

ACUITY **LAW**

INSOLVENCY

LAW NEWSLETTER

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ABOUT ACUITY LAW LLP

Acuity Law LLP was founded in November 2011. Acuity Law LLP comprises of a team of young and energetic lawyers/ professionals led by Souvik Ganguly, Gautam Narayan and Deni Shah 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 LLP 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.

As part of the Corporate practice, Acuity Law LLP 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 LLP under the leadership of Deni Shah 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 LLP 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 LLP 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 LLP, please visit our website acuitylaw.co.in or write to us at al@acuitylaw.co.in.

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INTRODUCTION

This newsletter covers key updates about developments in Insolvency Law during the month of June 2021.

We have summarized the key judgments passed by the National Company Law Appellate Tribunal (“NCLAT”) and the National Company Law Tribunals (“NCLT”). Please see below the summary of the relevant regulatory developments.

1) INELIGIBILITY TO SUBMIT RESOLUTION PLAN UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (“CODE”) IS APPLICABLE AT THE TIME WHEN THE RESOLUTION PLAN IS SUBMITTED BY THE RESOLUTION APPLICANT.

Matter: Martin S.K. Golla v. Wig Associates Pvt. Ltd.

Order dated: 04 June 2021.

Summary:

Wig Associates (“Corporate Debtor”) filed a petition under the Code for initiating voluntary corporate insolvency resolution process (“CIRP”) and the petition was admitted on 24 August 2017. Thereafter, on 23 November 2017, the Government of India introduced Section 29A in the Code which lists conditions rendering a person ineligible to submit a resolution plan. Accordingly, a person who had executed a guarantee in favour of a creditor in respect of a Corporate Debtor was ineligible as a resolution applicant. Mr. Mahendra Wig (“Resolution Applicant”), the guarantor of the Corporate Debtor, submitted his resolution plan, which was approved by the committee of creditors on 20 April 2018 and this resolution plan was placed before the NCLT, which approved the resolution plan on 04 June 2018. NCLT had held that once CIRP has commenced, the provisions of the Code as existing on the date of admission i.e., on 24 August 2017 would continue to apply even though an amendment such as Section 29A has been introduced in the Code.

In appeal, the NCLAT set aside the NCLT’s order and held that the ineligibility under Section 29A of the Code would be attracted from the time when the resolution plan was submitted by the Resolution Applicant. NCLAT further held that as the Resolution Applicant was ineligible under Section 29A of the Code, he was barred from submitting any resolution plan in the first place. The fact that the Resolution Applicant was not ineligible on the date of the admission of CIRP cannot be an excuse for non-applicability of Section 29A, even though the same was implemented after commencement of CIRP.

2) LIQUIDATION ORDER SET ASIDE DUE TO THE INVALID CONSTITUTION OF THE COMMITTEE OF CREDITORS (“CoC”).

Matter: Jayanta Banerjee v. Shashi Agarwal and Anr.

Order dated: 04 June 2021.

Summary:

The corporate insolvency resolution process (“CIRP”) was initiated against INCAB Industries Limited (“Corporate Debtor”). The interim resolution professional (“IRP”) invited claims against the Corporate Debtor and subsequently, the CoC was formed. The CoC decided to liquidate the Corporate Debtor and accordingly an application for the same was filed before the NCLT, Calcutta. A group of employees and a trade creditor opposed (“Appellants”) this application and also filed an application to remove the resolution

professional (“RP”) contending that he was colluding with the majority of the creditors. However, the NCLT, Calcutta passed a liquidation order.

The Appellants filed an appeal before the NCLAT. The main issues before the NCLAT included: a) whether entities which were made part of CoC are related parties of the Corporate Debtor under the insolvency law and b) whether IRP/RP can constitute CoC without verifying and admitting or rejecting the claims based solely on submission.

On the first issue, the Appellants contended that two entities of CoC, which formed the majority, are related parties of the Corporate Debtor as both were managed and owned by one of the directors i.e., Mr. Goswami of the Corporate Debtor. On the other hand, the liquidator (who was the RP during the resolution process) of the Corporate Debtor contended that Mr. Goswami was appointed as director of the Corporate Debtor only by means of an order passed by the erstwhile Board for Industrial and Financial Reconstruction in 2009. This order was subsequently set aside by the High Court. Therefore, Mr. Goswami was not a director of the Corporate Debtor. It was also contended that Mr. Goswami resigned from his directorship.

The NCLAT referred to the relevant orders and noted from the annual report and master data of the Ministry of Corporate Affairs that Mr. Goswami’s appointment as director of the Corporate Debtor was based on the resolution of the general meeting held in 1999. He was holding the post of additional director. Under the company law, an additional director holds office up to the next general meeting. Since no general meeting took place after 1999, Mr. Goswami continued to be director till his resignation, which was also much after the commencement of insolvency resolution process. Therefore, as per the insolvency law, the two entities in the CoC were related parties.

On the issue of whether an RP can constitute CoC without verifying and admitting or rejecting, the NCLAT noted that under the insolvency law, IRP invites claims. Based on the collation of the claims, IRP must form the CoC from among the financial creditors. IRP must assign the voting share to each creditor based on the financial debts owed to such creditor. Without verification and admission of a claim, the IRP cannot assign the voting share to a creditor, and without assigning a voting share there cannot be a meeting of the CoC. Since the IRP did not verify the claims, the constitution of CoC is invalid. When the constitution of CoC itself is found to be tainted, then the decision of such CoC cannot be validated on the pretext of exercise of commercial wisdom.

Accordingly, the NCLAT set aside the liquidation order and directed appointment of a new IRP for verification and collation of claims and constitution of CoC.

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