

KNOWLEDGE REPONERE

(FEBRUARY 23 – MARCH 16, 2018)

©  **INSOLVENCY PROFESSIONALS AGENCY**

All rights reserved. No part of this Publication may be translated or copied in any form or by any means without the prior written permission of The ICSI Insolvency Professionals Agency.

Disclaimer

Although due care and diligence has been taken in the production of this Knowledge Reponere (A Weekly Bulletin), the ICSI Insolvency Professionals Agency shall not be responsible for any loss or damage, resulting from any action taken on the basis of the contents of this Knowledge Reponere (A Weekly Bulletin). Anyone wishing to act on the basis of the material contained herein should do so after cross checking with the original source.

Published by:

 **INSOLVENCY PROFESSIONALS AGENCY**

4th Floor, ICSI House, 22, Institutional Area, Lodi Road

New Delhi-110003

Phones: 011-4534 1041

Email: info@icsiipa.com

INSOLVENCY PROFESSIONALS AGENCY

KNOWLEDGE REPONERE
(February 23 - March 16, 2018)

Dear Professional Members,

Greetings!

We are pleased to share with you our next issue of the bulletin on the Insolvency and Bankruptcy Code, 2016 (“Code”).

1. Insolvency and Bankruptcy Board of India invites comments on draft IBBI (Mechanism for Issuing Regulations) Regulations, 2018

IBBI has always endeavoured to evolve a transparent and consultative process by effectively engaging the stakeholders in the regulation making process. The process generally starts with a working group making draft regulations which are then put by IBBI out in public domain seeking comments thereon. After a few round tables to discuss draft regulations with the stakeholders, IBBI then takes advice of its Advisory Committee. The process culminates with the Governing Board of the IBBI finalising regulations and the IBBI notifies them. The participation of the public, particularly the stakeholders and the regulated, in the regulatory process ensures that the regulations are informed by the legitimate needs of those interested in and affected by regulations.

Keeping in view the importance of subordinate legislations for the processes under the Code and the need for IBBI having a structured, robust mechanism, including effective engagement with the stakeholders, for making regulations, IBBI has proposed to make regulations to govern the process of making regulations and consulting the public. The IBBI has invited comments from public, including the stakeholders and the regulated, on the draft Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations), Regulations, 2018 vide press release dated 7th March, 2018.

The press release can be accessed at:

http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Mar/Press%20Release-Making%20regulations_2018-03-07%2023:09:34.pdf

CASE UPDATES

Cases under the Code are being filed expeditiously across the various benches of NCLT. It is therefore imperative for our readers to be cognizant of the developments taking place. The newly admitted cases with regard to Corporate Insolvency Resolution Process ("CIRP") under the Code are as below:

| S. No. | Case Title | Relevant Section | NCLT Bench | Amount in default as mentioned in application (in Rupees) |
|--------|--|--|-----------------|---|
| 1. | SE Investments Ltd. v/s Soni Realtors Pvt. Ltd. | Section 7 of the Code dealing with the initiation of CIRP by financial creditor. | New Delhi Bench | Rs. 5,10,64,714 |
| 2. | M/s Consolidated Shipping Line (India) Private Limited v/s M/s M + R Logistics (India) Private Limited | Section 9 of the Code dealing with initiation of CIRP by operational creditor. | Chennai | Rs. 19,74,417 |
| 3. | SREI Equipment Finance Ltd. | Section 7 of the Code dealing with the initiation of CIRP by financial creditor. | Chennai | Rs. 69,44,89,923 |
| 4. | Shri Seo Pal v/s Quality Rice Exports Pvt. Ltd. | Section 9 of the Code dealing with initiation of CIRP by operational creditor. | Chandigarh | Rs. 1,62,51,689.05 |
| 5. | Mahavir Traders v/s Ajay Knitwears | Section 9 of the Code dealing with initiation of CIRP | Chandigarh | Rs. 8,40,14,804 |

