

INSTITUTE OF INSOLVENCY PROFESSIONALS

A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)

KNOWLEDGE REPONERE (16th November-1st December, 2019)

Dear Professional Members,

Greetings!

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

EVENTS HELD BY ICSI IIP:

- 1. Interactive Meet on IBBI Discussion Papers(dt. 3rd November 2019) held on 18th November, 2019 | New Delhi**



2. Webinar organized by ICSI IIP on "Insolvency Resolution and Bankruptcy Process for Personal Guarantors to Corporate Debtors" on 28th November, 2019.



3. ICSI IIP celebrated its 3rd Foundation Day celebrated on 28th November, 2019 at New Delhi.



NEWS UPDATE(S)

➤ **Aviva Life Insurance settles insolvency case in NCLT**

In an insolvency proceeding initiated under IBC by Apeejay Trust against Aviva Life Insurance claiming default of an Operational Debt in the sum of Rs 27.67 lakh due towards payment of Service Tax and Licence fee for the premises leased by the former to the latter, the matter now stands settled.

Aviva had earlier questioned maintainability of proceedings on the ground that it is an insurance company, and thus, a financial service provider.

Read more at:

[//economictimes.indiatimes.com/articleshow/72261630.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst](http://economictimes.indiatimes.com/articleshow/72261630.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

➤ **Jet Airways Rescue Plan Postponed Again**

The deadline for any Jet Airways' rescue plan has been postponed again. The administrators of the failed airline have extended the deadline date to December 16, 2019.

Read more at:

<https://simpleflying.com/jet-airways-rescue-deadline/>

➤ **DHFL Shares Fall Nearly 5% as RBI Starts Insolvency Resolution Process**

Shares of Dewan Housing Finance Corporation fell nearly 5 per cent to hit lower price band after the RBI filed an application to initiate the corporate insolvency resolution process against the company.

Read more at:

<https://www.news18.com/news/business/dhfl-shares-fall-nearly-5-as-rbi-starts-insolvency-resolution-process-2407957.html>

LIST OF COMPANIES THAT HAVE RECENTLY UNDERGONE LIQUIDATION

S. No	Case Title	Bench	Date of Order
	<i>In the matter of Saurabh (India) Pvt.</i>	New Delhi	19.11.2019
	<i>In the matter of Victory Electricals Ltd.</i>	Chennai	19.11.2019

<i>In the matter of Sri Ramagiri Spinning Mills Ltd.</i>	Hyderabad	20.11.2019
<i>In the matter of Pranee Infrastructure Private Limited</i>	Bengaluru	20.11.2019
<i>In the matter of R. B. Rice Mill Pvt. Ltd.</i>	Allahabad	20.11.2019
<i>In the matter of Fortune Pharma Private Limited</i>	Mumbai	25.11.2019
<i>In the matter of Sun Brushware Private Limited</i>	Chennai	25.11.2019
<i>In the matter of S3 Electrical & Electronics Pvt. Ltd.</i>	New Delhi	26.11.2019
<i>In the matter of Nagarjuna Oil Refinery Limited</i>	Hyderabad	26.11.2019
<i>In the matter of Deepa Developers Private Limited</i>	Chennai	26.11.2019
<i>In the matter of Lanco Babandh Power Limited</i>	Hyderabad	27.11.2019

Summary of Judgment delivered in the matter of *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.* (Civil Appeal No. 8766-67/2019 and other petitions)

Hon'ble Supreme Court, vide its order dated 15.11.2019, while setting aside impugned judgment dated 4th July, 2019 delivered by Hon'ble NCLAT, also upheld constitutional validity of Insolvency and Bankruptcy Code (Amendment) Act, 2019. The issues thus settled by the Apex Court are as follows:

- Role of RP: It has been conclusively held that the role of an RP is not adjudicatory but administrative. The duties of the Resolution Professional (RP) were enumerated to include convening the meeting of the CoC. As regards collation of claims it was decided that all claims are to be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what is to be paid in order to take over and run the business of the CD.
- Responsibility of Resolution Applicant: It has been held that the resolution plan submitted by a prospective Resolution Applicant must provide for measures as may be necessary for the insolvency resolution

of CD for maximization of the value of its assets, which may include transfer or sale of assets or part thereof, whether subject to security interests or not. The plan may provide for either satisfaction or modification of any security interest of a secured creditor and may also provide for reduction in the amount payable to different classes of creditors.

