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Learning Curve-319

June 1, 2020

Resolution Applicants can opt for arrangements u/s 230-232 of the Companies Act 2013 during liquidation proceedings under IBC

In the matter of ***First Global Finance Pvt Ltd. v. IVRCL Limited and State Bank of India***[1], the Appellant had filed the present appeal against the arbitrary rejection of the Resolution Plan submitted by the Appellant Company, on account of Expression of Interest (EOI) deviation and non-fulfillment of other eligibility criteria.

Alternatively, the Appellant was also seeking direction from NCLAT to direct the Respondent to file the application under section 230 of the Companies Act, 2013 to place on record the scheme of arrangement from the Appellant.

Hon'ble NCLAT relying on the judgment of *Jindal Steel and Power Limited V. Arun kumar jagatramka*, wherein it was observed that "*even during the period of liquidation for the purpose of section 230 to 232 of the Companies Act, the 'Corporate Debtor' is to be saved from its own management*.", held that,

> *"SBI and Respondent it is observed that the Appellant has strictly not complied with the terms and conditions of Expression of Interest (EOI) dated 14.08.2018 and non-submission of EMD along with submission of Resolution plan dated 4.10.2018 as required by the Bid Process Memorandum. They have also deviated on other parameters. And hence CoC after deliberation has rejected the plan and accordingly the Resolution Professional has communicated to the Resolution Applicant. Since, liquidation proceedings as a going concern is already on from July 2019 and there is always scope for Resolution Applicants to opt for Arrangements under Section 230-232 of the Companies Act, 2013, if they are eligible in accordance with provisions of Insolvency and Bankruptcy Code, 2016 along with relevant Rules. Hence there is no merit in the case to consider the relief of setting aside the impugned order of NCLT, Hyderabad Bench."*

Hon'ble NCLAT *vid*e order dated 29.05.2020, upheld the impugned order of NCLT, Hyderabad Bench.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclat.nic.in/Useradmin/upload/10536294735ed0de83e1205.pdf

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Learning Curve-329

June 15, 2020

The period spent while pursuing SARFAESI Proceedings does not extend the period of limitation

In the matter of ***M/s. Gradient Nirman Private Limited and Anr. v. M/s. IFCI Ltd and Ors.***[1] , the Appellant contented that the application under Section 7 was barred by limitation as the date of default being 15.10.2013. The Respondent contended that the loan amount was declared NPA on 30.06.2014; the recall notice was given on 02.07.2014; the Creditor took steps to initiate proceedings under DRT on 14.11.2014 and later under the SARFAESI Act, 2002 and that the Creditor is entitled for the exclusion of time period under Section 14 of the Limitation Act, 1963.

Hon'ble NCLAT on the issue of limitation as well as simultaneous proceedings, relied on the judgment of ***Gaurav Hargovind bhai Dave vs. Asset Reconstructions Company (India) Limited and another,*** to hold that,

> *"15. We observe from the letter dated 02.07.2014, that the date of default is 30.06.2014 though the date of default mentioned in Part IV of the Application, is 15.10.2013. In this case the 'right to sue' accrues on 30.06.2014 and 3 years limitation period ends on 29.06.2017, whereas the Application was filed on 08.11.2017.*
>
> *16. Therefore, the contention of the Learned Counsel that the Financial Creditor has also initiated proceedings under DRT and under the SARFAESI Act 2002, and therefore this period should be excluded, cannot be sustained.*
>
> *....we are of the considered view that suit for recovery based upon a cause of action even if it is within limitation, it cannot in any manner impact the separate and independent remedy of a winding-up proceeding. A suit for recovery is a separate and independent proceeding distinct from the remedy of winding-up and therefore the contention of the Learned Counsel appearing for the Respondents/ Financial Creditor that the period spent while pursuing SARFAESI Proceedings should extend the period of limitation, cannot be sustained, as the intent of the Court is not to give a new lease of life to the debt which is already time barred."*

Hon'ble NCLAT vide order dated 22.05.2020 allowed the appeal.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://ibbi.gov.in//uploads/order/5e59525cb7d1d1cd93be0b9f36e9d09a.pdf

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Learning Curve-328

June 12, 2020

NCLAT allowed settlement between Corporate debtor and Operation Creditor; and released Corporate Debtor from the rigour of Corporate Insolvency Resolution Process

In the matter of ***Rahul Gupta v. G Trans Logistics (India) Pvt. Ltd. & Ors***.[1], the Appellant had submitted that the claim of 'G Trans Logistics (India) Pvt. Ltd.' (Operational Creditor) was settled in terms of the Settlement Agreement, wherein the Corporate Debtor agreed to pay a sum of Rs.85.00 Lakh as full and final settlement of all claims of the Operational Creditor. Such sum was agreed to be paid in instalments as specified in the Settlement Agreement.

This appeal by Corporate Debtor was filed seeking to place on record the Terms of Settlement Agreement executed between the Appellant and the Respondent – Operational Creditor.

Hon'ble NCLAT relying on the judgment of ***Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors***. held that,

> "4. *In terms of dictum of Hon'ble Apex Court as laid down in 'Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.', Writ Petition (Civil) No. 99/2018 (para 52) dated 25th January, 2019 (2019 SCC OnLine SC 73), the exit route from the Corporate Insolvency Resolution Process being available prior to constitution of Committee of Creditors, we find that this is a fit case for exercise of Rule 11 of National Company Law Appellate Tribunal Rules, 2016 to allow the settlement and to take Settlement Terms on record.*
>
> *...5. We accordingly take the Settlement terms on record and dispose of the appeal in terms of this Settlement Agreement. The impugned order dated 2nd June, 2020 by virtue whereof the application under Section 9 preferred by Respondent No. 1 – Operational Creditor was admitted and Corporate Insolvency Resolution Process was commenced and all actions taken pursuant thereto are set aside. The Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-V is directed to close the case. The Corporate Debtor is released from the rigour of Corporate Insolvency Resolution Process and will function through its Board of Directors. The Interim Resolution Professional will hand over assets and records of the Corporate Debtor, immediately*."

