
506 Marathon Icon
Off Ganpatrao Kadam Marg
Lower Parel, Mumbai – 400013

Email: al@acuitylaw.co.in