

ACUITY **LAW**

# **INSOLVENCY**

## **LAW NEWSLETTER**

**May 2021**

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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](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 the Insolvency Law during the month of May 2021.

We have summarized the key judgments passed by the Supreme Court of India (**SC**), 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.

### 1) NO INTERFERENCE IN THE DECISION OF THE LIQUIDATOR TAKEN IN THE BEST INTEREST OF A CORPORATE DEBTOR.

**Matter:** Basavaraj Koujalagi & Ors. v. Sumit Binani, Liquidator of Gujarat NRE Coke Limited

**Order dated:** 03 May 2021.

#### Summary:

Gujarat NRE Coke Limited ("**Corporate Debtor**") was admitted into insolvency resolution process under the Insolvency and Bankruptcy Code ("**IBC**") and subsequently it went into liquidation. A liquidator was appointed, and he was directed to sell the Corporate Debtor as a going concern. The employees of the Corporate Debtor filed an application before the NCLT, Kolkata Bench, as they were aggrieved by the following actions of the liquidator:

- a) termination of an agreement of the Corporate Debtor with one of the customers;
- b) withholding payments to the workers and employees of the Corporate Debtor; and
- c) continuous intervention by the liquidator despite best efforts of the employees to run the Corporate Debtor as a going concern.

Regarding the termination of contract, the NCLT, Kolkata Bench, opined that as per the scheme of the IBC, the liquidator is responsible for the affairs of the company in liquidation. Therefore, the NCLT, Kolkata Bench cannot step into the shoes of the liquidator and examine the commercial viability of the contract and question why such a contract was terminated by the liquidator. If a decision is taken by the liquidator in the best interests of the company, then the matter should be left at that. The NCLT, Kolkata Bench, also noted that the liquidator could not make payments to the employees due to the absence of adequate cash flows to the Corporate Debtor and reasoned that the liquidator cannot be expected to pay the employees from his own pockets. NCLT, Kolkata Bench, also noted that the liquidator took every possible step to keep the Corporate Debtor operational, and therefore dismissed the application filed by the employees.

### 2) CIRP CAN BE INITIATED SIMULTANEOUSLY OR ONE AFTER ANOTHER AGAINST A CORPORATE DEBTOR AS WELL AS THE CORPORATE GUARANTOR.

**Matter:** Kanwar Raj Bhagat, suspended Director of Gujarat Hydrocarbons and Power SEZ Ltd. v. Gujarat Hydrocarbons and Power SEZ Ltd. through Insolvency Resolution Professional, Rakesh Kumar Agarwal

**Order dated:** 11 May 2021.

#### Summary:

Appeal arose before the NCLAT against the order of the NCLT, New Delhi Bench, admitting the application filed by SREI Infrastructure Finance Ltd., ("**Financial Creditor**") and initiating corporate insolvency resolution process ("**CIRP**") against Gujarat Hydrocarbons and Power SEZ Ltd., ("**Corporate Debtor**") for default in payment of outstanding debt. One of the issues before the NCLAT was that the Financial Creditor had already initiated CIRP against Assam Company India Ltd. ("**Corporate Guarantor**") who had provided guarantee for the same debt regarding which CIRP was initiated against the Corporate Debtor. It was contended

that CIRP cannot be initiated against the Corporate Debtor when similar proceedings have already been initiated against the Corporate Guarantor to recover the outstanding debt.

The NCLAT opined that IBC has no aversion to simultaneous proceedings against a corporate debtor and corporate guarantor and held that a financial creditor can simultaneously, or one after another, initiate CIRP against a corporate debtor as well as the corporate guarantor. NCLAT further observed that the Financial Creditor had not accepted the payment provided in the resolution plan of the Corporate Guarantor as full and final settlement of all its dues. Therefore, CIRP can be initiated against the Corporate Debtor for the same debt and default, and the Financial Creditor can recover the remaining dues from the Corporate Debtor.

**3) SC UPHOLDS VALIDITY OF VALIDITY OF THE NOTIFICATION DATED 15 NOVEMBER 2019, ALLOWING BANKS TO PROCEED AGAINST PERSONAL GUARANTORS FOR RECOVERY OF LOANS GIVEN TO A COMPANY.**

**Matter:** Lalit Kumar Jain v. Union of India & Others.

**Order dated:** 21 May 2021.

**Summary:**

The Government of India, *vide* a notification dated 15 November 2019 (“**Notification**”), brought into force certain provisions of the IBC which provides for insolvency resolution and bankruptcy of individuals and partnership firms. However, the Notification enforced such provisions only in so far as they relate to personal guarantors to corporate debtors, and not to all individual and partnership firms. The Notification empowered banks to move an application for initiation of insolvency against personal guarantors of a corporate debtor.

The validity of the Notification was challenged in several petitions on the following grounds;

- a) Indian Government cannot bring provisions of the IBC into force to selectively apply them on a sub-category of individuals i.e., only personal guarantors of corporate debtor;
- b) The Notification does not expressly repeal extant laws relating to insolvency of individuals; and
- c) Personal guarantor’s liability gets absolved after approval of resolution plan of the corporate debtor.

The SC observed that under IBC there was no mandate that it should be made applicable, at the same time, to all individuals (including personal guarantors) or not at all. After examining the various amendments to the IBC, SC opined that IBC always contemplated that asset of a corporate debtor and its personal guarantor could be dealt with in an identical manner during insolvency proceedings. It was also pointed out that IBC contains a *non-obstante* clause which gives IBC an overriding effect over other prevailing and contradictory laws. Therefore, the Notification need not expressly repeal existing laws, and any proceeding to be initiated against personal guarantors must be under IBC only. The SC also clarified that the approval of a resolution plan does not discharge the personal guarantor of his/ her liability because this liability arises out of an independent contract. Therefore, the liability of the personal guarantor would depend on the terms under which the guarantee was furnished. Accordingly, the SC upheld the validity of the Notification.

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