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Learning Curve-281

April 1, 2020

Section 61(2) of IBC overrides Section 5 of the Limitation Act.

In the matter of ***RadhikaMehra v. Vaayu Infrastructure LLP &Ors***[1]**.,**an appeal was preferred against the order of Adjudicating Authorityafter 30 days and beyond 15 days thereafter i.e. after 45 days of the date of receipt of order as provided under Section 61(2) of the Insolvency and Bankruptcy Code, 2016(IBC) with a request for exclusion the period under Section 14 of the Limitation Act, 1963. The Hon'ble NCLAT pointed that Section 14 of the Limitation Act relates to exclusion of time of proceeding bona fide in court without jurisdiction and if the provision of Section 5 of the Limitation Act is applied which provides for extension of prescribed period in certain cases, NCLAT would have the power to admit an appeal after the prescribed period, if the appellant satisfies the Tribunal that he had sufficient cause for not preferring the appeal within such period.

However, NCLAT observed that since Section 238 of the IBC provides for the provisions of IBC to supersede other laws, therefore, Section 61 of IBC will prevail over Section 5 of Limitation Act.

Perusing the provisions of IBC and Limitation Act, Hon' ble NCLAT held that:

> *"3. Section 14 of the Limitation Act relates to exclusion of time of proceeding bona fide in court without jurisdiction, but it relates to period of limitation for any suit the time during which the plaintiff had been prosecuting with due diligence another civil proceeding.* ***The other provision of Section 14 of the Limitation Act cannot be made applicable in this Appeal preferred under Section 61 of the I&B Code.***
>
> *....8.* ***Section 238 of the Code makes it clear that the provision of the Code will override other laws. Therefore, we hold that Section 61(2) of IBC will override Section 5 of the Limitation Act."***

Hon' ble NCLAT *vide* its order dated 30.01.2020, accordingly, dismissed the appeal.

Dr.Binoy J. Kattadiyil
Managing Director

[1]Re:Company Appeal(AT)(Insolvency) No. 121 of 2020 in the matter of Radhika Mehra vs. Vaayu Infrastructure LLP &Ors. before the NCLAT, New Delhidated 30.01.2020 (https://ibbi.gov.in//uploads/order/49808be519c8fd902d11df6cee2869b2.pdf)

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Learning Curve-282

April 3, 2020

The resolution can be taken even during the CIRP, if any Promoter as investor agrees to invest the money for keeping the company as a going concern and complete theinfrastructure project within the time frame.

In the matter of ***Rajesh Goyal Vs. Babita Gupta &Ors***[1], an appeal was preferred by a promoter of the infrastructure company undergoing CIRP on the ground that there was no default by the Corporate Debtor (CD) as the CD had invested more amount than the financial creditor in the project, which was on the verge of completion.

Hon'ble NCLAT relied on the orders passed in the case of '*Flat Buyers Association Winter Hills-77, Gurgaon vs. Umang Realtech Pvt. Ltd. through IRP &Ors.'* and '*Pioneer Urban Land and Infrastructure Limited &Anr. v. Union of India &Ors'* ,to observe that,

> *"20. The procedure as followed in "Flat Buyers Association Winter Hills – 77, Gurgaon' (Supra) shows curtailment of period of resolution without asking for 'resolution plan' from the third party before finalisation of the resolution plan'. The resolution can be taken even during the 'corporate insolvency resolution process', if any 'Promoter' as investor agrees to invest the money for keeping the company as a going concern and complete the project within the time frame. In view of the fact that part of the infrastructure (Apartments/Flats) has already been completed, the allottees (Financial Creditors) were the main beneficiaries of the infrastructure have already reached settlement with the 'Promoter' and the fact that the 'Promoter' as an 'outsider financial creditor' has agreed to invest the amount, not from the account of the 'Corporate Debtor' but from other sources to keep the infrastructure as a going concern…"*

Hon'ble NCLAT in exercise of inherent powers conferred under Rule 11 of the NCLAT Rules, 2016, passed an order wherein the Promoter wasallowed to invest in the CD's real estate projects as lender (financial creditor) and it was further held that if the projects are completed within the time frame, creditors are paid back, a completion certificate is received from the IRP and other conditions are fulfilled, the CIRP process would be closed. However, if the 'Promoter' fails to comply with the undertaking and fails to invest as financial creditor or do not cooperate with the IRP, the NCLT will complete the CIRP.

NCLAT vide its order dated 05.02.2020, disposed of the appeal, in favour of Appellant subject to the fulfilment of the conditions.

Dr.Binoy J. Kattadiyil
Managing Director

[1]*Company Appeal (AT) (Insolvency) No. 1056 of 2019 & I.A. Nos. 4033 & 4303 of 2019,* https://nclat.nic.in/Useradmin/upload/5658022195e479c2766232.pdf

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Learning Curve-283

April 7, 2020

Police cannot take forward criminal proceedings initiated against the Company under Corporate Insolvency Resolution Process (CIRP), unless and until the CIRP culminates, in a resolution or otherwise.

In the matter of ***India Infoline Finance Limited &Anr. Vs. the State of West Bengal &Ors.***[1], the grievance of the writ petitioner was that the police had refused to act on the FIR registered by them against the respondents, taking shelter of a CIRP pending in connection with the company in question.