- Powers of the CoC: It was held that it is the commercial wisdom of the CoC to decide as to whether or not to rehabilitate the CD by accepting a particular resolution plan. It was emphasized that the rationale for making provisions for only FCs handling CD's affairs and resolving them was considered and deliberated upon by the BLRC, which formed the basis for the enactment of the IBC.
- CoC's discretion on feasibility and viability: The Court held that it is the CoC's call to deliberate on the "*feasibility and viability*" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors.
- Scope of AA's jurisdiction vis-à-vis resolution plan: While discussing the scope of Adjudicating Authority's jurisdiction, it was held that the limited judicial review available to AA has to be within the four corners of section 30(2) of the Code. In respect of the NCLAT, it has to be within the parameters of section 32 read with section 61(3) of the Code. Such review can in no circumstance trespass upon a business decision of the majority of the CoC.
- Treatment of Financial Creditors and Operational Creditors: It was held that the amended Regulation 38 does not lead to the conclusion that FCs and OCs, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of rights of OCs under the Regulation 38 involves the resolution plan stating as to how it has dealt with the interests of OCs, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the CoC which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.
- Constitutional validity of IBC 2019 Amendment Act: The Apex Court held that while it is true that it may well be that the law laid down by the NCLAT in this very case forms the basis for some of these amendments, it cannot be said that the legislature has directly set aside

the judgment of the NCLAT. The Amendment Act cannot be struck down on the ground that it has been enacted only for curing the defect in the NCLAT order in the case of *Essar Steel*.

- Amendment to Section 12:It was held that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date - without any exception thereto - may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. However, the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail.
- Sub-Committees of the Committee of Creditors: The power to approve a resolution plan under section 30(4) cannot be delegated to any other body as it is the CoC alone that has been vested with this important business decision which it must take by itself. The powers of the CoC under section 28(1)(h) in respect of matters which have a vital bearing on the running of the business of the CD, though are administrative in nature, shall not be delegated to any other person. The CoC alone must take the decisions mentioned in section 28.
This does not mean that sub-committees cannot be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are ultimately approved and ratified by the CoC.

In conclusion, it was held that the NCLAT judgment which substitutes its wisdom for the commercial wisdom of the CoC and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside. The appeals filed by the CoC of Essar Steel Limited and other Civil Appeals were therefore allowed. The impugned NCLAT judgment was set aside. It was further held that the CIRP of the CD in the case shall take place in accordance with the resolution plan of ArcelorMittal, as amended and accepted by the CoC, as it has provided for amounts to be paid to different classes of creditors by following section 30(2) and regulation 38 of the CIRP Regulations.

BRIEF OF JUDGEMENTS

S. No	Case Details	Date of Order	Courts	Brief	Case link
1.	<i>Hindustan Construction Company Limited v. Union of India</i>	27.11.2019	Supreme Court	In the matter, Hindustan Construction Company Limited had contended that the term 'corporate person' as defined under Section 3(7) of the Code should be read to include Government Bodies other than Government Companies. A reference was made to the National Highway Authority of India. The Apex Court held that, " <i>NHAI is a statutory body which functions as an extended limb of the Central Government, and performs governmental functions which obviously cannot be taken over by a resolution professional under the Insolvency Code, or by any other corporate body. Nor can such Authority ultimately be wound-up under the Insolvency Code. For all these reasons, it is not possible to ... either read in, or read down, the definition of 'corporate person' in Section 3(7) of the Insolvency Code.</i> "	https://ibi.gov.in/uploads/order/15d74df94a962203942eb75f5461b853.pdf

2.	<i>Asset Reconstruction Company (I) Limited (ARCIL) v. Mahal Hotel Private Limited and Ors.</i>	18.11.2019	NCLAT	<p>In the case, Viceroy Hotels Limited (CD) and Mahal Hotel Private Limited had entered into a Business Transfer Agreement pursuant to which the CD was paid part of the consideration amount of Rs.122.23 crores. Subsequently, Mahal Hotel Private Limited had cancelled the Business Transfer Agreement and the amount paid by Mahal Hotel Private Limited was shown as forfeited and reflected in the Balance Sheet of the CD. CIRP was initiated against the CD in March 2018 and the Committee of Creditors was constituted without Mahal Hotel Private Limited as its member. On July 11, 2018, the RP had circulated an email with the "updated list" of members of the Committee of Creditors which included Mahal Hotel Private Limited as a FC.</p> <p>ARCIL moved in appeal before the NCLAT and contended that the new CoC could not be sustained as Mahal Hotel Private Limited was involved in money laundering and was facing proceedings under Prevention of Money</p>	https://ibi.gov.in/uploads/order/ca6e21eaa90b634e4fcd0a633.pdf
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Laundering Act, 2002 for the transaction which formed the basis of its admitted claim in the present case.

While deciding on the issue, NCLAT held,

"...we hold that after constitution of the 'Committee of Creditors', without its permission, the 'Resolution Professional' was not competent to entertain more applications after three months to include one or other person as 'Financial Creditor'.