| | | | | |
|-----|--|--|-----------|-------------------|
| | & Fabrics Pvt. Ltd. | by operational creditor. | | |
| 6. | NLMK India Services Centre Private Limited v/s Universal Power Transformers Private Limited | Section 9 of the Code dealing with initiation of CIRP by operational creditor. | Bengaluru | Rs. 3, 85,50,058 |
| 7. | M/s Harvardhan Steel and Alloys Private Limited v/s M/s Experienced Hi-Tech Consultancy Services Private Limited | Section 7 of the Code dealing with the initiation of CIRP by financial creditor. | Chennai | Rs. 1,17,36,438/- |
| 8. | Bank of Baroda v/s M/s Golden Jubilee Hotels Private Limited | Section 7 of the Code dealing with the initiation of CIRP by financial creditor. | Hyderabad | Rs. 728,79,00,000 |
| 9. | Affinity Financial Services Private Limited v/s Kiev Finance Limited | Section 9 of the Code dealing with initiation of CIRP by operational creditor. | Kolkata | Rs. 28,50,000 |
| 10. | M/s Aeromech Technologies Private Limited | Section 10 of the Code dealing with initiation of CIRP by corporate creditor. | Bengaluru | Rs. 103.50 Lakhs |

| | | | | |
|-----|--|--|---------|-------------------------|
| 11. | State Bank of India v/s Impex Metal and Ferro Alloys Ltd | Section 7 of the Code dealing with the initiation of CIRP by financial creditor. | Kolkata | Rs. 469,29,69,983.63 |
|-----|--|--|---------|-------------------------|

1) **BRIEF NOTE**

NCLAT JUDGMENT

Dakshin Gujarat VIJ Company Ltd. ...Applicant/Petitioner

Versus

M/s. ABG Shipyard Ltd. & Anr. ...Respondent

Date of Judgment: 08.02.2018

- The appeal was filed by Dakshin Gujarat VIJ Company Ltd. (“**Appellant**”), before National Company Appellate Tribunal (“**NCLAT**”), raising the question whether the order of ‘Moratorium’ will cover the current charges for supply of water, electricity etc. payable by the Corporate Debtor.
- Learned counsel appearing for the Appellant submitted that the order of ‘Moratorium’ will be applicable only in respect of the amount as is payable by the Corporate Debtor to the Appellant towards supply of electricity as was due for the period prior to passing of order of ‘Moratorium’ only and is not applicable to the current dues towards supply of electricity during the period of ‘Moratorium’.
- On the other hand, learned counsel for the ‘Resolution Professional’ contended that in view of Regulation 31 & 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 (‘the Regulation’), the appellant is duty bound to supply the essential goods and services, including the electricity, water etc.
- Earlier, on the application filed by the Resolution Professional requesting to extend the time granted by NCLAT for payment of the current charges for electricity, NCLAT vide order dated 15.01.2018, had directed the Resolution Professional to pay the electricity charges for the month of December, 2017 by

7th February, 2018, failing which the Appellant was open to disconnect the electricity.

- Learned counsel of the Resolution Professional also contended that the current electricity charge for the month of December, 2017 have been paid to the Appellant pursuant to the above stated order, however, for the present, the Corporate Debtor had no funds to pay any further amount.
- The NCLAT, examined the relevant regulations 31 and 32 of the Regulation and also the relevant provisions of the Code, including, section 14(2) and 5(13) and held that:
 - none of the aforesaid regulations or sections of the Code imposes any prohibition or bar towards the payment of current charges of essential services. Such prohibition is not covered by the order of “Moratorium”. The Hon’ble NCLAT further held that Regulation 31 cannot override the substantive provisions of section 14. Therefore, if any cost is incurred towards the supply of the essential services during the “Moratorium”, it may be accounted towards ‘Insolvency Resolution Costs’, but law does not stipulate that the suppliers of essential goods including the electricity or water to be supplied free of cost, till completion of the ‘Moratorium’ and that payment if made towards essential goods to ensure that the company remains on-going as made in the present case for the month of December, 2017, such amount can accounted towards ‘Insolvency and Resolution Process Costs’ but it does not mean that supply of essential goods and services to be supplied free of cost
 - if the Corporate Debtor has no fund even to pay for supply of essential goods, in such case the Resolution Professional cannot keep the company on-going just to put additional cost towards supply of electricity, water etc.
 - In the absence of any specific prohibition for payment of current charges and in view of the fact that the Corporate Debtor had already paid the current charges for the month of November, 2017, the Resolution Professional was ordered to pay the outstanding charges for supply of electricity for the month of September, 2017 and January, 2017 to the Appellant by 28th February, 2018, the current electricity charges for the month of October, 2017 and February, 2017 by 16th March, 2018 and the current charges towards the electricity for the month of November, 2017 and March, 2018 by 15th April, 2018. The NCLAT also ordered that the

Appellant will not levy any late payment surcharges for delayed payment of current charges, nor disconnect the supply of electricity in view of section 14(2) of the Code.