Hon'ble Kolkata High Court observed thatsince the intervening commencement of CIRP and the moratorium under Section14 of IBC will ultimately lead to an investigation as to the aspects and components of the loans and transactions made in respect of the company, which is the subject matter of the CIRP and consequential proceedings.

Therefore, Hon'ble High Courtheld that,

> *" although agreeing with the principle that a moratorium under Section 14 might not, in certain circumstances, directly stop a criminal proceeding from going on, however, in the present case, as is evident from the affidavit-in-opposition of the police, the police has done its level best up to the time when the moratorium started operating, and the order in connection with the CIRP was passed.*
>
> *Since any action of the police will have to be based on investigation on the subject matter of the transaction, which is directly within the purview of the CIRP, it is to be deemed that the police cannot take further steps in the matter unless and until the CIRP culminates, in a resolution or otherwise."*

The present Writ Petition was dismissed by High Court of Kolkata *vide* order dated 24.01.2020.

Dr.Binoy J. Kattadiyil
Managing Director

[1] W.P. 21071(W) of 2019,
https://ibbi.gov.in//uploads/order/2020-02-03-151749-ocm8j-a4be1d18ac6124b96754c31c5bc9dddb.pdf

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Learning Curve-284

April 8, 2020

The legislative intent behind the amendment in Section 31(1) of the IBC is that the government will not raise any further claim of its dues after the resolution plan is approved.

In the matter of ***Ultra Tech Nathdwara Cement Ltd., (formerly known as Binani Cements Ltd.) v. Union of India through Joint Secretary, Department of Revenue, Ministry of Finance and Ors.,***the writ petitioner Ultra Tech Nathdwara Cement Ltd. has approached the Court by way of the instant writ petition being aggrieved of the demands raised by the respondent Central Goods and Service Tax Department, Govt. of India whereby the petitioner was called upon to pay Goods and Service Tax (G.S.T.) for the period before it took over a company named M/s. Binani Cements Ltd.

The facts at hand are that the resolution plan of Ultra Tech Cement was accepted by the COC in the ongoing CIRP of Binani Cements. After the approval of the resolution plan by the NCLT, the operational creditors i.e. the Commercial Taxes Department of Govt. of Rajasthan as well as the respondent (Commissioner of Goods and Service Tax) assailed the resolution plan by filing appeals before Hon'ble the Supreme Court with a specific plea that their dues have not been accounted for by the COC in the resolution plan. The present writ petition has been filed seeking relief from the same.

Hon'ble High Court relied on the Supreme Court judgment in the matter of ***Committee of Creditors of Essar Steel India Ltd. Through Authorised Signatory Vs. Satish Kumar Gupta &Or***sand also the statement of the Hon'ble Finance Minister before the parliament on the legislative intent of amended **Section 31(1) of IBC** in the following terms:

> *"IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but, largely, yes, it is IBC.*
>
> *There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that The Government will not raise any further claim. The Government will not make any further claim after resolution plan is approved. So,that is going to be a major, major sense of assurance for the people who are using the resolution plan."*

The High Court of Rajasthan therefore held that the respondents would be acting in a totally illegal and arbitrary manner while pressing for these demands and accordingly demand notices so raised by the respondents Central Goods and Service Tax Department, Govt. of Indiawere quashed and struck down, thus allowed the writ petition *vide* order dated 07.04.2020.

Dr.Binoy J. Kattadiyil
Managing Director

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Learning Curve-285

April 9, 2020

Guidelines for Court Functioning Through Video Conferencing during Covid-19 Pandemic

In the matter of ***In Re: Guidelines For Court Functioning Through Video Conferencing During Covid-19 Pandemic,*** the Supreme Court vide Order in the Sup Moto Writ (Civil) No.5/2020 dated 06.04.2020**,** laid down the following guidelines for court functioning through video- conferencing:

i. All measures that have been and shall be taken by this Court and by the High Courts, to reduce the need for the physical presence of all stakeholders within court premises and to secure the functioning of courts in consonance with social distancing guidelines and best public health practices shall be deemed to be lawful;

ii. The Supreme Court of India and all High Courts are authorized to adopt measures required to ensure the robust functioning of the judicial system through the use of video conferencing technologies; and

iii. Consistent with the peculiarities of the judicial system in every state and the dynamically developing public health situation, every High Court is authorised to determine the modalities which are suitable to the temporary transition to the use of video conferencing technologies;

iv. The concerned courts shall maintain a helpline to ensure that any complaint in regard to the quality or audibility of feed shall be communicated during the proceeding or immediately after its conclusion failing which no grievance in regard to it shall be entertained thereafter.

v. The District Courts in each State shall adopt the mode of Video Conferencing prescribed by the concerned High Court.

vi. The Court shall duly notify and make available the facilities for video conferencing for such litigants who do not have the means or access to video conferencing facilities. If necessary, in appropriate cases courts may appoint an amicus-curiae and make video conferencing facilities available to such an advocate.

vii. Until appropriate rules are framed by the High Courts, video conferencing shall be mainly employed for hearing arguments whether at the trial stage or at the appellate stage. In no case shall evidence be recorded without the mutual consent of both the parties by video conferencing. If it is necessary to record evidence in a Court room the presiding officer shall ensure that appropriate distance is maintained between any two individuals in the Court.

viii. The presiding officer shall have the power to restrict entry of persons into the court room or the points from which the arguments are addressed by the advocates. No presiding officer shall prevent the entry of a party to the case unless such party is suffering from any infectious illness. However, where the number of litigants are many the presiding officer shall have the power to restrict the numbers. The presiding officer shall in his discretion adjourn the proceedings where it is not possible to restrict the number.