NCLAT *vide* order dated 11.06.2020 allowed the application.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclat.nic.in/Useradmin/upload/6666191015ee225d339858.pdf

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Learning Curve-327

June 11, 2020

The evaluation matrix applied by the CoC falls within the commercial wisdom of the CoC and it is settled position of law that approval or rejection of Resolution Plan depends upon the commercial wisdom of the CoC.

In the matter of ***IMR Metallurgical Resources AG Vs. Ferro Alloys Corporation Limited***[1], appeal has been filed against the order of NCLT, Cuttack Bench whereby Ld. Adjudicating Authority dismissed the application filed by the Appellant (IMR Metallurgical Resources AG**)** for seeking and direction to reconsider Resolution Plan of Appellant before accepting the Resolution Plan submitted by the successful Resolution Applicant, mechanically without appreciating the submission of the Appellant.

NCLAT observed that the resolution applicant does not have any vested right that his Resolution Plan must be considered. The commercial wisdom of the CoC is paramount, and it has the absolute prerogative to decide the viability and feasibility of the Resolution Plans presented before them and the same is not to be interfered even by the Adjudicating Authority.

Hon'ble NCLAT relying on the judgments of ***K. Sashidhar vs. Indian Overseas Bank*** *and* ***Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others***, held that,

> *"12. In this Appeal, the Appellant had challenged the evaluation matrix applied by the CoC which falls within the commercial wisdom of the CoC. It is settled position of law that approval or rejection of Resolution Plan depends upon the commercial wisdom of the CoC, which involves evaluation of the Resolution Plan based on its feasibility. Such commercial wisdom of the CoC with the requisite voting majority is non-justiciable. The powers of the Adjudicating Authority under Section 31 of the Code is limited to the matters covered under Section 30(2) of the Code when the Resolution Plan does not conform to the stated condition. Therefore, the Appellant cannot question the commercial wisdom of the CoC in rejecting the Resolution Plan, with the requisite majority and in approving the Resolution Plan of SPTL. No material irregularity in Corporate Insolvency Resolution Process before the R.P. has been demonstrated."*

Hon'ble NCLAT *vide* order dated 08.06.2020 dismissed the appeal stating that impugned order of NCLT was passed on proper application of mind in conformity with the law and therefore, NCLAT is not inclined to interfere with the impugned order regarding the approval of Resolution Plan.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclat.nic.in/Useradmin/upload/13052615365ede175cdc785.pdf

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Learning Curve-326

June 10, 2020

Changes in the payment time-line of Resolution Plan due to COVID-19 allowed by NCLT.

In the matter of ***Sunil Kumar Agarwal (RP of DIGJAM Ltd) v. Suspended Board of Directors of DIGJAM Ltd***[1], the present application was filed before NCLT, Ahmadabad Bench for approval of Resolution Plan in respect of M/s. Digjam Ltd. (Corporate Debtor), being already approved by the Committee of Creditors.

The Resolution Applicant (*Finquest Financial Solutions Pvt. Ltd*.) has asked for certain relaxations in the Resolution Plan with regard to payment to be made to Financial Creditors/Operational Creditors and other stakeholders arising out of the current ongoing pandemic due to COVID-19 virus.

NCLT referred the notification of RBI that announced an extension of the moratorium on loan EMIs by three months vide its "Developmental and Regulatory Policy" in the public interest, and held that,

> "*On perusal of the affidavit dated 29.04.2020, so filed by the Resolution Applicant, seeking modification/concession/relaxation in the time line for the payment to the Financial Creditors/Operational Creditors and/or other stakeholders, if any, due to pandemic of COVID-19 virus, it is found that there is no material change in the Resolution Plan save and except modification/concession/relaxation in respect of time line of payment to the creditors and/or stakeholders. Those concession/modification/relaxation, so sought for by the Resolution Applicant appears to be genuine and bonafide in view of pandemic COVID-19 virus and consequent lock down which has global effect on the economy*."

NCLT *vide* order dated 27.05.2020, allowed the present application with modifications to time line for payment to the Financial Creditors/Operational Creditors and/or other stakeholders.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclt.gov.in/sites/default/files/Feb-final-orders-pdf/Scan_20200530_2.pdf

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Learning Curve-325

June 9, 2020

The Income Tax Department may continue with the assessment proceedings during CIRP and file their claim, if any, as an Operational Creditor.

In the matter of ***Deputy Commissioner of Income Tax Vs. Bhuvan Madan RP for Diamond Power Infrastructure Ltd. & Anr***[1]**,** the present application was preferred by the Applicant to seek permission from the Adjudicating Authority to carry out the assessment proceedings under Section 153A read with 281B of the Income Tax Act.

NCLT, Ahmedabad Bench observed that during the search operations against the Corporate Debtor, the Income Tax Department has found many discrepancies in the accounts of the Corporate Debtor which may lead to huge tax demand on the Corporate Debtor, in case assessment proceedings for the A.Y. 2013-14 to 2019-20 of the Corporate Debtor are carried out, otherwise there will be grave injustice to the interests of the Applicant as well as the Government Exchequer.

