



DEVELOPMENTS IN INSOLVENCY LAWS

IN NOVEMBER

2018

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 have advised 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 www.acuitylaw.co.in or write to us at al@acuitylaw.co.in.

INTRODUCTION

This newsletter covers developments with respect to the Insolvency and Bankruptcy Code, 2016 during the month of November 2018. We have covered orders passed by the National Company Law Appellate Tribunal and various benches of the National Company Law Tribunal. Please see below the summary of the relevant orders.

ABBREVIATIONS

Adjudicating Authority	AA
Committee of Creditors	CoC
Corporate Insolvency Resolution Process	CIRP
Insolvency and Bankruptcy Code, 2016	Code
Debt Recovery Tribunal	DRT
National Company Law Tribunal	NCLT
National Company Law Appellate Tribunal	NCLAT
Resolution Professional	RP

1. PROCEEDINGS AGAINST PERSONAL GUARANTORS CAN BE INITIATED ONLY UNDER PART-III OF THE CODE

Matter: State Bank of India vs. Mr. Vijaraj Surana

Order dated: 30 October 2018

Summary:

State Bank of India (“**Petitioner**”) filed an application before the NCLT, Chennai Bench (“**NCLT**”) for initiating CIRP against personal guarantors who were owners of M/s. Surana Power Limited (“**Corporate Debtor**”) undergoing CIRP. These personal guarantors provided guarantee for the loan availed by the Corporate Debtor from the Petitioner. The said application was filed by the Petitioner under the assumption that creditors have the right to proceed against personal guarantors before the AA where CIRP is pending against a corporate debtor.

Under the Code, the inherent jurisdiction regarding insolvency / bankruptcy against individuals and partnership firms falls under Part-III of the Code that has not yet come into force.

In view of the above, the issue before the NCLT was whether the NCLT has the jurisdiction to initiate insolvency / bankruptcy proceeding against personal guarantors (i.e. individuals) which is under Part-III of the Code and the bankruptcy proceedings of such personal guarantors will be initiated with the NCLT on the footing that CIRP against the Corporate Debtor is pending before the NCLT.

The NCLT while dismissing the application inter alia held that the NCLT did not have the jurisdiction to entertain initiation of insolvency / bankruptcy proceeding against personal guarantors (individuals) for the reason being that Part-III of the Code which deals with insolvency / bankruptcy proceeding against individuals and partnership firms have not come into force and the DRT has not yet been conferred as the AA to deal with Part-III of the Code. Hence, the NCLT cannot act as DRT regarding proceedings against personal guarantors by disregarding the jurisdiction conferred upon the NCLT under the Code.

2. AN APPLICATION FOR INITIATING CIRP CANNOT BE WITHDRAWN AFTER PUBLICATION OF EXPRESSION OF INTEREST

Matter: Mr. Vimalchandrunwal in the matter of Brilliant Alloy Private Limited & Others

Order date: 01 November 2018

Summary:

In this matter, an application was filed before the NCLT, Chennai Bench (“**NCLT**”) by the RP of Brilliant Alloy Private Limited, for seeking withdrawal of application filed under the Code. However, at the time of filing the said application, the RP had already published the expression of interest.

The NCLT dismissed the application on the ground that, an application can be withdrawn under the Code only before publication of the expression of interest and not post such publication.

3. OBLIGATION ARISING OUT OF THE RESOLUTION PLAN TO BE FULFILLED BY THE RESOLUTION APPLICANT

Matter: Mr. Ramkumar SV, RP vs. Ms. Ingen Capital Group LLC & Others

Order dated: 02 November 2018

Summary:

In this matter, the successful resolution applicant as per its resolution plan was required to infuse a certain amount of funds within 30 days of approval of the resolution plan.

However, the said resolution applicant failed to infuse the requisite funds within the prescribed time as laid down under its resolution plan as well vide an order passed the NCLT, Chennai Bench (“NCLT”). In view of the above, the RP of the corporate debtor was forced to file the present application before the NCLT.

In its application the RP sought for directions to be given to the successful resolution applicant to immediately infuse one third of the total payment of the financial creditors in order to avoid the corporate debtor to go into liquidation.

Accordingly, the NCLT directed the successful resolution applicant to make a payment of one third of the total payment of the financial creditors, as sought by the RP of the corporate debtor within 5 days of passing of such order which will be kept in escrow as security for performance of obligations of the resolution applicant.

4. A ‘STANDARD OPERATING PROCEDURE’ SHOULD BE INTRODUCED FOR THE MEMBERS OF COC FOR DETERMINING THE SUITABILITY AND VIABILITY OF RESOLUTION PLANS

Matter: Mr. Ajay Agarwal & another vs. M/s. Ashok Magnetics Limited & another

Order dated: 09 November 2018

Summary:

In this matter, the prospective resolution applicants (Applicants) filed an application before the NCLT, Chennai Bench, wherein it sought for directions to be issued to the RP and the CoC of M/s. Ashok Magnetics Limited (Corporate Debtor) to reconsider their decision by which the resolution plan submitted by the Applicant was rejected. It is pertinent to note that, the Applicants are the promoters of the Corporate Debtor.

The CoC rejected the resolution plan of the Applicants on the following alleged grounds, namely, a) failure to pay INR 1,000,000 as provided under the expression of interest; and b) ineligible to submit a resolution plan as Mr. Ajay Agarwal was a director of Ankit Ispat Private Limited, which is an existing non-performing asset and classified as a willful defaulter.