The guidelines were passed in exercise of powers conferred to the Hon' ble Supreme Court under Article 142 of the Constitution of India.

Dr.Binoy J. Kattadiyil
Managing Director

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Learning Curve-286

April 13, 2020

Key Points of the COVID-19 *Regulatory Package* issued by the Reserve Bank of India on 27.03.2020.

The key features in the Circular *RBI/2019-20/186 DOR.No.BP.BC.47/21.04.048/2019-20* are as follows:

1. All term loans (including agricultural term loans, retail and crop loans), all commercial banks, co-operative banks, all-India Financial Institutions, and NBFCs (including housing finance companies) are permitted to grant a moratorium of 3 months on payment of all instalments falling due between March 1, 2020 and May 31, 2020. (Interest shall continue to accrue on the outstanding portion of the term loans during the moratorium period.)
2. Working capital facilities sanctioned in the form of cash credit/overdraft ("CC/OD"), lending institutions are permitted to defer the recovery of interest applied in respect of all such facilities during the period from March 1, 2020 upto May 31, 2020. (The accumulated accrued interest shall be recovered immediately after the completion of this period.)
3. Since the moratorium/deferment/recalculation of the 'drawing power' is being provided specifically to enable the borrowers to tide over economic fallout from COVID-19, the same will not be treated as concession or change in terms and conditions of loan agreements due to financial difficulty of the borrower as per Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 dated June 7, 2019 ("Prudential Framework"). Consequently, such a measure, by itself, shall not result in asset classification downgrade. (The asset classification of term loans which are granted relief shall be determined on the basis of revised due dates and the revised repayment schedule.)
4. The rescheduling of payments, including interest, will not qualify as a default for the purposes of supervisory reporting and reporting to Credit Information Companies (CICs) by the lending institutions. CICs shall ensure that the actions taken by lending institutions pursuant to the above announcements do not adversely impact the credit history of the beneficiaries.
5. Lending institutions shall frame Board approved policies for providing the above-mentioned reliefs to all eligible borrowers, *inter alia*, including the objective criteria for considering reliefs.
6. Wherever the exposure of a lending institution to a borrower is ₹ 5 crore or above as on March 1, 2020, the bank shall develop an MIS on the reliefs provided to its borrowers which shall *inter alia* include borrower-wise and credit-facility wise information regarding the nature and amount of relief granted.

A plea was filed in the Supreme Court to seek directions as per the abovementioned Circular, as it is stated in the plea that the purported relief proclaimed to have been given by the Central Government and RBI *vide* circular dated March 27, 2020 is incomplete as the same does not provide interest relaxation to citizens and those who avail moratorium of three months shall have to pay interest on the same subsequently. Directions were also sought from the RBI to *"appropriately consider extending the moratorium period for certain period so as to enable millions of persons, who may get unemployed due to Covid-19 health emergency for some time even after lockdown".*

Dr.Binoy J. Kattadiyil
Managing Director

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Learning Curve-287

April 15, 2020

Resolution plan in relation to a corporate debtor would not extinguish/reduce the liability of a guarantor of such corporate debtor.

In the matter of ***Gouri Shankar Jain* vs. *Punjab National Bank and Anr., W.P. No. 10147(W) of 2019***, petitioner was a director of a company 'Divya Jyoti Sponge Iron Private Limited' ('Corporate Debtor/CD'). Such company enjoyed credit facilities from various banksincluding the first respondent herein. Such credit facilities weresecured inter alia by the personal guarantee given by the petitioner.The petitioner has given a personal guarantee to the first respondentfor due repayment of the credit facilities enjoyed by the company from the first respondent.

The company facedproceedings before the National Company Law Tribunal under theInsolvency and Bankruptcy Code, 2016. By an order dated March 13, 2018, the Tribunal approved the resolution plan. Under the said resolution plan, the liabilities of the CD as against the creditors were dealt with in finality. On March 26, 2019, the Respondent Bank had issued a notice under Section 13(2) of the Securitisation andReconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) to the Petitioner on the basis of the guarantee.

The issue in the petition is '*whether the liability of a guarantor of a debt of a corporate debtor stands reduced/extinguished upon an insolvency resolution plan in respect of the corporate debtor, being approved under the IBC?'*

The Hon'ble High Court of Calcutta relied on the case of ***Maharashtra State Electricity Board Bombay vs. Official Liquidator High Court, Ernakulum and Anr.,*** to hold that,

> *"37. Section 14 of the Code of 2016 does not apply to a personal guarantor. The Code of 2016 does not allow personal guarantors to escape their liability. When an application under Section 7 of the Code of 2016 is admitted by the Adjudicating Authority, the steps taken subsequent thereto flows out of the statute. The two termination points of an application under Section 7 of the Code of 2016, after the admission of such application, do not result in any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor to constitute a discharge of a surety under Section 133 of the Act of 1872."*

High Court of Calcutta *vide* order dated 13.11.2019 dismissed the present petition.

Dr.Binoy J. Kattadiyil
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April 16, 2020

The definition of "person" in Section 3(23) of IBC is an inclusive definition which inter alia also includes Sole Proprietorship Firms.