NCLT also observed that once the CIRP proceedings have already commenced and moratorium is imposed, all the legal proceedings, execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority are prohibited against the Corporate Debtor except supply of essential goods or services to the Corporate Debtor. NCLT held that,

> "*the Insolvency and Bankruptcy Code, 2016 was enacted with a view to bring about a complete reorganization and insolvency resolution of Corporate Debtors in a time bound manner and to inspire life into a Corporate Debtor struggling to repay its debts, Section 238 was inserted in the Code. Provisions Of this Section 238 override other laws as decided by the Hon 'ble Supreme Court in* ***Duncans Industries Ltd. v. A. J. Agrochem.***
>
> *..It is also made clear that problems should not be there during assessment work for the Resolution Professional in completing the CIRP in time. On the other hand, the Resolution Professional is directed to extend his full co-operation to the Income Tax Department in their assessment of tax of the Corporate Debtor. The Income Tax Department may file their claim, if any, as an Operational Creditor with the Resolution Professional of the Corporate Debtor in time. The Resolution Professional may examine the claim of the Income Tax Department in accordance with the provisions of the Code."*

NCLT, Ahmadabad Bench *vide* order dated 27.05.2020 disposed of the application.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclt.gov.in/sites/default/files/Feb-final-orders-pdf/FINAL%20IA%20672%20Deputy%20Commissioner%20of%20income%20Tax%20vs%20Bhuvan%20Madan%20RP%20for%20Diamond%20Power%20Infrastructure%20Ltd%20%26%20Anr..pdf

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Learning Curve-324

June 8, 2020

The Central Government's decision to increase the minimum threshold for the initiation of insolvency proceedings is prospective in nature.

In the matter of ***Arrowline Organics Pvt. Ltd v. Rockwell Industries Pvt. Ltd***.[1], Rockwell Industries (Operational creditor) had filed a plea under Section 9 of IBC for initiation of insolvency proceedings against the Arrowline Organic Products (Corporate Debtor). An order of admission was passed by the NCLT, Chennai Bench on 5th May, 2020. The present application was moved by the Corporate Debtor for recall of the admission order in view of the Central Government Notification dated 24th March, 2020 which raised the minimum threshold limit of default for initiation on insolvency to Rs 1 crore from Rs 1 lakh.

Corporate Debtor submitted that NCLT was required to recall the admission order as the proceedings under the present case pertained to an amount of default lesser than Rs. 1 crore, which had occurred prior to the date of notification i.e. 24th March and the notification which was issued on 24th March was retrospective in nature.

NCLT, Chennai Bench considered the text of the Notification along with the provisions pursuant to which it was issued and stated that the law and notification did not expressly confer any power to issue the March 24 Notification retrospectively. They held that,

> *"...this Tribunal confines itself to the careful reading of the Notification and the provisions under which it has been issued, and find that the provision under which the Notification had been issued do not expressly confer any power on the delegate to issue the Notification making it retrospective in its operation nor any necessary intendment can also be gathered therefrom***.**
>
> *..the Notification issued by the Central Government through the Ministry of Corporate Affairs dated 24.03.2020 .., in view of the detailed discussions in relation to the issue of its Applicability, can be considered only as prospective, i.e. applicable from 24.03.2020"*

Hon'ble NCLT, Chennai Bench *vide* order dated 02.06.2020, dismissed the application and held that since the present case was heard and reserved for order much before the Notification, the increased pecuniary jurisdiction was not applicable to it.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclt.gov.in/sites/default/files/Feb-final-orders-pdf/IA%20341.pdf

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Learning Curve-323

June 5, 2020

Civil Suit filed after receipt of the demand notice, will not be a dispute as defined in Section 5(6) of I&B Code.

In the matter of ***G. T. Polymers v/s. Keshava Medi Devices Pvt. Ltd.***[1]**,** a Section 9 application was filed by the Appellant (G.T Polymer) against the Corporate Debtor (Keshava Medi Devices Pvt. Ltd.) and was rejected by the NCLT, Amrawati Bench at Hyderabad on the ground that the claim of the Appellant falls within the ambit of disputed claim since the Respondent had filed a civil suit in the matter.

Hon'ble NCLAT relied on the Supreme Court judgment in case of ***Mobilox Innvations Pvt. Ltd. Vs. Kirussa Software Pvt. Ltd. 2017 1 SCC Online SC 353*** where it was held as to what are facts to be examined by the Adjudicating Authority while examining an Application under Section 9 of I & B Code, to hold that,

> *"20. The Adjudicating Authority wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of disputed claim. Merely disputing a claim cannot be a ground, as held by the Hon'ble Supreme Court in Innovative Industries Ltd Vs ICICI Bank and Anr. wherein it is observed that "claim means a right to payment even it is disputed. The Code gets triggered the moment the default of Rs.1 Lakh or more".*
>
> *...21. From the record as we find that the Respondent has defaulted to pay more than Rs. 1 Lakh and in absence of any pre-existing dispute and the record being complete we hold that the application u/s 9 preferred by the Appellant was fit to be admitted."*

Hon'ble NCLAT vide order dated 03.06.2020, set-aside the impugned judgment of NCLT, Amravati Bench and allowed the appeal.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclat.nic.in/Useradmin/upload/3482476985ed7996310807.pdf

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Learning Curve-322

June 4, 2020

Abatement of Original Suit before DRT will not affect the proceeding in NCLT under IBC as the dues still remain outstanding.

In the matter of *Babasaheb Sawalaram Chaware Vs. Punjab National Bank,*[1]the claim of the Appellant is that the Bank for itself and Consortium continued measures after issuing notice under SARFAESI, from 2015 to 2018 the Bank and consortium forced the Appellant and the Company for one time settlement. It is abated liability and hence no liability. Appellant claims the application admitted is time barred.