State Bank of India

...Appellant

Versus

1. Mr. V Ramakrishnan

And

2. M/s. Veasons Energy Systems Pvt. Ltd.

...Respondent

Date of Judgment: 28.02.2018

- The instant appeal arises out of the order dated 18th September, 2017 (“**Impugned Order**”) passed by the NCLT, Chennai Bench (“**NCLT**”) whereby NCLT allowed the Interlocutory Application preferred by Mr. V. Ramakrishnan (**Personal Guarantor - “Respondent no. 1”**) and restrained the Appellant- State Bank of India (**Financial Creditor - “Appellant”**) from proceeding against the Respondent no. 1 till the period of Moratorium is over.
- The brief facts of the case are that the Respondent no.1, being the Director of M/s. Veasons Energy Systems Pvt. Ltd. (**Corporate Debtor -“Respondent no. 2”**) gave personal guarantee and mortgage of collateral securities of his assets with the Appellant against the facilities availed by the Respondent No.2. The Appellant invoked its right under SARFESI Act, 2002 (“**SARFESI**”) against the Respondent no.1 u/s 13(2) of SARFESI for recovery of Rs. 61,13,28,785.48/- from the Respondent no.1 as securities. However, the same was challenged and dismissed with costs by the Madras High Court on 17th November, 2016. Thereafter, the Appellant issued a Possession Notice dated 18th November, 2016 under Section 123(4) of SARFAESI and took symbolic possession of the secured assets.
- The Respondent no.2, having failed to get relief from the Madras High Court, invoked Section 10 of the Code, which was admitted and the order of Moratorium was passed and an Interim Resolution Professional was appointed.
- The Appellant, even after the declaration of the ‘Moratorium’ proceeded against the property of the Respondent no. 1 under SARFESI and issued Sale Notice on 12th July, 2017. Being aggrieved, Respondent no. 1 filed the

interlocutory application before NCLT for stay of proceedings under SARFAESI and auction notice dated 12th July, 2017. The interlocutory application was allowed by NCLT vide the Impugned Order.

- It was contended by the Appellant that the order of Moratorium will not affect the assets of the Respondent no. 1, on the other hand, the counsel for the Respondents contended that in view of section 14(1)(b) and 31(1) of the Code, the Appellant cannot proceed against the Personal Guarantor.
- Hon'ble NCLAT having heard the parties and after perusing the record proceeded to examine the relevant provisions of the Code viz. Part III, Section 14, section 31(1), Section 60(2), (3) & (4) and held that . NCLAT , held that it is clear that not only the institution of suits or continuation of pending suits or proceedings against the 'Corporate Debtor' are prohibited in terms of the section 14(1)(b), 14(1)(c) and 14(1)(d) of the Code but also the transfer, encumbrance, alienation or disposal of any of the assets of the Corporate Debtor and/or any legal right or beneficial interest therein and recovery or enforcement of any security interest created by the corporate debtor in respect of its property occupied by it or in the possession of the corporate debtor are also prohibited.
- NCLAT further observed that it was clear that 'Resolution Plan' if approved by the 'Committee of Creditors' under Section 30 (4) and also if it meets the requirement referred under Section 30 (2) and approved by the NCLT, is not only binding on the Corporate Debtor' but also on its employees, members, creditors, guarantors and other stakeholders involved in the 'Resolution Plan' including the 'Personal Guarantor'
- Thus, in view of the above observations, NCLAT held that the 'Moratorium' will not only be applicable to the property of the Corporate Debtor but also on the Personal Guarantor and for the reasons aforesaid, the appeal filed by the Appellant was dismissed without any costs.

Sandeep Kumar Gupta
Resolution Professional

...Appellant

Versus

Stewarts & Lloyds of India Ltd. & Anr.