In the matter of ***Neeta Saha, Member of Suspended Board of Palm Developers Pvt. Ltd. v. Mr. Ram Niwas Gupta and Anr., Company Appeal(AT) (Insolvency) No. 321 of 2020***[1], an application under Section 9 was filed by the sole proprietor firm Mr. Ram Niwas Gupta & Sons (Operational Creditor/OC) against the Palm Developers Pvt. Ltd. (Corporate Debtor/CD). The adjudication authority, after hearing the parties, admitted the application and against the said admission, present appeal was filed.

Thereafter, a settlement was reached between them. However, the cheque was dishonoured and the OC filed the Application under Rule 11 of NCLT Rules, 2016 seeking restoration and the Application was restored. The present appeal is filed on the ground that the Sole Proprietorship Firm is not a legal entity under the definition of "person" under Section 3(23) of IBC, and thus application under Section 9 of IBC could not be maintained.

After hearing the submissions of both parties, Hon'ble NCLAT overruled the order of NCLT, New Delhi in the matter of ***R.G. Steels Vs. Berry Auto Ancillaries (P) Ltd,*** wherein it was held that when the petition was filed by Sole Proprietorship concern it was not held to be a person and the petition was dismissed.

The Hon'ble NCLAT held that,

> *"Even the judgment shows the name of Respondent No. 1 as the Operational Creditor in his personal name. The Adjudicating Authority in effect has allowed the defects to be cured. The objection on this count does not survive. We also note that Section 2 of IBC provides that the provisions of the Code apply, inter alia, to "proprietorship firms". Further the definition of "person" in Section 3(23) of IBC is inclusive definition."*

NCLAT *vide* order dated 25.02.2020 upheld the decision of Adjudicating Authority and dismissed the appeal.

Dr. Binoy J. Kattadiyil
Managing Director

[1] https://ibbi.gov.in//uploads/order/88cf4c391a875b6b4b5dc6d1795523a0.pdf

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April 17, 2020

The letters of One Time Settlement (OTS) create a fresh period of limitation with effect from the date when the OTS was signed.

In the matter of ***Ashish Kumar S/o Rajendra Kumar Jain Vs. Mr. Vinod Kumar Pukhraj Ambavat RP, Company Appeal (AT) (Insolvency) No. 1411 of 2019***[1], an appeal emanated from the Order passed by NCLT, Cuttack Bench, whereby the NCLT had admitted an application filed under Section 7 of the Code on 03rd October, 2019 for initiation of CIRP against the Corporate Debtor (CD), in the case of ***M/s ASREC (India) Limited Vs. Mr R.K. Jain Construction (India) Pvt. Ltd.*** The Appellant had filed this appeal on the ground of limitation since the account of the CD was classified as NPA on 29th August 2012 and, according to the appellant, the petition should have been filed within three years from the date, when the account was declared NPA.

However, the Hon'ble NCLAT observed that the corporate debtor submitted the OTS letters and acknowledged the liability on different dates till 2019. The OTS proposal/acknowledgement of debt was given regarding the subsisting liability of the CD. Given the provision of Section 18 of Limitation Act and law laid down by the Hon'ble Supreme Court that on the acknowledgement of liability, afresh period of limitation starts, it was clear that the petition is not barred by limitation.

Therefore, Hon'ble NCLAT held that:

> *"18. In this case, it is clear that on the day of filing the petition U/S 7 of the Code, there was a subsisting liability on the corporate debtor, and due to the acknowledgement of debt in writing, though the account of the corporate debtor which was classified as NPA on 29th August, 2012, its validity got extended from time to time by acknowledgement of debt in writing and a fresh period of limitation started after the acknowledgement of debt as per provision of Sec 18 of the Limitation Act."*

NCLAT *vide* order dated 17.02.2020 rejected this appeal.

Dr.Binoy J. Kattadiyil
Managing Director

[1] https://ibbi.gov.in//uploads/order/846da44e7368a19fbc5b9351949c79f7.pdf

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Learning Curve-290

April 20, 2020

IBC update: The period of COVID 19 lockdown will not be counted for Liquidation Process related timelines.

Next in line to the relaxation in timelines under CIRP Regulations, timelines under the IBBI (Liquidation Regulations), 2016 have also been relaxed.

On 17.04.2020, IBBI vide its much-awaited notification inserted a new regulation 47A under IBBI (Liquidation Process) Regulation, 2016 to exclude the COVID-19 lockdown period from the computation of the time-line for any task that could not be completed in relation to any liquidation process. The Regulation was inserted by way of Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2020[1] in exercise of the powers conferred by clause (t) of sub-section(1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 and will come into effect from 17.04.2020.

The newly inserted Regulation 47A reads as under-

> *"**Exclusion of period of lockdown**.*
> *47A. Subject to the provisions of the Code, the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak shall not be counted for the purposes of computation of the time-line for any task that could not be completed due to such lockdown, in relation to any liquidation process."*

This amendment is in similar line with the IBBI's earlier notification dated 29.03.2020[2] which amended CIRP Regulations by inserting new Regulation 40C relating to timeline of CIRP process, to exclude the period of lockdown imposed by Central Government in relation to CIRP process.

This would, however, be subject to the overall time-limit provided in the Code.

