

ACUITY LAW

**INSOLVENCY
LAW NEWSLETTER**

MAY 2019
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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 led by Souvik Ganguly and Gautam Narayan, 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 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

As part of the Disputes practice, Acuity Law under the leadership of Gautam Narayan 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 the Insolvency Law during the month of June 2019. We have summarized the key judgments passed by the National Company Law Appellate Tribunal (**NCLAT**) and various benches of the National Company Law Tribunals (**NCLT**). Please see below the summary of the relevant regulatory developments and reports.

SO LONG AS THE CORPORATE DEBTOR IS A CORPORATE PERSON, IT MAKES NO DIFFERENCE AS TO WHETHER THE CORPORATE PERSON STOOD AS A GUARANTOR TO AN INDIVIDUAL OR A CORPORATE PERSON.

Matter: M/s Karur Vysya Bank Limited vs. M/s. Maharaja Theme Park and Resorts Private Limited

Order dated: 08 April 2019

Summary:

In this matter, Maharaja Refineries (a partnership firm), Maharaja Industries (a proprietary concern) and Maharaja Enterprises (a proprietary concern) (collectively referred to as **Principal Borrowers**) had availed loans from Karur Vysya Bank Limited (**Financial Creditor**) against the payment of interest on the guarantee given by Maharaja Theme Parks and Resorts Private Limited (**Corporate Debtor**). The Principal Borrowers failed to repay the loans availed by them and the same was notified by the Financial Creditor to the Corporate Debtor who also failed to discharge the liability. It is to be noted that the Principal Borrowers admitted to the liability. As the Corporate Debtor had failed to discharge its liabilities, the Financial Creditor filed an application for initiation of corporate insolvency resolution process (**CIRP**) against the Corporate Debtor before the National Company Law Tribunal, Chennai Bench (**NCLT**).

The question inter alia before the NCLT was whether a creditor could initiate CIRP under the Insolvency and Bankruptcy Code, 2016 (**Code**) against a guarantor which is a company under the Companies Act, 2013 especially when guarantee is given against the loans availed by partnership firm and proprietary concerns.

The NCLT held that so long as the obligation in respect of a claim is due from a corporate person falling within the definition of financial debt as defined under the Code, a creditor can proceed to initiate insolvency proceedings under the Code against such corporate person.

In view of above the NCLT, in this case, held that the Corporate Debtor being a corporate guarantor although for loans availed by partnership firm and proprietary concerns, would fall within the definition of financial debt as defined under the Code and accordingly admitted the insolvency application initiated by the Financial Creditor against it.

EXCLUSION OF TIME GRANTED FOR RECONSIDERING A REVISED RESOLUTION PLAN ON MAKING OUT A PRIMA FACIE CASE

Matter: Manibhadra Polycot vs. Abhishek Corporation Limited and others.

Order dated: 01 May 2019

Summary:

The National Company Law Tribunal, Mumbai Bench, in the absence of a resolution plan, had approved the application for initiation of liquidation vide order dated 11 March 2019 filed by the resolution professional (**RP**) of Abhishek Corporation Limited (**Corporate Debtor**). The said order was challenged by Invent Assets Securitisation and Reconstruction Private Limited being the financial creditor and Moneybhadra Polycot (**Resolution Applicant**) (collectively referred to as **Appellants**) before the NCLAT stating that the Resolution Applicant had revised the resolution plan and accordingly made a prima facie case for exclusion of 21 days for counting the period of 270 days to reconsider the resolution plan for successful resolution.

The NCLAT vide order dated 11 April 2019 was of the view that before excluding the period, the committee of creditors (**CoC**) should first reconsider the revised resolution plan submitted by the Resolution Applicant. Accordingly, the NCLAT directed the RP of the Corporate Debtor and the CoC to call for an urgent meeting and decide the matter within a fortnight.

Subsequently, as per the direction of the NCLAT, the meeting of the CoC was conducted and the revised resolution plan was approved by the CoC with 71.029% voting share. In view of the revised resolution plan obtaining a majority approval of the CoC and the order of the NCLAT dated 11 April 2019, the NCLAT granted exclusion of time sought for by the Appellants.

DEBTS PAYABLE TO CENTRAL GOVERNMENT AND STATE GOVERNMENT OR ANY OTHER AUTHORITIES WOULD FALL UNDER THE CATEGORY OF 'OPERATIONAL DEBT' AND THEREFORE NO WAIVER CAN BE SOUGHT IN THE RESOLUTION PLAN.

