

INSOLVENCY AND RESTRUCTURING: KEY JUDGMENTS AND UPDATES FOR THE YEAR 2022



The Insolvency and Bankruptcy Code, 2016 (**Code**) provides a mechanism for timebound insolvency resolution of debtors to enable maximisation of the value of their assets while balancing the interests of all stakeholders. Since our [2021 snapshot](#) on 25 key developments in insolvency law, the Code has undergone further developments with priority being afforded to insolvency resolution of the corporate debtor over recovery of creditors. The insolvency courts have also played their part in resolving ambiguity in insolvencies of personal guarantors under the Code.

We have enumerated hereinbelow some significant developments in the field of insolvency law in India in the year 2022. These include orders of the National Company Law Tribunal (**NCLT**), National Company Law Appellate Tribunal (**NCLAT**), and the Supreme Court (**SC**) and also amendments to the Code.

1. **'Going concern sale' includes sale of liabilities (January)** (*read our thoughts on the judgement [here](#)*)

In *Visisth Services Ltd v. S.V. Ramani, The Liquidator of United Chloro-Paraffins Pvt. Ltd.*, the NCLAT held that 'going concern' sale means sale of assets as well as liabilities, if it is stated to be on 'as is where is basis'. The NCLAT further held that the successful bidder cannot escape his contractual obligations and withdraw his bid after paying the earnest money deposit on the ground that the offer made by the bidder was a conditional one.

2. **Guarantor barred from being a resolution applicant if guarantee is invoked and insolvency proceedings are initiated by creditors (January)** (*read our thoughts on the judgement [here](#)*)

In *Bank of Baroda and Anr v. MBL Infrastructures Ltd. and Ors*, the SC held that ultimate objective of the Code is to put the corporate debtor back on its feet. It further held that once the guarantee is invoked and corporate insolvency resolution process is initiated by the creditors, the guarantor is barred from being a resolution applicant.

3. Even when the resolution plan of the corporate debtor is approved, NCLT can entertain petition related to personal guarantees of the corporate debtor (January)

In *State Bank of India v. Savita Gowda*, the NCLT held that it will have jurisdiction to entertain petition related to personal guarantees of corporate debtor, even if the corporate debtor was admitted into corporate insolvency resolution process and resolution plan is approved.

4. Operational creditor under the code includes purchaser of goods and services (February)
(read our thoughts on the judgement [here](#))

In *Consolidated Construction Consortium Limited v. Hitro Energy Solutions Private Limited*, the SC held that a debt arising out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt under the Code.

5. Withdrawal of CIRP against the principal borrower not a bar for the lender in initiating fresh CIRP of the guarantor (February) (read our thoughts on the judgement [here](#))

In *Rajnish Gupta v. Union Bank of India and Anr.*, the NCLAT held that the lender is not bound to exhaust its remedy against the principal borrower before proceeding against the guarantor for payment of outstanding sum, unless otherwise agreed to in the deed of guarantee. Therefore, withdrawal of insolvency process against the principal borrower is not a fetter in initiating insolvency process against the guarantor.

6. NCLT can issue a non-bailable warrant for enforcing attendance of a person (February)
(read our thoughts on the judgement [here](#))

In *Vikram Puri and Anr. v. Universal Buildwell Pvt. Ltd. and Anr.*, the NCLAT held that the NCLT at its discretion, can issue at any time a warrant either with or without bail for arrest of such person who without any lawful excuse, failed to attend or to produce the document in compliance with summons.





7. **Decree holder is not a financial creditor under the Code (April)** (read our thoughts on the judgement [here](#))

In *Sri Subhankar Bhowmik v. Union of India*, the SC upheld the judgement of the Tripura High Court that a decree holder cannot be treated at par with financial creditors in a corporate insolvency resolution process initiated under the Code.