...Respondent

Date of Judgment: 28.02.2018

- These appeals have been preferred by Mr. Sandeep Kumar Gupta, the 'Resolution Professional' against orders dated 26th October, 2017 and 15th November, 2017 passed by NCLT, Kolkata Bench, in Company Petition (IB)

No. 213/KB/2017, whereby NCLT decided not to appoint the 'Resolution Professional' ('Appellant' herein) as 'Liquidator', he having failed to take appropriate steps for completing the 'Resolution Plan' and appointed one Ms. Mamta Binani, as 'Liquidator'.

- The learned counsel for the Appellant made the following submissions:
 - that the observation made by NCLT that the Appellant did not issue an advertisement in the newspaper for inviting "Resolution Plan" is unfounded in view of the fact that the Appellant had duly issued Public Announcement in newspapers like Business Standard and Ajkal, inviting Resolution Plan by stating therein the last date for submission of Resolution Plans;
 - that the finding of the NCLT that the Resolution Professional was appointed on the recommendation of the Corporate Debtor is baseless since the Appellant was duly appointed by the CoC in their meeting;
 - the removal of the Appellant was inappropriate since as per section 34(4) of the Code, replacement can only take place in two eventualities i.e. in case the Resolution Plan submitted by the Resolution Professional u/s 30 of the Code is rejected for failure to meet the requirement in Section 30(2) or in case the Insolvency and Bankruptcy Board of India (IBBI) recommends the replacement of the Resolution Professional for reasons to be recorded in writing. However, in the present case, neither the Resolution Plan was rejected nor was any recommendation made by IBBI for replacement of the Resolution Professional.
- It was submitted by the counsel for IBBI the order dated 26th October, 2017 calling for name of a liquidator from the Board was forwarded by letter dated 16th November, 2017. However, before the said letter, NCLT had already appointed the liquidator on 15th November, 2017.
- The NCLAT made the following findings that:
 - The Resolution Professional filed his progress report on 15th July, 2017 alongwith the minutes of 1st meeting of the CoC dated 12th June, 2017 as recorded by NCLT and not been disputed by the Appellant;
 - NCLT also noted that within 180 days only one meeting of the CoC took place on 12th June, 2017 and thereafter no progress was made as no meeting of CoC was held. Ultimately just before completion of

180 days, the Resolution Professional submitted his report that no Resolution Plan has been submitted by any Resolution Applicant.

- In view of the undisputed facts, the NCLAT while dismissing the appeal held that the observations made in the impugned order should not be construed to be misconduct on the part of the Appellant. However, as the NCLT was not satisfied with the performance of the Resolution Professional, the NCLAT held that the NCLT was well within its jurisdiction to engage another person as Resolution Professional or liquidator.
- The NCLAT further held that any person appointed out of the list of Resolution Professionals having been made available by IBBI to NCLT should be considered as an appointment of Resolution Professional/Liquidator on the recommendation of IBBI.

Punjab National Bank

...Financial Creditor

Versus

Divya Jyoti Sponge Iron Private Limited

...Respondent

Date of Judgment: 13.03.2018

- This is an application filed by the Punjab National Bank- Financial Creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Divyajyoti Sponge Iron Ltd.- Corporate Debtor. The application was admitted by NCLT, Kolkata Bench (NCLT) vide order dated 23rd August, 2017 whereby Mr. Arun Kumar Gupta was appointed as the Interim Resolution Professional and thereafter as the Resolution Professional vide order dated 24th October, 2017.
- The period of 180 days for submitting the resolution plan and the closure of CIRP in respect of the Corporate Debtor expired on 19th February, 2018 and the RP submitted the Resolution Plan in time.
- The RP in compliance of the provisions of the Code and the Regulations convened 8 meetings of the Committee of Creditors (CoC) and called for claims from various stakeholders through public announcement. After

considering claims received from financial and operational creditors and after due deliberation of the Expression of Interest (EOI) submitted by the resolution applicants, the Resolution Plan submitted by CP Ispat Private Limited was approved by the CoC with 100% voting share in the meeting held on 14th February, 2018. The said Resolution Plan was submitted before NCLT on 19th February, 2018 before the expiry of 180 days of CIRP.