Dr.Binoy J. Kattadiyil
Managing Director

[1] Available at : https://ibbi.gov.in/uploads/whatsnew/4697af9d01b6c12c0816f4be28ea6835.pdf
[2] https://www.ibbi.gov.in/uploads/whatsnew/be2e7697e91a349bc55033b58d249cef.pdf

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Learning Curve-291

April 21, 2020

Delhi High Court restrained a Bank to declare an account as NPA in light of the moratorium announced by RBI by its circular issued on 27th Marchamid COVID-19

The Reserve Bank of India(RBI) vide its circular dated March 27, 2020[1]announced certain regulatory measuresto mitigate the burden of debt servicing brought about by disruptions on account of COVID-19 pandemic and to ensure the continuity of viable businessesby inter alia providing a grant of moratorium of three months on payment of all instalments falling due between March 1, 2020 to May 31, 2020.

In the matter of ***Shakuntla Educational& Welfare Society Vs. Punjab & Sind Bank, W.P.(C)2959/2020***[2], the petitioner (a charitable society engaged in the business of technical and higher education) sought a direction to the respondent to not declare its pending loan accounts as Non-Performing Assets (NPA) when the countrywide lockdown is still continuing. The petitioner also sought a direction to the respondent for grant of moratorium of three months to it as per the circular issued by the Reserve Bank of India (RBI) on 27thMarch, 2020.

Petitioner claimed that in view of circular issued by the RBI, whereunder a 90 days moratorium qua the instalments, which became payable after 01.03.2020 has been granted, the respondent cannot declare the petitioner's accounts as NPA only on account of its failure to pay the instalments, which were payable on or before 31.03.2020.

While relying on an order dated 06.04.2020 passed by a Coordinate Bench of this Court in ***W.P.(C) URGENT 5/2020 [Anant Raj Limited v. Yes Bank Limited]***, the Hon'ble High Court observed that the intention of the RBI while issuing the regulatory package was to maintain status quo with regard to the classification of accounts of the borrowers as they existed on 01.03.2020.

In view of the above, the Hon'ble High Court of Delhi held that,

> *"13. Any classification of the petitioner's accounts as NPA would certainly amount to altering the position as existing on 01.03.2020 and, therefore, grave and irreparable loss will be caused to the petitioner, in case, its accounts are declared as NPA, only on account of its failure to pay the instalments, which were admittedly payable on or before 31.03.2020."*

Accordingly, the Hon'ble High Court of Delhi *vide*its order dated 13.04.2020 while admitting the petition directed that till 04th May, 2020, the respondent will stand restrained from declaring the petitioner's accounts as NPA.

Dr.Binoy J. Kattadiyil
Managing Director

[1] https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11835&Mode=0
[2] https://ibbi.gov.in//uploads/order/9d8994718d822c587162604366694180.pdf

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Learning Curve-292

April 22, 2020

A Financial Creditor can file application under section 7 of the Code against a Company who is guarantor to an individual/Sole Proprietorship firm

In the matter of***Laxmi Pat Suranav. Union Bank of India and Ors., Company Appeal (AT) (Ins) No. 77 of 2020***[1], M/s Mahaveer Construction (Sole Proprietorship firm/Borrower) had borrowed money against the payment of interest from the First RespondentBank. M/s Surana Metals Ltd.(Corporate Debtor)undertook a guarantee to the Bank against the loan facilities sanctioned to M/s. Mahaveer Construction. An application was filed against the Corporate Debtor by the first Respondent Bank under Section 7 of the Code, which was admitted by Adjudicating Authority on 06.12.2019.

The present appeal was preferred against the said impugned order of NCLT on the ground that since M/s. Surana Metals Ltd. is guarantor to the individual and not to the corporate person, no proceeding can lie againstit under IBC,2016.Moreover, the application filed by the first Respondent/Bank/ 'Financial Creditor' was barred by 'Limitation' since the 'Account' was admittedly declared as'Non-Performing Asset' on 30.10.2010 by the First Respondent/Bank and that the application under Section 7 of the Code was filed on 13.02.2019 i.e. after more than nine years.The counter argument by the RespondentBank was that the limitation for filing of an application against the 'Corporate Guarantor' begins from the acknowledgement i.e. 08.12.2018, furnished by the 'Corporate Guarantor' and not from the date that the account was declared to be NPA.

Hon'ble NCLAT placed reliance on the orders passed by the Hon'ble Supreme Court in the matters of ***Gaurav Hargovind Bhai Dave V/s Asset Reconstruction Company (India) Ltd. &Anr. 2019 10SCC 572***and ***B.K. Educational services Ltd. V/s Parag Gupta and Associates (Civil Appeal No. 23988/17)***, to hold that,

> *"23. It may not be out of place for this tribunal to make a relevant mention that the 'Financial Debt' includes a 'Debt' owed to a Creditor by a 'Principal' and 'Guarantor'. A just Omission or failure to pay on the part of a Guarantor to pay the 'Financial Creditor', When the Principal sum is claimed/demanded certainly, will come with the scope of 'Default' under Section (3),(12) of the Code. The proceedings under Section 7 of the Code can be triggered by a 'Financial Creditor' who had taken Guarantee in respect of 'Debt' against 'Guarantor' for failure to repay the money borrowed by the 'Principal Borrower'. To put it explicitly (Ms/ Surana Metals Ltd.) is the 'Corporate Debtor' and that the Appellant is the proprietor of the Firm of M/s Mahaveer Construction.*

Hon'ble NCLAT vide order dated 19.03.2020 dismissed the appeal and clarifiedthat by virtue of Deed of Guarantee Corporate Debtor being a'Corporate Person' owes debt to the Bank.In the present case, the 'Corporate Debtor' is the Guarantor and in the year 2008, undertook to repay the debt in case of default by the Principal Borrower. **As per Section 3(8) of the Code 'Corporate Debtor' means a Corporate Person who owes debt of any person**and the application projected before the Adjudicating Authority(NCLT) for admission, on 13.02.2019 is well within limitation and not barred by Limitation.