Hon'ble NCLAT held that,

> *"9. Considering the above it is apparent that Appellant all the time admitted and acknowledged the dues and making some payments kept seeking time. Appellant has vaguely pleaded coercion, force and pressure in getting executed OTS documents. There are no particulars to spell out and no material showing coercion, force or pressure. Rather it appears Appellant consumed time by such constant offers. The correspondence referred has Acknowledgments of dues covered under section 18 of the Limitation Act. The dues outstanding relied on are not hit by limitation. Abatement of Original Suit before DRT will not affect the proceeding in NCLT under IBC as the dues still remain outstanding. As such the Adjudicating Authority (NCLT) rightly admitted the application. We find no substance in the Appeal and arguments raised for the Appellant."*

Hon'ble NCLAT *vide* order dated 02.06.2020 dismissed the appeal.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclat.nic.in/Useradmin/upload/6499313595ed642211c706.pdf

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Learning Curve-321

June 3, 2020

The Liquidator is not required to file Application before compounding authority for an offence committed by the Company by not depositing TDS. Company itself will file compounding application accepting that it has committed such offence

In the matter of ***Mr. Savan Godiawala Vs. Mr. G. Venkatesh Babu and Ors*** [1], Mr. Savan Godiawala was appointed as the Official liquidator of the Corporate Debtor(Lanco Infratech Ltd). It was also admitted that Income Tax Department filed complaint under Section 276-B read with Section 278-B of the Income Tax Act against the being Managing Director and person responsible and in charge of day to day affairs of the Corporate Debtor with the allegation that the Tax deducted at source during the financial year 2012-2013 had not been deposited to the Government account within the stipulated period.

The question in this appeal was whether the onus of filing application for compounding of the said offence would fall on the Liquidator as per the duties prescribed under Section 35(1)(k) of IBC. The question was of figuring out who had committed the default.

The Hon'ble NCLAT observed that,

> *"14. It is true that as per Section 35(1)(k) of the I&B Code, it is duty of the liquidator to institute or defend any suit, prosecution or other legal proceedings, civil or criminal in the name of on behalf of Corporate Debtor. Compounding of offence is a process whereby the person/entity committing default will file an Application to the compounding authority accepting that it has committed an offence and so that same should be condoned. In the instant case as per the Corporate Debtor has committed the offence under Section 276 -B read with Section 278-B of the Income Tax Act, therefore, he has filed the Application before the compounding authority. Liquidator has not committed the alleged offence therefore; he is not required to file Application before compounding authority accepting that he has committed an alleged offence. However it is true that the liquidator has to defend the Company once he has taken the charge of the Company."*

Hon'ble NCLAT vide order dated 29.05.2020 while allowing the appeal held that the Adjudicating Authority had misconstrued the provisions of Section 35(1) (k) of I&B Code. The impugned order was not sustainable in law and facts, hence it was set aside

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://ibbi.gov.in//uploads/order/5150885293ac99dafcddec2b2dbb07d9.pdf

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Learning Curve-320

June 2, 2020

Adjudicating Authority *suo-moto* cannot direct the CoC to consider the new resolution plan and re-consider the already approved resolution plan.

In the matter of ***Chhatisgarh Distilleries Ltd. v. Dushyant Dave and Ors.***[1]**,** the Chattisgarh Distilleries Ltd. (Resolution Applicant/Appellant) submitted its Resolution Plan before the Adjudicating Authority on 13.02.2019 whereas, the last date for submission of Resolution Plan before RP was 15.10.2018. Resolution plan of successful Resolution Applicant i.e. Dera Finvest Pvt. Ltd. was approved by 98.72 % of the Committee of Creditor in e-voting conducted on 01.11.2018 and 02.11.2018.

The contention raised was mainly whether the AA could *suo-moto* direct the CoC for considering a different resolution plan than what was approved by them previously. Further, raised issue that the Resolution Plan is submitted before the Adjudicating Authority for approval thereafter, the limitation of 180 days is stopped.

NCLAT relied on the matter of ***Committee of Creditor of Essar Steel India Ltd. Vs. Satish Gupta & Ors*****.** to hold that,

> *"20. The Appellant has not taken any of the grounds specified in S.61 (3) of the I&B Code in the memo of Appeal. Even, during the course of argument learned Counsel for Appellant, was unable to convince us that the appeal is filed on any of the grounds provided u/s 61(3) of the I & B Code. The Hon'ble Supreme Court held that undoubtedly the inquiry in such Appeal would be limited to the power exercisable by the Resolution professional under Section 30(2) of the I&B, which are at the best by the Adjudicating Authority under Section 31(2) read with section 31(1) Code of the I&B Code, no other enquiry would be permissible. Further, the jurisdiction bestowed upon the Appellate Authority is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matter (other than enquiry into autonomy or commercial wisdom of the descending Financial Creditor). Thus, the prescribed Authority (NCLT/NCLAT) have been endured with limited Jurisdiction has specified in the I&B Code, and not to act as a Court of enquiry are exercised plenary powers."*

Hon'ble NCLAT *vide* order dated 29.05.2020 dismissed the appeal and upheld the impugned order.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://ibbi.gov.in//uploads/order/42e4e9efd0770c890ea32317db9b9f37.pdf

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Learning Curve-337

June 25, 2020

The purpose of increasing threshold limit to Rs. 1 crore was to ensure that MSMEs are not inflicted with sudden insolvency proceedings, Delhi High Court held.