Matter: RMS Employees Welfare Trust vs. Anil Goel

Order dated: 30 May 2019

Summary:

An appeal was preferred by RMS Employees Welfare Trust being the Resolution Applicant (**Appellant**) before the NCLAT against the order of the National Company Law Tribunal, Chandigarh Bench (**NCLT**) that approved the Resolution Plan presented by the Appellant. The appeal was preferred against a particular section of the order which held that since the Resolution Plan did not envisage the payment of government duties, its waiver as such would be considered by the respective government department.

The Appellant submitted that government duties that is, debts payable to Central Government and State Government or any other authorities would fall under the category of 'operational debt' and therefore seeking of waiver would not depend on the Appellant. The NCLAT agreed with the above submission of the Appellant and held that the amount to be paid to the government shall not be less than the amount payable to the other operational creditors in the event of liquidation of the corporate debtor.

Accordingly, the NCLAT set aside the impugned portion of the order passed by the NCLT.

COMPANIES AGAINST WHOM CIRP PROCEEDINGS HAD BEEN INITIATED STILL HAD EXIT OPTIONS FROM THE CIRP AND THEREFORE CANNOT BE SAID TO BE 'UNDISCHARGED INSOLVENTS'

Matter: State Bank India vs. Bhushan Energy Limited

Order dated: 30 May 2019

Summary:

The National Company Law Tribunal, New Delhi (**NCLT**) had earlier admitted an application filed by a State Bank of India, being the financial creditor against Bhushan Energy Ltd. (**Corporate Debtor**) under the Insolvency and Bankruptcy Code, 2016 (**Code**). The present application has been preferred by the Resolution Professional seeking an approval of the resolution plan as submitted by Tata Steel Limited (**Resolution Applicant**).

The resolution plan as submitted by the Resolution Applicant had been unanimously approved by the Committee of Creditors (**CoC**). The ex-promoters of the Corporate Debtor, however, made submissions against the Resolution Applicant, that the company is an 'undischarged insolvent' and therefore ineligible to act as a resolution applicant as provided under Section 29A of the Code.

The NCLT observed that a corporate insolvency resolution process (**CIRP**) had been initiated against the Resolution Applicant company itself, however, that did not mean the Resolution Applicant company was to qualify as an 'undischarged insolvent'. The NCLT held that all companies against whom CIRP proceedings had been initiated still had exit options from the CIRP which could be in the form of a settlement and could not be said to be 'undischarged insolvents' until a final adjudication is made in the matter.

Keeping in mind the above legal position, the NCLT held that the Resolution Applicant was not ineligible under Section 29A and since its resolution plan had been accepted by the CoC, the resolution plan shall be approved and deemed to be binding on the Corporate Debtor and all its stakeholders.

NCLT HAS NO JURISDICTION TO HEAR A MATTER OR APPRECIATE EVIDENCE ONCE THE FINAL ORDER HAS BEEN PASSED

Matter: Nimit Builders Private Limited vs. Jeevan Jyoti Vanijya Limited

Order dated: 14 June 2019

Summary:

The National Company Law Tribunal, New Delhi Bench (**NCLT**) had admitted an application filed by Nimit Builders Private Limited, being the financial creditor for initiation of corporate insolvency resolution process (**CIRP**) against Jeevan Jyoti Vanijya Limited (**Corporate Debtor**). The present application has been preferred by the Corporate Debtor under Rule 11 of the National Company Law Tribunal Rules, 2016 which is the inherent powers clause giving the NCLT the jurisdiction to make such orders for meeting the ends of justice. The present application was filed to recall the order that initiated the CIRP of the Corporate Debtor.

The present application was filed on the ground that the Corporate Debtor is a non-banking financial company and thus would fall under the category of 'financial service providers' as provided under the Insolvency and Bankruptcy Code, 2016 (**Code**) against whom CIRP cannot be initiated under the Code.

The NCLT dismissed the application on two grounds. The NCLT held that it had no jurisdiction to hear the matter or appreciate evidence once the final order had been passed and doing so under the 'inherent powers' provision would amount to discriminate use of the provision. The NCLT also noted that this defense had not been brought by the Corporate Debtor in the original proceedings at all and evaluating this defense would require appreciating and admitting new evidence for which it had no jurisdiction.