8. **Initiation of insolvency proceedings against the corporate debtor is not a pre-requisite to initiate insolvency proceedings against the personal guarantor too (May)** (read our thoughts on the NCLAT's judgement [here](#))

In *State Bank of India v. Mahendra Kumar Jajodia*, the SC upheld the NCLAT's judgment that initiation of insolvency proceedings against the corporate debtor is not a pre-requisite to initiate insolvency proceedings against the personal guarantor. The NCLAT had ruled that the Code does not in any way prohibit initiation of insolvency proceedings against the personal guarantor even if no proceeding is pending against the corporate debtor before the NCLT.

9. **Holder of a recovery certificate issued under the Recovery of Debts and Bankruptcy Act, 1993 is a financial creditor under the Code (May)** (read our thoughts on the judgement [here](#))

In *Kotak Mahindra Bank Ltd. v. A. Balakrishnan and Anr.*, the SC held that any person holding a recovery certificate issued by the Debt Recovery Tribunals (**DRT**) falls within the scope of a financial creditor under the Code and therefore such a person can file an application for initiating insolvency resolution process of the corporate debtor.

10. Lease of land by developing authority to the builders is an operational debt (May)

In *New Okhla Industrial Development Authority v. Anand Sonbhadra*, the SC held that a lease of land, which is not a finance or capital lease, will not create a financial debt. Therefore, the lease of a land by the developing authority to the builder would not be a financial debt and the developing authority would be an operational creditor under the Code.

11. A performance bank guarantee can be invoked or encashed even after moratorium has been imposed (May) (read our thoughts on the judgement [here](#))

In *Engineering Projects (India) Ltd. v. Mr. Ram Ratan Kanoongo, Resolution Professional of D. Thakker Construction Pvt. Ltd.*, the NCLAT held that amount given by a bank under a performance bank guarantee does not belong to the corporate debtor and is not an asset of the corporate debtor. Therefore, the provisions of the moratorium will not apply to such assets and the performance bank guarantee can be invoked even during the moratorium period under the Code.

12. Resolution professional should include claims of all homebuyers in the information memorandum, regardless of delay in filing claims (June) (read our thoughts on the judgement [here](#))

In *Puneet Kaur v. KV Developers Pvt. Ltd.*, the NCLAT held that it is the duty of the resolution professional to include all the details and claims of homebuyers in the information memorandum if the same are reflected in the records of the corporate debtor. Even if the homebuyers have defaulted in filing their claim before the resolution professional within time, their claim should be reflected in the information memorandum.

13. NCLT has discretion to not admit financial creditor's CIRP application even if corporate debtor is in default (July) (read our thoughts on the judgement [here](#))

In *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*, the SC held that it is not mandatory for the NCLT to admit an application to initiate corporate insolvency resolution process even if a debt existed and the corporate debtor is in default. However, such discretionary power cannot be exercised arbitrarily or capriciously.





14. Non-payment of license fee is an operational debt (July) (read our thoughts on the judgement [here](#))

In *Jaipur Trade Expocentre Pvt. Ltd. v. Metro Jet Airways Training Pvt. Ltd.*, a full bench of the NCLAT held that dues in relation to lease and license of immovable property constitute an 'operational debt' under the Code. It overruled *M. Ravindranath Reddy v. G. Kishan* where the NCLAT had held that such dues do not constitute an 'operational debt'.

15. Interest component can be included with the principal debt to arrive at the minimum threshold of INR 10 million to invoke the provisions of the Code (July)

In *Mr. Prashant Agarwal v. Vikash Parasrampurua*, the NCLAT held that if there is a mutual agreement between parties to charge interest for delayed payment, then accumulated interest amount would be a part of the operational debt. In such an event, the principal debt and the accumulated interest amount could be clubbed together to meet the minimum threshold of INR 10 million to invoke the provisions of the Code.

16. NCLAT cannot *suo moto* conduct judicial review of decision of NCLT and change mode of sale of assets (August) (read our thoughts on the judgement [here](#))

In *R.K. Industries (Unit-II) LLP v. H.R. Commercials Pvt. Ltd. and Ors.*, the SC held that once the liquidator applies to the NCLT for the decision to sell the movable and immovable assets of the corporate debtor in liquidation by adopting a particular mode of sale and NCLT grants approval to such a decision, there is no provision in the Code that empowers the NCLAT to *suo motu* conduct a judicial review of the said decision.