In the matter of **Pankaj Aggarwal vs Union Of India And Ors**[1]**,** present petition was filed to challenge the impugned order passed by the NCLT dated 29th May, 2020 by which the NCLT had entertained a petition under Section 9 of IBC against the Company M/s. VMA Enterprises Pvt. Ltd. of which the Petitioner is one of the Promoter-Directors. The NCLT's order records that the default amount was to the tune of Rs.1 lakh, and hence the petition under Section 9 was being entertained.

Hon'ble High Court of Delhi held that,

> *"The notification dated 24th March 2020 has changed the `minimum amount of default' from one lakh rupees to one crore rupees in respect of `Insolvency Resolution and Liquidation for corporate persons' in Part II of the Code. The proceedings in the present case have been commenced under Section 9 of the IBC which is in Part II of the Code. The purpose of the notification was to ensure that Small and Medium Enterprises viz., SMEs and MSMEs are not subjected to Insolvency proceedings during the lockdown or immediately thereafter. The present writ petition accordingly deserves consideration. Prima facie, this is an error by the NCLT, as the notification dated 24th March 2020 was clearly applicable. Subject to the Petitioner depositing an amount of Rs.10 lakhs with the ld. Registrar General of this Court, the order of the NCLT dated 29th May, 2020 shall remain stayed till the next date of hearing."*

Hon'ble High Court of Delhi vide order dated 23.06.2020 allowed the petition and directed the counsel appearing for Union of India to bring the notification to the notice of the Adjudicating Authority.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://indiankanoon.org/doc/185417357/

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Learning Curve-336

June 24, 2020

Any creditor of the Corporate Debtor should not be allowed to raise such belated claims and challenge the approved Resolution Plan, much after the implementation of Resolution Plan;

Successful Resolution Applicant cannot be burdened with the past liabilities.

In the matter of ***State of Haryana Through Excise & Taxation v. Uttam Strips Ltd.*[1],** the Appellant had made an application under Section 60(5) of the Code, seeking directions against the Resolution Professional to accept its claim as an Operational Creditor and modify the Resolution Plan by incorporating the statutory dues of the Appellant but the AA dismissed the application by an Order that the grievance of the Applicant was highly belated and could not be looked into at this stage when the entire Resolution Plan had been implemented.

Hon' ble NCLAT relied on the case of ***Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.*** and held that,

> *"17. It is beyond doubt the claims of the Appellant is relating to the statutory dues, which is an Operational Debt. It is also on record that the Appellant had not properly filed its claim before the Resolution Professional up to the prescribed time limit. Since the Appellant failed to submit its claim before the Resolution Professional and the Resolution Plan submitted by Jyoti Strips Private Limited was implemented after approved from the Adjudicating Authority. Therefore as per the law laid down by Supreme Court in the case of Committee of Creditors of Essar Steel India Limited (supra),* ***Successful Resolution Applicant cannot be burdened with the past liabilities.*** *Such an act will make it impossible for the successful resolution applicant to run the business of the corporate debtor. It will ultimately defeat the entire purpose and mechanism set out under the I&B Code."*

Hon'ble NCLAT *vide* order dated 23.06.2020 dismissed the appeal.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclat.nic.in/Useradmin/upload/8501161965ef1cdbd43bf0.pdf

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Learning Curve-335

June 23, 2020

If a secured creditor does not have a requisite 60% value in Secured Interest, they do not have the right to realize its security interest, because it would be detrimental to the Liquidation process and the interest of the remaining Secured Creditors.

In the matter of ***Mr Srikanth Dwarakanath v. Bharat Heavy Electricals Limited***[1], the Liquidator could not commence a liquidation process on account of some of the secured lenders not intimating in time about their decision concerning relinquishment of their securities. The Respondent was one of the last Secured Creditors who remained to intimate about the decision on relinquishment. The main ground of appeal was that the Adjudicating Authority failed to appreciate that ten out of eleven Secured Creditors, representing together 73.76% (in value of the admitted claims) of the total Secured assets have relinquished their Security Interest into the liquidation estate and only because of the Respondent, who has decided not to relinquish its Security Interest, the Liquidator is unable to proceed any further with the sale of assets.

Hon'ble NCLAT relied on the ***JM Financial Asset Reconstruction Company Ltd. Vs. Finquest Financial Solutions Pvt. Ltd.,*** held that,

> *"16. In the present case, the Secured Creditors which 73.76% in value have already relinquished the Security Interest into the liquidation estate. Thus, it would be prejudicial to stall the liquidation process at the instance of a single creditor having only 26.24% share (in value), in the secured assets. The Respondent does not hold a superior charge from the rest of the Secured financial creditors in the secured Assets.*
>
> *... Therefore, the Respondent can realise a Security Interest as per provision Section 13(9) of the SARFAESI Act. Since the Respondent does not have a requisite 60% value in Secured Interest, therefore, the Respondent does not have right to realize its security interest, because it would be detrimental to the Liquidation process and the interest of the remaining ten Secured Creditors."*

Hon'ble NCLAT *vide* order dated 18.06.2020 allowed the appeal and directed the Appellant (Liquidator) to complete the Liquidation Process.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclat.nic.in/Useradmin/upload/2549036775eeb4253cba47.pdf

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Learning Curve-334

June 22, 2020

The Adjudicating Authority should provide one more opportunity for the parties to consider the renewal of OTS and in the event of renewal of OTS, the said opportunity may be utilised by the parties in right earnest, of course in true letter and spirit.