On examining the said grounds, the NCLT observed that, the members of the CoC rejected the said resolution plan mechanically without application of mind. For instance, with respect to the allegation of non-payment of INR 1,000,000, the expression of interest contained an exemption for depositing the said amount, which was over looked by the CoC. Further, with respect to the allegation of ineligibility due to Mr. Ajay Agarwal's relation with Ankit Ispat Private Limited, it was clarified that Mr. Ajay Agarwal was neither the promoter nor a shareholder of the said entity, but a mere nominee director having no control / managerial rights over the affairs of the said entity. The NCLT overall found the grounds to be lacking merit and being flimsy in nature.

Since the RP and the CoC were not interested in accepting any resolution plan and the fact that the CIRP period has already expired, the NCLT rejected the application and passed an order for liquidation. In view of the above, the NCLT opined that the Banking Division of Ministry of Finance should be consulted by the head office of the members of the CoC to formulate a 'Standard Operating Procedure' to be followed by the members of CoC for determining the suitability and viability of resolution plans.

5. CIRP UNDER THE CODE SHOULD CONSIDER THE INTERESTS OF EVEN THOSE CREDITORS WHO ARE NOT PART OF IT, SUCH AS OPERATIONAL CREDITORS, WHILE ALSO MAINTAINING THE ABILITY OF THE CORPORATE DEBTOR IN CONTINUING AS A GOING CONCERN

Matter: Binani Industries Limited vs. Bank of Baroda & Another

Order dated: 14 November 2018

Summary:

In this matter, Mr. Vijay Kumar Iyer, the RP of Binani Cement Limited ("**Corporate Debtor**"), filed an application before the NCLT, Kolkata Bench ("**NCLT**") for approval of the resolution plan for the Corporate Debtor as submitted by Rajputana Properties Private Limited ("**RPPL**"). However, various objections were filed against the said resolution plan, especially by Binani Industries Limited and Ultratech Cement Limited ("**UCL**").

It is pertinent to note that, both, RPPL and UCL submitted their original resolution plan within the timelines prescribed by the CoC. Subsequently, the CoC vide its meeting held on 14 March 2018 approved the revised resolution plan which was submitted by RPPL on 07 March 2018. Also, the CoC did not even consider the revised resolution plan of UCL which was submitted on 08 March 2018.

The NCLT in one its order dated 02 May 2018 inter alia held that, i) the resolution plan submitted by RPPL was discriminatory to certain creditors, including financial and operational creditors; ii) the CoC should consider the revised resolution plan submitted by UCL.

Pursuant to the said order, the CoC vide its meeting held on 28 May 2018 approved the revised resolution plan of UCL with 100% votes.

Being aggrieved by the said order and other orders dated 28 February 2018 and 27 March 2018, various appeals were filed before the NCLAT (one being by RPPL), which were clubbed together and adjudicated upon.

The NCLAT inter alia held the following:

- a) The resolution plan submitted by RPPL was rightly held to be 'discriminatory' by the NCLT, as some of the financial creditors who are equally situated were discriminated with respect to their claim amount, as Edelweiss Asset Reconstruction Company Limited, IDBI Bank Limited, Bank of Baroda, Canara Bank, Bank of India and State Bank of India has been provided with 100% of their verified claim, whereas a lesser percentage has been given to Export-Import Bank of India, being 72.59% of their verified claim and State Bank of India-Hong Kong, being 10% of their verified claim. Further, the operational creditors were also given differential treatment with respect to their claims.
- b) The revised resolution plan submitted by UCL not only took care of maximization of the assets of the Corporate Debtor but also balances all the claims of all the stakeholders of the Corporate Debtor. Hence, the said resolution plan should be reconsidered by the CoC of the Corporate Debtor.
- c) In addition to the above, the NCLAT made certain important observations, as follows:
 - The liabilities of all creditors who are not part of CoC must also be met in the resolution;
 - A creditor cannot maximize his own interest in view of moratorium;
 - The Code aims to balance the interests of all stakeholders and does not maximize value for financial creditors;
 - The dues of operational creditors must get at least similar treatment as compared to the due of financial creditors;
 - A resolution process is not equivalent of (i) a sale; (ii) an auction; (iii) a recovery; and (iv) liquidation, but it is a revival process;

Note: Being aggrieved by the order of the NCLAT, RPPL filed an appeal before the Hon'ble Supreme Court of India. However, the Hon'ble Supreme Court of India, vide order dated 19 November 2018 dismissed the said appeal, as it found no infirmity in the decision of the NCLAT.

6. NCLT CANNOT ADMIT AN APPLICATION WHERE SETTLEMENT HAS BEEN ARRIVED AT BETWEEN THE PARTIES PRIOR TO PRONOUNCEMENT OF THE ORDER

Matter: Gaurav Pandey vs. Eternity Investment Services Private Limited & another

Order dated: 30 November 2018

Summary:

On the date of pronouncing the order for admission of the application filed by the financial creditor against the corporate debtor, it was brought to the attention of the NCLT, Chandigarh Bench that a settlement had been arrived at between the parties and that the parties wished to withdraw the said application. The NCLT declined to allow the withdrawal of the application on the ground that the matter had been fixed for pronouncement. Aggrieved by the decision of the NCLT the corporate debtor moved the NCLAT which referred to the settlement deed entered into between the parties which clearly showed that the settlement had been entered into prior to the pronouncement of the order of admission.

Accordingly, the NCLAT held that there being no default of payment the NCLT had no occasion for admitting the application. Further, the NCLAT also held the appointment of the IRP, declaration of moratorium, freezing of account and all other orders passed by the NCLT as illegal and accordingly set aside the order of the NCLT.