Dr.Binoy J. Kattadiyil
Managing Director

[1]https://ibbi.gov.in//uploads/order/e4da3b7fbbce2345d7772b0674a318d5.pdf

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Learning Curve-293

April 23, 2020

Without moving to the Resolution Professional & CoC, merely filing of application to Adjudicating Authority by the Prospective Resolution Applicant regarding tendering of resolution plan, is not the complete compliance as required under IBC and its regulation.

In the matter of ***Rajesh Kumar Agarwal and Ors. v. M/s Srivani Merchants Pvt. Ltd. And Ors., Company Appeal (AT) (Insolvency) No. 669 & 689 of 2019***[1], the present Appeal was preferred against an order of liquidation. Grievance of the Appellants was that they had filed three applications before the Adjudicating Authority(AA). One was for impleadment, the second was to consider them as Resolution Applicants and the third claimed that the appeal proceedings of 'CIRP' were vitiated because of fraud attracting Section 65 of IBC. It was submitted that without deciding the applications of the Appellants, the AA proceeded to pass orders of Liquidation as period for completing 'CIRP' had come to an end and no Resolution Plan had been received.

Hon'ble NCLAT on the grounds of impleadment and attracting provisions of fraud, stated that further material would be required to be shown to Appellant's claims. Merely on assumption, fraud cannot be said to have been prima facie indicated for the AA to further take cognizance of the averment made. There was not any sufficient cause for the appellants to resist the Resolution Professional when the Resolution Professional in discharge of duties under IBC wanted to proceed against the property of the CD and take it over. Same is the position with regard to the Liquidator.

On the ground of appeal for the Appellants to be considered as Resolution Applicants, the Hon'ble NCLAT placed reliance on the matter of, ***"Arcelormittal India Pvt. Ltd. vs. Satish Kumar Gupta and Others" (2019) 2 SC,*** and held that,

> *"It appears to us that the provisions of IBC require that a prospective Resolution Applicant must approach the Resolution Professional by filing expression of interest and then following the procedures of IBC and the Regulations and complete compliances regarding the tendering of the Resolution Plan. Nothing of this sought has admittedly been done. Without moving Resolution Professional & CoC, filing of application to Adjudicating Authority is not the solution. The learned counsel for Appellant states that as 180 days were already over the Appellants could not follow this procedure. When admittedly, the necessary procedure was not followed during the course of 'CIRP' as required by the provisions of IBC and the Regulations, such belated offer cannot be said to be bona fide. Merely expressing that I am ready to file Resolution Plan is not sufficient for taking cognizance of such offer."*

Hon'ble NCLAT *vide* order dated 18.03.2020 dismissed the appeal.

Dr. Binoy J. Kattadiyil
Managing Director

[1] https://ibbi.gov.in//uploads/order/45c48cce2e2d7fbdea1afc51c7c6ad26.pdf

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Learning Curve-294

April 24, 2020

Mere finding on an Interlocutory Application that the debt claimed by the Creditor constituted a 'financial debt' would not ipso facto justify admission or rejection of the application to initiate CIRP.

In the matter of ***Kerala Ayurveda Ltd. v. Tata Global Beverages Ltd. , Company Appeal (AT) (Insolvency) No. 429 of 2020***[1]**,** an appeal was preferred by the appellant opposing the finding of Adjudicating Authority that the money advanced in the matter, constituted a 'financial debt'.

Hon'ble NCLAT observed that the Section 7 application had not been dealt with at the stage of admission and no order had been passed either admitting or rejecting the application yet. Held that,

> *"Mere finding on an Interlocutory Application that the debt claimed by the Creditor constituted a 'financial debt' would not ipso facto justify admission or rejection of the application as learned Adjudicating Authority is required to consider the debt along with default and unless there is a finding in respect of default and an order of admission is passed, 'Corporate Insolvency Resolution Process' does not commence. Viewed in this perspective, it is futile to contend that the appeal in terms of Section 60(1) shall be maintainable"*

Hon'ble NCLAT dismissed the appeal as premature *vide* order dated 16.03.2020.

Dr. Binoy J. Kattadiyil
Managing Director

[1] https://ibbi.gov.in//uploads/order/d79aed5e9f199d0b0cd6ffcc3ce9d498.pdf

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Learning Curve-295

April 27, 2020

Dear Professional Colleagues,

Various notifications rolled out by IBBI under IBBI Regulations

The Insolvency and Bankruptcy Board of India ('IBBI') vide its notifications dated 20th April, 2020, being published on the Official Gazette of India on 24th April, 2020, have come out with following notifications in IBBI regulations:

1. **IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020**

The IBBI vide its notification dated 20th April 2020 has amended Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) by inserting new Regulation 40C relating to timeline of CIRP process. As per the amendment, the period of lockdown imposed by Central Government will not be counted in relation to CIRP process.

This amendment is effective from 29th March, 2020.