In the matter of ***Sandeep Kumar Bhagat v. Punjab National Bank***[1]**,** One Time Settlement (OTS) was entered into between the Corporate Debtor and the Respondent Bank which the debtor failed to comply with and thereafter, a Section 7 application was initiated against the CD. The Appellant again approached the Respondent Bank for the revival of the OTS by tendering cheque of Rs. One Crore as part payment towards OTS. Since the offered amount was too low, and the Appellant had earlier failed to comply with the terms and conditions of the OTS; therefore, the Respondent Bank did not consider OTS again.

Hon'ble NCLAT held that,

"26. On perusal of the record it is apparent that after acceptance of OTS for settling the dues of all the three companies, Bank has received substantial amount from the Corporate Debtor. It is also clear that after making default in payment as per terms of OTS, the Corporate Debtor further paid rupees One Crore to the Bank for renewing the OTS. Bank even after accepting after rupees One Crore revoked the offer to renew the OTS. Considering the present/prevailing economic scenario of the country and downfall/slump in every business activity, we deem it fit and proper to provide one more opportunity to the parties for considering the OTS (One Time Proposal) in a fair, just, objective and dispassionate manner.

27. On perusal of the record that it is also evident that there is no proper compliance under Section 7(5)(a) of the Insolvency and Bankruptcy Code, but this defect in the Application is curable defect which can be rectified. It is also on record that the admission order was passed even after the status quo order of the Hon"ble High Court."

Hon'ble NCLAT *vide* order dated 18.06.2020 allowed the appeal and made it clear that the Adjudicating Authority should provide one more opportunity for the parties to consider the renewal of OTS and in the event of renewal of OTS, the said opportunity may be utilised by the parties in right earnest, of course in true letter and spirit.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
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[1] https://nclat.nic.in/Useradmin/upload/9431472255eeb3dd3450d9.pdf

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Learning Curve-333

June 19, 2020

The existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, NCLAT held.

In the matter ***Excel Infra Logistics Pvt Ltd. v. Karnani Solvex Pvt Ltd***[1], the Appellant (Excel Infralogistics Private Limited) filed an application under Section 9 of IBC against "Karnani Solvex Private Ltd" (Corporate Debtor). The NCLT, Jaipur, by impugned order dated 1st October, 2019 rejected the application on the ground that the claim of the Appellant falls within the ambit of 'Existence of Dispute'.

Hon'ble NCLAT observed that in an application under Section 9, it is always open to the 'Corporate Debtor' to point out pre-existence of dispute. It is to be shown that the dispute was raised prior to the issuance of demand notice under Section 8(1).

Hon'ble NCLAT relied on the judgment of ***Mobilox Innovations Pvt Ltd Vs Kirusa Software (P) Limited*** to hold that,

> *"13. ...it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs.1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid 'operational debt' the application under Section 9 cannot be rejected and is required to be admitted."*

Hon'ble NCLAT vide order dated 12.06.2020 held that the Respondent had defaulted to pay more than Rs.1 lakh and in absence of any pre-existing dispute, the application under section 9 preferred by the Appellant was fit to be admitted.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://ibbi.gov.in//uploads/order/2020-06-16-102240-b2ci1-6512bd43d9caa6e02c990b0a82652dca.pdf

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Learning Curve-332

June 18, 2020

Adjudicating Authority cannot direct the legal heirs of a Financial Creditor to cause individual newspaper publications to receive the claim amount when they were already impleaded in the case as legal heirs of Financial Creditors.

In the matter *S. Rajendran, Resolution Professional v. S. Mukanchand Bothra (Deceased) and Ors*.[1], the Appellants contended that their father Late Mr S. Mukanchand Bothra was a Financial Creditor who had filed a claim to the tune of Rs.15 Crores which was challenged before the Adjudicating Authority. During the pendency of this petition, on 17th April 2019, Mr Mukanchand Bothra expired, and the Appellants were impleaded as their legal heirs vide Order passed by the Adjudicating Authority. The Resolution Professional started asking for a copy of the will, probate order, succession certificate etc. and also asked to get the direction of NCLT to release the money. The AA had to be moved again and ordered for publication of notice in the newspapers by the legal heirs.

The question for consideration is whether the AA was correct in directing the appellants to cause individual newspaper publications to receive the claim amount when the appellants were already impleaded in the case as legal heirs of Late Mukunchand Bothra.

Hon'ble NCLAT held that,

> *"As per approved Resolution Plan Rs.4,12,95,002/- comes to the shares of Late Mukhanchand Bothra. Therefore, all the appellants are entitled to one-third share, from the amount which was allotted in favour of Late Mukhanchand Bothra. This resolution plan has become final, and the adjudicating Authority has substituted the names of the appellants as legal heirs of late Mukhanchand Bothra. Therefore, any demand for succession certificate, Probate order at this stage is without any basis. Since the approved resolution plan is binding on all the stakeholders. Therefore the resolution professional has no right to again raise the issue of succession from the appellants at the time of distribution of amount."*

Hon'ble NCLAT *vide* order dated 15.06.2020 allowed the appeal and clarified that there is no need of asking any proof of succession from the legal heirs of the deceased Financial Creditor.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://ibbi.gov.in//uploads/order/2020-06-16-101614-2vcju-c9f0f895fb98ab9159f51fd0297e236d.pdf

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Learning Curve-331

June 17, 2020

The adjudicating authority should not reject the application so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory

In the matter of ***M/s Naik Environment Engineers Pvt. Ltd v. M/s Indiabulls Constructions Limited***[1], this Appeal emanates from the Order passed by NCLT, New Delhi whereby the Adjudicating Authority rejected the application of the Appellant filed under Section 9 of the IBC. The Appellant contended that the Adjudicating Authority failed to consider and appreciate the submissions of the Appellant and arrived at a perverse finding that there exists a pre-existing despite between the parties, thereby, rejected the application. Feeling aggrieved by the said Order, this Appellant had filed this appeal.