17. Resolution plan which ignores the debts which are payable to the Government is liable to be rejected (September) (read our thoughts on the judgement [here](#))

In *State Tax Officer v. Rainbow Papers Ltd.*, the SC held that tax department of the State making a claim under the Gujarat Value Added Tax Act, 2013 will be a secured creditor under the Code. The SC further went on to state that any resolution plan which ignores the debts that are payable to the Government is liable to be rejected.

18. Approval of a Resolution Plan in respect of one borrower cannot discharge a co-borrower (September)

In *Maitreya Doshi v. Anand Rathi Global Finance Ltd. and Anr.*, the SC held that the approval of a resolution in respect of one borrower cannot certainly discharge a co-borrower. If there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why insolvency proceedings cannot be initiated against both the corporate debtors. However, once the claim of the financial creditor is discharged, there can be no question of recovery of the claim twice over.

19. Liquidation Regulations undergoes radical changes (September)

The Government notified the IBBI (Liquidation Process) (Second Amendment) Regulations, 2022 which provides for a change in the composition of the stakeholders' consultation committee, steps to enable better participation of stakeholders during the liquidation proceedings and streamlines the liquidation process to reduce delays and realize better value.

20. Interim moratorium not applicable to future liabilities (November) (read our thoughts on the judgement [here](#))

In *Ashok Mahindru and Anr. v. Vivek Parti*, the NCLAT held that the interim moratorium for personal guarantors will stay proceedings only relating to a debt which is due as on the date filing of the insolvency application. Interim moratorium cannot stay proceedings which may give rise to future obligation or liabilities.

21. No insolvency when arbitral award is in execution (November) (read our thoughts on the judgement [here](#))

In *Shaikh Mohammed Tariq v. Aegis Forging Ltd.*, the NCLAT refused to initiate insolvency proceedings against a corporate debtor where the creditor had already initiated execution proceedings to enforce the arbitral award along with payment of interest.



Our thoughts

In *Lalit Kumar Jain v. Union of India and Ors*, the SC had upheld the provisions of the Code which permitted banks to proceed against personal guarantors for recovery of loans given to a company (*read our thoughts on the judgement [here](#)*). The judgement was celebrated by creditors who could now pursue their remedies against the assets of personal guarantor. However, soon confusion arose from the seemingly inconsistent provisions of the Code and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The inconsistent views taken by the NCLTs with regards to the correct forum for proceeding against the personal guarantors, the bifurcation of claim of the creditor between principal borrower and guarantor and the exceptions to the 'interim moratorium' put a spanner in the insolvencies of the personal guarantors.

In 2022, the judiciary has put to rest the legal quandary vis-à-vis the position of personal guarantors under the Code. Indian courts have purposively constructed the provisions of the Code to allow clubbing of the respective proceedings against the corporate debtor and the personal guarantor before the same forum i.e., NCLT. They have also permitted creditors to initiate simultaneous insolvency proceedings against the principal borrower as well as the guarantor, while limiting the scope of the "interim moratorium" to only those proceedings relating to a debt which is due as on the date the interim moratorium kicks in. The law of guarantee has been rightly read into the insolvency framework. The various judgments passed in 2022 are a welcome step towards the unification of the insolvency proceeding of corporate debtor as well as its guarantors, whether it be a corporate guarantor or a personal guarantor, so as to enable Committee of Creditors as well as NCLT in properly adjudicating the insolvency proceedings.

The year 2022 was characterised by Indian courts relying on *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.* to refuse insolvency applications where they found such application were for recovery of money rather for insolvency of the debtor. Courts have reemphasised that the provisions of the Code are essentially intended to help the corporate debtor stand on its feet and are not for money recovery.

The biggest challenge that has been observed in the year 2022 is with respect to the timelines within which insolvency matters are being dealt with by the insolvency courts. Keeping this in view, the year 2023 will be significant in the journey of the Code gaining relevance as a timebound 'business rescue process' or the Code being reduced to time consuming 'debt recovery mechanism'.

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