

ACUITY **LAW**

INSOLVENCY

LAW NEWSLETTER

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

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INTRODUCTION

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

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

1) **ONCE COC APPROVES A RESOLUTION PLAN, IT BECOMES BINDING ON THE RESOLUTION APPLICANT AND THERE REMAINS NO SCOPE OF WITHDRAWAL.**

Matter: Ebix Singapore Pte Ltd v. Committee of Creditors of Educomp Solutions Ltd. and Ors.

Order dated: 13 September 2021.

Summary:

In the present case, the resolution plan submitted by Ebix Singapore Pte Ltd. (**Ebix**) for Educomp Solution Ltd. (**Educomp**) was approved by the Committee of Creditors (**CoC**). While an application was pending before the NCLT for final approval of resolution plan, Ebix sought permission of NCLT to withdraw the resolution plan citing delays in getting NCLT's final approval on the resolution plan, financial mismanagement of Educomp by the erstwhile management, etc., and NCLT allowed Ebix to withdraw the resolution plan. This order was reversed by the NCLAT in appeal.

The issue under consideration before the SC was whether once a resolution plan is approved by the CoC and submitted to NCLT, can the successful resolution applicant withdraw or modify the resolution plan. SC observed that resolution plans under the Insolvency and Bankruptcy Code, 2016 (**Code**) are not in a nature of a traditional contract, and the process leading up to their formulation and acceptance by the CoC is regulated by the Code. The Code does not provide for withdrawals or modifications of resolution plans once approved by the CoC and an application is filed seeking final sanction of the NCLT. Therefore, common law remedies available under the Indian Contract Act are not available to the parties since a submitted resolution plan is not a contract which can be otherwise voidable on account of frustration, *force majeure*, or other such instances. Hence, parties can only seek reliefs that are specifically envisaged in the Code.

SC further held that the framework of the Code, as it stands, only enables withdrawals from the Corporate Insolvency Resolution Process (**CIRP**) by following the procedure detailed in the Code with approval of 90% voting share of the CoC. Enabling withdrawals or modifications of the resolution plan at the behest of the successful resolution applicant, once it has been submitted to the NCLT after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by the Code, and therefore cannot be allowed. Accordingly, the SC held that once the resolution plan is approved by CoC and submitted to NCLT; the successful resolution applicant cannot withdraw or modify the resolution plan.

2) **NCLAT HAS NO JURISDICTION TO CONDONE DELAY EXCEEDING THE PRESCRIBED LIMITATION PERIOD MENTIONED UNDER THE CODE.**

Matter: National Spot Exchange Ltd v. Mr. Anil Kohli, Resolution Professional for Dunar Foods Ltd

Order dated: 14 September 2021

Summary:

Under the Code, an order of the NCLT should be appealed before the NCLAT within 30 (thirty) days. However, the NCLAT has powers to condone a delay of 15 (fifteen) days over and above the period of 30 (thirty) days. In the present case, National Spot Exchange Limited (**NSEL**) was aggrieved with the order of the NCLAT refusing to condone a delay of 74 (Seventy-four) days in preferring an appeal against the order passed by the NCLT. The said order of NCLAT was challenged by NSEL before the SC, where the main issue under consideration was whether the NCLAT could have condoned the delay beyond the statutory limitation

period of 30 (thirty) plus 15 (fifteen) days and whether, in the alternative, the SC could exercise its inherent powers under the Constitution of India to condone such delay.

The SC held that where the law itself commands that a court or tribunal cannot condone delay beyond a certain period or limits the power to condone delay to a certain specific number of days, then the same would come under the ambit of legislation and would not be condonable even by taking recourse of the provisions of the Constitution of India. If the Code intended to allow for the condonation of delay to any extent, contrary provisions would not exist limiting the number of days for which the delay can be condoned. Furthermore, the SC stated that if the language of the act is sufficiently clear, the court has to give effect to it, and accordingly held that the NCLAT has no jurisdiction to condone the delay exceeding 15 (fifteen) days from the period of 30 (thirty) days as contemplated under the Code and the appeal was dismissed.

3) **SUCCESS FEES FOR RESOLUTION PROFESSIONAL CANNOT BE PART OF THE CODE.**

Matter: Mr. Jayesh N. Sanghrajka, Erstwhile R.P. of Ariisto Developers Pvt. Ltd v. The Monitoring Agency nominated by the Committee of Creditors of Ariisto Developers Pvt. Ltd.

Order dated: 23 September 2021

Summary:

In the present case, the issue before the Principal Bench of the NCLAT was whether the Resolution Professional could charge success fee for CIRP. The NCLT, Mumbai Bench, while approving the resolution plan of the successful resolution applicant, disallowed the success fee of Indian Rupees Thirty Million to the Resolution Professional and directed redistribution of this amount. This order of the NCLT was appealed before the NCLAT by the Resolution Professional contending that the approval of success fee was a commercial decision of the CoC and the NCLT could not have interfered with the same while approving the resolution plan.

The NCLAT appointed an Amicus Curiae to assist the tribunal on whether 'success fees' could be charged. The Amicus Curiae submitted that the Code and related regulations contain no express provision for grant of success fees and that the Resolution Professional could charge remuneration only in a transparent manner and the same should be a reasonable reflection of the work and should not be inconsistent with the regulations. Also, there had to be a prior consultation of minds at initial stages of CIRP to see as to what a reasonable fee would be to be incurred on the Resolution Professional.

NCLAT opined that where the 'success fees' is more in the nature of contingency and speculative, it cannot be said to be a part of the provisions of the Code and the same is not chargeable. The NCLAT further found that the manner in which the 'success fees' was pushed for approval in the present case at the last minute when the CoC was approving the resolution plan, as well as quantum of the 'success fees' as improper, and upheld the decision of the NCLT rejecting the payment of 'success fees' to the Resolution Professional.

4) **POWER OF ATTORNEY HOLDER AUTHORIZED BY THE FINANCIAL CREDITOR CAN FILE APPLICATION FOR INITIATING CIRP AGAINST A CORPORATE DEBTOR.**

Matter: Rajendra Narottamdas Sheth & Anr. v. Chandra Prakash Jain & Anr.

Order dated: 30 September 2021

Summary:

In the present case, the issue before the SC was regarding the maintainability of an application for initiating CIRP against a corporate debtor under the Code filed by a power of attorney holder. Mr. Praveen Kumar Gupta had been given general authorisation by the Union Bank of India (**Bank**) with respect to all the business and affairs of the Bank, including commencement of legal proceedings before any court or tribunal with respect to any demand and filing of all necessary applications in this regard. Such authorisation was granted by way of a power of attorney pursuant to a resolution passed by the Bank's board of directors.

The application was allowed by the NCLT, Ahmedabad Bench, and NCLT's decision was upheld by the NCLAT. On appeal, the SC agreed with the view taken by the NCLAT that, in the present case, the authorization to Mr. Praveen Kumar Gupta, was granted by way of a power of attorney pursuant to the resolution passed by the Bank's board of directors. The mere fact that the authorisation was granted through a power of attorney would not impair Mr. Praveen Kumar Gupta's authority to file the application. Accordingly, the appeal was dismissed.

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