The question for determination was whether pre-existing dispute exists before issuance of the demand notice.

Hon'ble NCLAT relied on the judgment in the case of ***Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.,*** held that,

> *"There is nothing on record to substantiate that there is running composite account between the same parties, and there is no differentiation between different work orders issued between the parties. The above observation of the Adjudicating Authority is without any basis. It is also necessary to mention that each P.O./W.O. Constitutes separate contract having separate terms and conditions and independent dispute resolution clause, therefore for the alleged deficiency of service relating to the Sky Forest Project, the outstanding payment relating to other invoices could not be stopped and the finding of the Adjudicating Authority that there was pre-existing dispute is also erroneous. Based on the above discussion, and the law laid down by Hon"ble Supreme Court in* ***Mobilox Innovations (P) Ltd.*** *it is clear that the Adjudicating Authority erred in rejecting the application filed under Section 9 of the IBC based on the preexisting dispute. Thus, the Appeal deserves to be allowed."*

Hon'ble NCLAT *vide* order dated 08.02.2020 allowed the appeal basis that all the ingredients of Sec 9 application are fully satisfied. The Adjudicating Authority is directed to pass the Order of admission within seven days from the date of submission of a certified copy of Order.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://ibbi.gov.in//uploads/order/2020-06-16-112929-5nrai-6f4922f45568161a8cdf4ad2299f6d23.pdf

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Learning Curve-330

June 16, 2020

In a section 7 petition, there has to be a judicial determination by the Adjudicating Authority as to whether there has been a 'default' within the meaning of section 3(12) of the Code.

In the matter of ***Indus Biotech Private Limited v. Kotak India Venture Fund***-I[1], a Company Petition was filed by Kotak India Venture Fund-I under section 7 of IBC, seeking to initiate CIRP against Indus Biotech Private Limited on the ground that the Corporate Debtor had failed to redeem the Optionally Convertible Redeemable Preference Shares (OCRPS) on or before 15.04.2019 in terms of the Share Subscription and Shareholders Agreement (SSSA) dated 20.07.2007.

NCLT, Mumbai Bench relying on the case of ***Innoventive Industries Limited v ICICI Bank & another,*** held that,

"*The Adjudicating Authority, post ascertaining and being satisfied that such a default has occurred, may admit the application of the financial creditor. In other words, the statute mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the financial creditor that the default has occurred is not sufficient. The same is subject to the Adjudicating Authority's summary adjudication, though limited to 'ascertainment' and 'satisfaction'…*

Therefore, in a section 7 petition, there has to be a judicial determination by the Adjudicating Authority as to whether there has been a 'default' within the meaning of section 3(12) of the IBC."

In the present case, there were disputes regarding multiple things and the default was not established and arbitration proceedings were initiated for handling the disputes. NCLT Mumbai Bench *vide* order dated 09.06.2020 held that since there was no satisfaction of establishment of dispute, a solvent company cannot be pushed into insolvency. The application was dismissed.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://nclt.gov.in/sites/default/files/Feb-final-orders-pdf/Indus%20Biotech%20Private%20Limited%20IA%203597-2019%20IN%20CP%20%28IB%29%203077-2019%20NCLT%20ON%2009.06.2020%20FINAL.pdf

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Learning Curve-338

June 26, 2020

'Speed' is the gist for an effective and efficacious functioning of 'I&B' Code. The longer the delay, it may induce 'Liquidation' and 'Value, Deterioration/Destruction'.

In the matter of ***Mr. Abhijit Guhathakurta, Monitoring Agency of the Corporate Debtor v. Royale Partners Investment Fund Ltd***.[1], an application was filed because of the deliberate delay and failure on the part of the Respondent / 'Successful Resolution Applicant' to implement the approved resolution plan, the Monitoring Agency (Appellant) had to file application before the Adjudicating Authority(AA) on 22.1.2020 among other things seeking an implementation of the 'Resolution Plan'. The benches of the AA were then re-constituted. The Appellant contended that the AA while passing the impugned order dated 12.02.2020 had acted arbitrarily and exceeded its jurisdiction in staying the proceeding which was heard at length and reserved for 'Orders' by an Erstwhile Bench / Co-ordinate Bench of 'NCLT', Mumbai.

Hon'ble NCLAT opined that,

> *"108. In the instant case, it cannot be brushed aside that nearly six months have gone by, from the order of approving the 'Resolution Plan' dated 25.11.2019 of the Appellant and the same is yet to be implemented by the Appellant till date. In the 'Preliminary Reply Affidavit', the Appellant / Respondent at paragraph 6 had stated that it had always shown its willingness and ability to execute the approved 'Resolution Plan' etc. As such, this Tribunal is of the earnest opinion that the Appellant / Respondent cannot avoid/evade/ or circumvent its 'solemn responsibility' to implement the 'Resolution Plan' unconditionally in stricto sense of the term, without any further procrastination."*

Hon'ble NCLAT *vide* order dated 25.06.2020 dismissed the appeal.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
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[1] https://nclat.nic.in/Useradmin/upload/19848071895ef4848631749.pdf