The Notification is available at:https://ibbi.gov.in/uploads/legalframwork/3d8c8efd906d320e296833445c91a0a4.pdf

2. **Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2020.**

The IBBI vide its notification dated 20th April, 2020 has amended the principal regulation, the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. As per the amendments:

- **Relaxation for paying fee by Insolvency Professional(IP) and Insolvency Professional Entity(IPE) for the Financial Year 2019-20:** As per the Regulation 7(2)(ca) and Regulation 13(2)(ca), the Insolvency Professional(IP) and Insolvency Professional Entity(IPE) are required to pay to the IBBI, a fee calculated at the rate of 0.25% of the professional fees earned for the services rendered by them as an IP/IPE in the preceding financial year, on or before the 30th April every year alongwith the statement in Form E of the second schedule. As per this amendment, this date of 30the April, has been extended to 30th June, 2020 for the financial year 2019-20.
- **Intimation about joining and cessation of director or partner by Insolvency Professional Entity(IPE) to the IBBI:** As per the amended Regulation 13(2)(b), IPE shall intimate board when an individual ceases or join as its director or partner, as the case may be, on and from the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2020 (i.e. 28th March, 2020) and ending on the 31st December 2020, the insolvency professional entity shall inform the Board, within thirty days of such cessation;

This amendment is effective from 28th March, 2020.

The Notification is available at: https://ibbi.gov.in/uploads/legalframwork/ac467ecac3ad7a0f66433d3cbedfa03d.pdf

3. **IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2020**

The IBBI vide its notification dated 20th April, 2020 has amended the principal regulation, the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016.

Under Regulation 12A, professional member of IPA has to register their assignments with their IPAs. As per the amendment, if an application has been made by such IPs to either renew their certificate to get assignments or to obtain a fresh certificate and is not availed within 30 days (timeline to renew or issue a certificate) shall be deemed to have been renewed or issued by the Agency. However, the said consideration is for the period 28th March, 2020 to 30th September, 2020 only.

This amendment is effective from 28th March, 2020.

The Notification is available at: https://ibbi.gov.in/uploads/legalframwork/685f38c7444a9a6b8ddad11ac23c90cf.pdf

4. **Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2020.**

IBBI vide its notification dated 20th April, 2020 amended IBBI(Liquidation Process) Regulation, 2016 by inserting special provision, Regulation 47A relating to timeline of liquidation process. As per the amendment, the period of lockdown imposed by Central Government will not be counted in relation to liquidation process.

This amendment is effective from 17th April, 2020.

The Notification is available at: https://ibbi.gov.in/uploads/legalframwork/51250311f7791102b612ff9c9810b997.pdf

5. **Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2020.**

Regulation 40B pertains to filing of forms by the IPs with respect to the assignment being taken or consent given for taking any assignment. Earlier the IPs were to file the forms as prescribed in the said Regulation which was to be enforced from 1st April, 2020, however, the said Regulation, vide this amendment, shall be made applicable from 1st October, 2020.

This amendment is effective from 25th March, 2020.

The Notification is available at: https://ibbi.gov.in/uploads/legalframwork/ba2702f58a4ed1841e0e7a9a71ba40ec.pdf

Dr. Binoy J. Kattadiyil
Managing Director

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Learning Curve-296

April 28, 2020

Rule 11 of NCLT Rules, 2016 which speaks 'Inherent Powers of the National Company Law Tribunal' may be invoked to restore main petition filed before the Tribunal

In the matter of ***M/s Ricoh Thermal Media Asia Pacific Pvt. Ltd. v/s M/s Efficient Data Pvt. Ltd., Company Appeal(AT) (Insolvency) No. 1295 of 2019***[1]**,** the Appellant/ 'Operational Creditor' filed the instant appeal before the Appellate Tribunal invoking Section 61 of the IBC, 2016 as an aggrieved person of the impugned order of NCLT, Mumbai Branch. Admittedly, the appellant has not filed any application for restoration of the petition which was dismissed for default on 26.08.2019 by resorting to Rule 11 of the NCLT Rules, 2016.

Appellant was under the *bonafide* belief that the matter was listed before the Adjudicating Authority on 16.09.2019, as was also evident from the 'Cause List'. Appellant was not aware of the hearing the matter on 26.08.2019, when the Petition was dismissed for default. Only on 16.09.2019, the appellant was apprised of the fact that the matter was already dismissed. Hon'ble NCLAT observed that although the appellant filed this appeal invoking Section 61 of the IBC, yet, in law the appellant had a viable, effective and equally efficacious remedy of projecting an application for restoration of the admission application by setting out sufficient reasons or causes for non-appearance on the dates fixed by the Adjudicating Authority.

Further, deliberating on the power of NCLT under the Rule-11 of the NCLT Rules, the Hon'ble NCLAT stated that,

> *"6. In fact, Rule-11 of NCLT Rules, 2016 speaks of 'Inherent Powers of the National Company Law Tribunal' and the same can be exercised to meet ends of justice or to prevent an abuse of process of the Tribunal. Therefore, this Tribunal simpliciter, at this stage, grants permission to the Appellant to move before the Adjudicating Authority and to file an Application seeking restoration of the main Petition, by setting out the reasons for non-appearance on earlier occasions before the Adjudicating Authority/Tribunal, within one week from the date of receipt of this Judgment. It is open to the Appellant as an 'Applicant' to raise all factual and legal pleas before the said Authority and to seek redressal of its grievances in accordance with Law, if it so desires or advised. If the Appellant files an Application for restoration of the main petition within time specified by this Tribunal before the Adjudicating Authority, the same may be taken on file (if it is found to be otherwise in order) and necessary orders be passed on merits,…"*

NCLAT *vide* order dated 18.03.2020 disposed of the appeal.