....10. Further, money laundering case having been initiated against Mahal Hotel Private Limited, the said Hotel cannot be allowed to be the Member of the 'Committee of Creditors'."

3.	<p><i>Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd. & Anr.</i></p>	NCLAT	22.11.2019	<p>An appeal was preferred u/s Section 61 of the Code by the Directors of M/s Debi Fabtech Pvt Ltd, Corporate Debtor to set aside the impugned order dated 25.4.2019 passed by National Company Law Tribunal, Kolkata Bench, wherein the CIRP u/s 7 of the Code was initiated against M/s Debi Fabtech Pvt Ltd.</p> <p>The Corporate Debtor submitted that it was declared NPA on 31.03.2013 whereas the application under Section 7 of the Code was filed on 27.08.2018 i.e. after about 5years and 5 months from the date of accrual of cause of action; therefore it was barred by Limitation Act.</p> <p>Hon'ble NCLAT held:</p> <p><i>"10. We have carefully examined the issue of limitation. The Respondent has bonafidely prosecuted within limitation period under SARFEASI Act. Therefore, the Respondent is entitled for the exclusion of time period under Section 14(2) of Limitation Act i.e. the period of 3 years and 6 months. After exclusion of this period</i></p>	<p>https://ibi.gov.in/uploads/order/85d4095f5b04189e026c37437ef03aaa.pdf</p>
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				<p><i>the application filed under Section 7 of I&B Code is within limitation period.”</i></p> <p>Hon’ble NCLAT found that the application under Section 7 was within limitation and dismissed the appeal.</p>	
4.	<i>Vijaykumar V. Iyer v. Union of India</i>	NCLT, Mumbai Bench	27.11.2019	<p>Two applications were preferred by Mr. Vijaykumar V. Iyer Resolution Professional of Aircel Limited and Dishnet Wireless before Hon’ble National Company Law Tribunal, Mumbai Bench seeking directions to Union of India (Respondent) to refrain from suspending/terminating and/or taking any other action against the Petitioner Company in relation to the Telecom Licenses and Spectrum allocation.</p> <p>The present applications revolved around the fundamental question of Telecom License granted by Department of Telecommunication/ DoT (Licensor) to the</p>	<p>https://ibi.gov.in/uploads/order/eaf159ae2f8b9b9097dfd6b9582bd22e.pdf</p>

Petitioner /Aircel (Licensee) under the provisions of Section 4 of Indian Telegraph Act, 1885. The most important feature of holding the Spectrum and the license is that the Telecom Licenses and Spectrum are required for operation of the Petitioner Company as a going concern.

Union of India (Respondent) pleaded that it has exclusive ownership right over the Spectrum and in the case the default of non-payment of license fees had occurred therefore, the licensor/DoT otherwise has right to terminate the impugned facility to the Company.

Hon'ble NCLT held:

"7.7 ...Otherwise also, through agreements only 'right to use' is granted and not the 'right to ownership". Therefore, 'right to use' should remain, during the period agreed upon, with the Corporate Debtor which is always beneficial for the company as well as for all stake holders. This argument can further be buttressed by placing reliance on Sub-sec. (2) of Section 14 of the I&B

				<p><i>Code which prescribes that the supply of essential goods or services to the Corporate Debtor shall not be terminated or suspended or interrupted during Moratorium Period. The usage of license/spectrum is akin to "Essential Goods or Services" because without usage the Company cannot run its Telecom Business.</i></p> <p><i>This prohibition shall, therefore, also applicable on DoT."</i></p> <p>NCLT, Mumbai Bench instructed the concerned DoT authority not to make any attempt to cancel the impugned license issued in favour of the debtor company and disposed of the applications.</p>	
5.	<i>Oriental Bank of Commerce v. M/s Sikka Papers Ltd. and Ors.</i>	NCLT, New Delhi (Principle Bench)	22.11.2019	<p>NCLT while adjudicating on the matter deliberated that making MCA a proper party in all proceedings would facilitate production of authentic record needed for the smooth functioning of the proceedings under the Code.</p> <p>NCLT, Principal Bench, thus directed as follows:</p> <p><i>"We further direct that in all cases of Insolvency &</i></p>	<p>https://ibi.gov.in/uploads/order/3a8494e23ea6dc4306043dc173a0a9b2.pdf</p>

			<p><i>Bankruptcy Code and Company Petition, the Union of India, Ministry of Corporate Affairs through the Secretary be impleaded as a party respondent so that authentic record is made available by the officers of the Ministry of Corporate Affairs for proper appreciation of the matters.</i></p>	
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This shall be applicable throughout the country to all the benches of the National Company Law Tribunal. The Registrar shall send a copy of this order to all NCLT benches so that respective Deputy Registrar may ensure that proper parties are impleaded."

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

Wish you good luck in all your endeavors!!

Team ICSI IIP

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