- Two other resolution applicants, viz. Omkara Infraprojects Private Limited (CA (IB) No. 172 of 2018) and Mr. Prakash Jain of Simplex Credits and Industries Limited (CA (IB) No. 205/KB/2018), whose claims were rejected by the CoC filed applications challenging the resolution plan approved by the CoC.
- Omkara Infraprojects Private Limited (“Omkara”) prayed for extension of period of CIRP and beyond 180 days and for passing an order for investigations into the process of approval of resolution plan based on the following allegations:
 - The resolution professional has violated the confidentiality of the decisions the CoC meeting by disclosing the bid amount submitted by Omkara to other applicant thereby managed to get the highest bid from the CP Ispat Private Limited whose resolution plan has been approved.
 - The resolution applicant, Omkara was informed of approval of its resolution plan by the CoC in the meeting held on 2nd February, 2018. However, surprisingly, the plan submitted for the approval of NCLT is not the resolution plan of Omkara.
 - Since the resolution plan of Omkara was already approved in the meeting of CoC held on 2nd February, 2018, therefore the approval of another plan in the meeting of the CoC held on 14th February, 2018 was irregular and in violation of the provisions of the Code.
- Mr. Prakash Jain of Simplex Credits and Industries Limited (CA (IB) No. 205/KB/2018) prayed for extension of the period of CIRP, issuance of directions to the Resolution Professional to accept the Expression of Interest of the resolution applicant and to further direct him to make over the Information Memorandum to the CoC based on the following allegations:
 - The expression of interest submitted by him was not accepted by the resolution professional citing delay in submission whereas the

resolution professional accepted resolution plan of other applicants even after delay in submission by them. Thus, the Resolution Professional discriminated in rejecting his plan.

- After hearing the counsels for the resolution applicants in CA (IB) No. 172 of 2018 and CA (IB) No. 205/KB/2018 and the counsel for the workmen and Financial Creditors and after having perused the records along with the plan submitted by the Resolution Professional, NCLT held that:
 - The Resolution Plan submitted by the Resolution Professional after getting approval of the CoC, meets all the requirements of Section 30(2) of the Code;
 - the Resolution Professional gave the certificate as per Regulation 39(4)(a) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ;
 - the report submitted by the Resolution Professional revealed all the data regarding the 8th meeting of the Committee of Creditors and things transacted in the CoC in detail
 - CA (IB) No. 172 of 2018 and CA (IB) No. 205/KB/2018 require no consideration in view of the rejection of resolution plan submitted by the applicants in the above mentioned CAs supported by reasons. Moreover, the right of rejection or approval of a plan is with the CoC and NCLT can only screen whether the plan approved by the CoC meets the requirements referred to in 30(2) of the Code. If all the requirements are satisfied, NCLT shall pass an order for approval. That being so, NCLT cannot reopen the reasons for rejection of the plan passed with 100% voting share for adjudication.
 - The objection regarding the irregularity in not considering the Resolution Plan submitted by the applicant in CA 172/KB/2018 is devoid of any merit since the unanimous decision regarding non-acceptance of the resolution plan was taken up by the CoC in its meeting held on 14th February, 2018 after deliberations in various meetings of the CoC upto the final voting stage. Also, in respect of the allegation of violation of confidentiality by the Resolution Professional, no data was furnished to NCLT that the bid amount offered by the complainant was known to the Resolution Professional and he had communicated it to the applicant whose plan was approved. Furthermore, the fact that the

complainant submitted its revised plan belatedly i.e. after the submission of the revised plan by CP Ispat Private Limited, renders the allegations leveled against the Resolution Professional devoid of any merit.

- Any investigation on the basis of the grievance, if any, against the Resolution Professional cannot be ordered in the case in hand because the complainant can approach IBBI u/s 217 of the Code read with IBBI (Inspection and Investigation) Regulations, 2017.
- In accordance with section 31(3) of the Code, NCLT passed an order approving the Resolution Plan which was approved by the CoC with 100% voting share and held that the same shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involving the Resolution Plan.
- NCLT also took judicial notice of fixation of exaggerated insolvency resolution cost inclusive of fixation of fees of resolution professional in a lump sum manner by the CoC without applying its mind in regard to the fate of the corporate debtor, the volume, nature and complexity of CIRP. NCLT was of the view that hopefully IBBI would consider the above factors and frame necessary regulations or guidelines in regard to fixation of fee and resolution cost by a resolution professional.

We trust you will find this issue of our bulletin useful and informative.

Wish you good luck in all your endeavors!!

Team ICSI IPA