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Learning Curve-339

June 29, 2020

NCLAT extended CIRP time limit beyond 330 days exercising Rule 11 of NCLAT Rules

In the matter of ***Ritu Rastogi, Resolution Professional, Benlon India Ltd. v. Riyal Packers***[1]**,** there was a delay of 10 days in filing the application under Section 31 of IBC on the part of the Resolution Professional for seeking approval of the resolution plan. The hardship encountered by the 'Resolution Professional' is not on account of any lapse on his part but due to certain statutory compliances to be made, which are mandatory or without adhering to which the 'resolution plan' could not be placed before the Adjudicating Authority. The Appellant submitted that this case was fit for exercise of power under Rule 11 of the 'NCLAT Rules' in terms of the law enunciated by the Hon'ble Apex Court in '***Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors'.***

Hon'ble NCLAT held that,

> *"since only one day was left for the 'Resolution Professional' to file an application under Section 31 of the 'I&B Code' for placing the approved 'resolution plan' before the Adjudicating Authority for approval which despite diligence and best efforts on his part was improbable as he was left only with one day to complete all legal formalities including seeking performance guarantee in terms of the approved 'resolution plan', further extension of time by 10 days enabling the 'Resolution Professional' to seek approval of the 'resolution plan' from the Adjudicating Authority is warranted. This is a fit case for exercising the jurisdiction by this Appellate Tribunal being an exceptional case to depart from the general rule of 330 days being outer limit prescribed under the law for completion of the 'corporate insolvency resolution process' inclusive of period of judicial intervention. We are also of the considered opinion that failure to exercise discretion in a matter of this nature would have serious implications imperilling the legitimate interests of all stakeholders and inevitable conclusion would be to push the 'Corporate Debtor' into liquidation which has to be avoided at all costs."*

Hon'ble NCLAT *vide* order dated 16.06.2020 allowed the appeal, set aside the impugned order of Adjudicating Authority and extended the period of 'corporate insolvency resolution process' by 10 days under section 31 of IBC. The Adjudicating Authority was accordingly directed to consider the application of Resolution Professional under section 31 for approval of resolution plan.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://ibbi.gov.in//uploads/order/2020-06-23-175751-8a3b0-c9f0f895fb98ab9159f51fd0297e236d.pdf

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Learning Curve-338

June 26, 2020

'Speed' is the gist for an effective and efficacious functioning of 'I&B' Code. The longer the delay, it may induce 'Liquidation' and 'Value, Deterioration/Destruction'.

In the matter of ***Mr. Abhijit Guhathakurta, Monitoring Agency of the Corporate Debtor v. Royale Partners Investment Fund Ltd***.[1], an application was filed because of the deliberate delay and failure on the part of the Respondent / 'Successful Resolution Applicant' to implement the approved resolution plan, the Monitoring Agency (Appellant) had to file application before the Adjudicating Authority(AA) on 22.1.2020 among other things seeking an implementation of the 'Resolution Plan'. The benches of the AA were then re-constituted. The Appellant contended that the AA while passing the impugned order dated 12.02.2020 had acted arbitrarily and exceeded its jurisdiction in staying the proceeding which was heard at length and reserved for 'Orders' by an Erstwhile Bench / Co-ordinate Bench of 'NCLT', Mumbai.

Hon'ble NCLAT opined that,

> *"108. In the instant case, it cannot be brushed aside that nearly six months have gone by, from the order of approving the 'Resolution Plan' dated 25.11.2019 of the Appellant and the same is yet to be implemented by the Appellant till date. In the 'Preliminary Reply Affidavit', the Appellant / Respondent at paragraph 6 had stated that it had always shown its willingness and ability to execute the approved 'Resolution Plan' etc. As such, this Tribunal is of the earnest opinion that the Appellant / Respondent cannot avoid/evade/ or circumvent its 'solemn responsibility' to implement the 'Resolution Plan' unconditionally in stricto sense of the term, without any further procrastination."*

Hon'ble NCLAT *vide* order dated 25.06.2020 dismissed the appeal.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
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[1] https://nclat.nic.in/Useradmin/upload/19848071895ef4848631749.pdf

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June 30, 2020

CIRP cost will be borne by the members of CoC, 'Corporate Debtor' cannot be saddled with the liability of the CIRP costs.

In the matter of **M/s. *Kotak Resources v. Dharmendra Dhelaria & Ors*[1],** the issue raised in the appeal that was preferred by the Financial Creditor (M/s. Kotak Resources) was in regard to reimbursement of the 'corporate insolvency resolution process cost', liability in respect whereof had been laid by the Adjudicating Authority upon Committee of Creditors consisting of the Appellant and another financial creditor (ARCIL) in equal proportion.

The contention of the Appellant was that the Adjudicating Authority had no jurisdiction to pass the impugned order and that the Appellant could not be visited with the 'corporate insolvency resolution process cost' in view of the fact that the CIRP was not only for the benefit of the members of the CoC.

Hon'ble NCLAT held that,

> *"..it is fallacious to contend that the Adjudicating Authority lacked jurisdiction to provide for the resolution costs while closing the case in consequence of the order of admission of application under Section 7 of the 'I&B Code' being set aside by this Appellate Tribunal in appeal preferred by the erstwhile Director of the 'Corporate Debtor'. Since the 'Committee of Creditors' comprised of both, Appellant and ARCIL, the 'corporate insolvency resolution process costs' had necessarily to be borne by them in equal proportion. It is indisputable that the 'Corporate Debtor' could not be saddled with the liability of the 'corporate insolvency resolution process costs'. It would be preposterous to hold that the whole amount of the 'corporate insolvency resolution process cost' should have been reimbursed by the ARCIL alone to the 'Resolution Professional'."*

Hon'ble NCLAT *vide* **order dated 26.06.2020** dismissed the appeal at the very threshold stage.

Regards,
Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

[1] https://ibbi.gov.in//uploads/order/bf66186d953a557e93330003925c5c72.pdf