Dr. Binoy J. Kattadiyil
Managing Director

[1] https://ibbi.gov.in//uploads/order/c4ca4238a0b923820dcc509a6f75849b.pdf

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Learning Curve-297

April 29, 2020

National Company Law Tribunal or Appellate Tribunal cannot sit in appeal on commercial wisdom of the 'Committee of Creditors'.

In the matter of ***Vishal Vijay Kalantri and Ors. v. DBM Geotechnics & Construction Pvt. Ltd and Ors***.[1]**,** the order of admission was appealed against in three appeals. One for there being 'existence of dispute' which remained pending as a settlement was reached between parties and Section 12A application was filed, another appeal was filed by a resolution applicant against the successful resolution applicant for allowing time for modification of their plan and the last appeal was filed by a shareholder of the CD against the settlement under Section 12A being rejected by the Committee of Creditors.

The Resolution Professional placed before the 'Committee of Creditors' [i] the term sheet received from the promoters regarding their Settlement Proposal, and [ii] the revised/ improved/revalidated Resolution Plans from APSEZ and Veritas Consortium (Resolution Applicants). CoC discussed and deliberated upon the Resolution Plans submitted by 'APSEZL' and 'Veritas Consortium' and called upon the Resolution Applicant(s) to give a presentation on their Resolution Plans. CoC proposed to put the withdrawal resolution under Section12A of the I&B Code for voting by the members of the CoC. The resolution for withdrawal of CIRP under Section 12A of the I&B Code was rejected by the members of the CoC by 99.68% voting shares and CoC members having the remaining 0.3% voting shares abstained from voting. Subsequently, Resolution Plan submitted by APSEZ was approved by the members of the CoC with 99.68% votes.

Hon'ble NCLAT relying on the matter of ***'Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors. – (2019) SCC Online SC 1478'***, which stated that the National Company Law Tribunal or this Appellate Tribunal cannot sit in appeal on commercial wisdom of the CoC, observed that,

"*the determination/adjudication as to whether the Resolution Plan is in compliance to the provisions of the I&B Code and Regulations framed thereunder is sub judice before the NCLT i.e. Adjudicating Authority being the court of first instance. It is further submitted that the Settlement Proposal of the Appellant under Section 12A of the I&B Code has been rejected by 99.68% [voting share] of the 'Committee of Creditors'. Furthermore, almost 2[two] years have elapsed since passing of the Admission Order and in the event this Appellate Tribunal interferes with the Admission Order, this would result in one of the creditors filing a fresh application before the NCLT and 'corporate insolvency resolution process' of the 'Corporate Debtor' would have to be recommenced.*
..Consequently, none of the lenders/stake holders would receive their dues from the subsequent 'corporate insolvency resolution process' of the Corporate Debtor and the Corporate Debtor would eventually be subjected to nothing but liquidation."

Hon'ble NCLAT *vide* order dated 12.03.2020, dismissed the appeals preferred by 'Vishal Vijay Kalantri' and declared both the appeals preferred by 'APSEZL' as infructuous.

Dr. Binoy J. Kattadiyil
Managing Director

[1] https://ibbi.gov.in//uploads/order/fec66ba8f113b3c924b7de271f7c48dd.pdf

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Learning Curve-298

April 30, 2020

The sale proceeds from the pledged stock of Corporate Debtor can be used for the purpose of CIRP

In the matter of ***Punjab National Bank v. State Bank of India and Anr. Company Appeal(AT) (Insolvency) No. 1484 of 2019***[1], it was stated that a stock of rice was lying in the godown of the Corporate Debtor (CD) and the same had been pledged in favour of Punjab National Bank(Appellant) by a document of pledge. The CoC decided that stock of rice, being perishable commodity, should be sold to utilise the money for conducting CIRP in spite of this resolution being opposed by the Appellant. It was further decided by CoC that since PNB is in Minority, RP may move an application before NCLT for appropriate directions.

The appellant contended that the pledged stock being the only security, Punjab National Bank had from the CD, the stock should not have been sold and the money should not be utilised by the Interim Resolution Professional (IRP) for conducting CIRP.

Hon'ble NCLAT observed that AA, after hearing the parties, had accepted the prayer of IRP to utilise the sale proceeds and operate bank account of the Corporate Debtor for the purpose of day to day functioning of the Corporate Debtor including payment of current bills of supplier, salaries and wages of the employees and workmen. It would also include CIRP cost. NCLAT, thus, stated that,

> *"10. The stock already having been sold, there is no illegality if the Resolution Professional uses the money available from the sale of the stock for the purpose CIRP. The rights and benefits in law claimed by the Appellant of having security by way of pledge and the value of the stock which was pledged are kept open for consideration of the CoC when the Resolution Plan is available before it, and/or in case situation of liquidation arises."*

Hon'ble NCLAT vide order dated 03.03.2020 disposed of the appeal, holding that the claim as above of Appellant shall be kept in consideration by RP/CoC/Adjudicating Authority while dealing with the Resolution Plan, if any, and/or in case of liquidation.

Dr. Binoy J. Kattadiyil
Managing Director

[1] https://ibbi.gov.in//uploads/order/1c383cd30b7c298ab50293adfecb7b18.pdf