EVEN THOUGH THE ASSET IS IN THE CUSTODY OF THE CUSTOM AUTHORITY ON ACCOUNT OF NON-PAYMENT OF CUSTOMS DUTY CORPORATE DEBTOR STILL THE OWNER OF THE ASSET

Matter: Commissioner of Customs, (Preventive) West Bengal vs. Ram Swarup Industries Limited and others

Order dated: 20 June 2019

Summary:

Ram Swarup Industries Ltd. (**Corporate Debtor**) had filed an application for admitting itself into corporate insolvency resolution process before the National Company Law Tribunal, Kolkata Bench (**NCLT**) which was admitted by the NCLT. The present appeal has been preferred by the Commissioner of Customs (**Appellant**) before the NCLAT against an order of the NCLT that allowed the Resolution Professional (**RP**) to take over the machinery that were in the custody of the Custom Authority.

The facts of the case are that the two consignments i.e. machineries, in question were imported by the Corporate Debtor for which only part of the custom duty was paid by the Corporate Debtor. In other words, the custom duty levied on the two consignments was not discharged completely and the goods were not cleared for home consumption hence in the custody of the Custom Authority.

The NCLAT observed that under Customs Act, 1962 in case of non-clearance of goods within 30 days or within extended period or if the title of any imported goods is relinquished after notice to the importer and the permission of the proper officer had been obtained, the goods could be sold by the Customs Authority.

In view of the above, the NCLAT held that, in this case, the asset under question though in the custody of the Custom Authority, the ownership still remains with the Corporate Debtor. In other words, the non-payment of customs duty would not cause the ownership of the machinery to be relinquished by the Corporate Debtor and ownership would only shift if the property had already been sold as per the provisions of the Customs Act.

The NCLAT thus decided that during the operation of moratorium, the Appellant could not auction the machinery to a third party and that the RP had the right to take custody and control of the asset.

RESERVATION OF RIGHT TO TRANSFER OR SELL THE PLEDGED PROPERTY AMOUNTED TO DISCHARGE OF DEBT

Matter: PTC India Financial Services Limited vs. Venkateswarlu Kari and Another

Order dated: 20 June 2019

Summary:

The National Company Law Tribunal, Hyderabad Bench (**NCLT**) had admitted an application filed by NSL Nagapatnam Power and Infratech Limited (**Corporate Debtor**) to initiate corporate insolvency resolution process of itself. The present matter is an appeal by PTC India Financial Services Limited (**Appellant**) before the NCLAT whose claim as a 'Financial Creditor' had been rejected by both the Resolution Professional (**RP**) and the NCLT for the reason that there no longer existed a debt owed by the Corporate Debtor.

The Appellant had held pledged shares as security for the debt owed by the Corporate Debtor. On the occurrence of default, the appellant had reserved its rights to transfer and sell the pledged shares. The RP while rejecting the claim of the Appellant held that such reservation of right to transfer or sell the pledged property amounted to discharge of debt as far as the Corporate Debtor was concerned and in the absence of any debt, his claim could not be admitted. The NCLT agreed with the point of view of the RP.

The NCLAT held that the Appellant's claim could not be admitted thus upholding the decision of the NCLT and dismissing the appeal.

JET AIRWAYS (INDIA) LIMITED ADMITTED FOR CORPORATE INSOLVENCY RESOLUTION PROCESS

Matter: State Bank of India vs. Jet Airways (India) Limited

Order dated: 20 June 2019

Summary:

The National Company Law Tribunal, Mumbai Bench (**NCLT**) admitted the application filed by State Bank of India (**Financial Creditor**) against Jet Airways (India) Limited (**Corporate Debtor**) for initiation of corporate insolvency resolution process. Two other applications were also filed by operational creditors against the Corporate Debtor. In view of admission of the application filed by the Financial Creditor being admitted, the applications filed by the operational creditors becomes infructuous and therefore dismissed.

In this matter, the debt and the default of debt was sufficiently proved by the Financial Creditor and in the absence of any arguments from the Corporate Debtor, the application was initiation of CIRP was admitted.

The NCLT was apprised that insolvency proceedings against the Corporate Debtor has already been initiated in a foreign court and a copy of the order of the Noord-Holland District Court was placed before the NCLT. The NCLT referred to the order of the Noord-Holland District Court's order and held that the Insolvency and Bankruptcy Code, 2016 did not allow taking note of a judgment passed by any foreign court and thus the relevant order was declared a nullity ab-initio.

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