

Insolvency & Restructuring

Monthly Newsletter

July 2020

TABLE OF CONTENTS

HSA OPINION

- Vexed case of proceedings against personal guarantors

STATUTORY UPDATES

- Notification No. S.O. 2119(E) dated June 26, 2020 issued by Ministry of Micro, Small and Medium Enterprises
- Notification No. S.O. 1702(E) dated June 01, 2020 issued by Ministry of Micro, Small and Medium Enterprises

RECENT JUDGMENTS

- Indus Biotech Pvt Ltd v. Kotak India Venture Fund – I Sunil Kumar Agarwal RP of DIGJAM Ltd v. Suspended Board of Directors of DIGJAM Ltd & Ors
- Srikanth Dwarakanath, Liquidator of Surana Power Ltd – In Liquidation v. Bharat Heavy Electricals Ltd
- R. R. Gopaljee v. Indian Overseas Bank & Ors.
- Kotak Resources v. Dharmendra Dhelaria & Ors.

RECENT DEALS

- Takeover of Aircel and its group companies by UVARC

SECTOR FOCUS | Food & Beverages



HSA

OPINION

Vexed case of proceedings against personal guarantors

Pursuant to Notification dated November 15, 2019 of Ministry of Corporate Affairs, with effect from December 1, 2019, personal guarantors are now under purview of Chapter III of Part III of Insolvency and Bankruptcy Code, 2016 (**IBC** or **Code**). While the extension of IBC to personal guarantors is expected to provide an efficient framework for resolution of insolvency proceedings against them, this poses various interpretation challenges.

Jurisdiction

Section 60(1) of the Code provides that adjudicating authority for purpose of insolvency proceedings against personal guarantor shall be the National Company Law Tribunal (**NCLT**) that has jurisdiction over the corporate debtor. Further, Sections 60(2) and (3) provide for initiation of proceedings or transfer of proceedings to NCLT where a corporate insolvency resolution is pending or is subsequently initiated against corporate debtor. However at this juncture it may be pertinent to take a look at Rule 3(1)(a) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (**Rules**) which defines adjudicating authority for the purposes of section 60 as NCLT and in all other cases as Debts Recovery Tribunal (**DRT**). It is not clear as to when jurisdiction of DRT will be applicable, especially when Section 60(1) seems to suggest that all insolvency cases against personal guarantor to corporate debtor have to be instituted before the jurisdictional NCLT.

Notice to Personal Guarantor

The term 'guarantor' has been defined under Rules as 'a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part'. Thus, from definition it appears that a person shall be termed to be a guarantor for purposes of Rules only once contract of guarantee is invoked and not prior to that. However, said rules also seemingly contemplate a statutory 14-day notice to be sent out to guarantor before initiation of insolvency proceedings. This might lead to multiplicity of notices and delay the procedure of initiating insolvency process, unless demand notice to be served on personal guarantor under Form B itself can be interpreted to be invocation of guarantee. Till such time a clarification is provided, ambiguity in interpretation will continue.

Moratorium

Under IBC, once an application filed under Section 7, 9 or 10 is admitted, a moratorium under Section 14 is declared by adjudicating authority prohibiting institution of suits, continuation of pending suits or proceedings against corporate debtor. A similar provision has been embodied under the Code in Part III under Section 96 which provides for an interim moratorium.

Interim moratorium under Section 96 commences from the date an application is filed under Section 94 or Section 95 of Code, by or against personal guarantor. Subsequently, once application filed under Section 94 or Section 95 is admitted, a moratorium under Section 101 commences. However, unlike Section 14, moratorium under Sections 96 and 101 contemplates stay of pending legal action or proceeding in respect of any debt and not corporate debtor, thus rendering scope of the moratorium to be very wide. In *State Bank Of India v. V. Ramakrishnan*, the Supreme Court had also held that protection of moratorium under these Sections is far greater than that of Section 14 in that pending legal proceedings in respect of debt and not debtor are stayed.

In premises, an interpretation may be adopted that since moratorium is with respect to debt, once an application is filed against personal guarantor, corporate debtor cannot be proceeded against since an action against corporate debtor would be in respect same debt. Such an interpretation goes against principles embodied under Indian Contract Act, 1872 specifically, Section 128 which provides that surety's liability is coextensive with that of principal debtor. This interpretation challenge will perhaps be resolved only through judicial precedents expected to evolve in due course.

Forfeiture of security

The Rules provide that a creditor has to make an application for insolvency in Form C. Under entry 17 in Part III of Form C, where financial creditor is a secured creditor, financial creditor is required to either agree or disagree to forfeit its right to enforce security held by it during period of repayment plan. Exercise of this option is very crucial for financial creditor as choice exercised by lender under entry 17 of Form C would determine voting share of financial creditor in respect of repayment plan.

Pursuant to Section 110 of Code where a secured financial creditor disagrees to forfeit its right to enforce security held by it, it loses its right to vote on the repayment plan in so far as secured portion of debt is concerned and shall have a voting right only for unsecured portion of debt. Upon construction of provisions of Rules, it appears that debt that is subject matter of adjudication is a debt of corporate debtor which is in default. Thus, there may arise a situation where financial creditor may be a secured creditor *vis-à-vis* debt but may not be a secured creditor *vis-à-vis* personal guarantor, as personal guarantor may not have created any security interest in favor of lender. The status that will be accorded to the financial creditor in such a situation is not clear. If the financial creditor is treated as a secured creditor since the debt is secured by assets of the corporate debtor, then it will result in substantial injustice as the creditor will then be required to forfeit its security in order to have voting rights, though such security may not have been extended by the personal guarantor. A purposive interpretation would require that forfeiture should be applicable only in cases where the personal guarantor has extended the security. However, till same is clarified by judicial precedents, uncertainty would continue.

While the amendment extended scope of IBC however enforcement action against personal guarantors under IBC is plagued with difficulties emerging because of absence of clarity in interpretation of various provisions governing such enforcement. Since the proceedings against the individual corporate debtor as well as personal guarantors can be initiated simultaneously, the manner in which the proceedings against a corporate debtor and personal guarantor will proceed is still not clear.

Regardless of whether such proceedings will be conducted in parallel with each other or will they be inconsequential, and in such a circumstance will the NCLT appoint a common resolution professional. It still remains to be seen as to what extent can the creditors recover from the personal guarantors after they have taken a haircut in the resolution plan of the corporate debtor and have discharged borrower in its insolvency against entire debt, after taking haircut amount.



STATUTORY UPDATES

Notification No. S.O. 2119(E) dated June 26, 2020 issued by Ministry of Micro, Small and Medium Enterprises

- In exercise of powers conferred under Micro Small Enterprises Development Act, 2006 and in supersession of notifications issued by Government of India, Ministry of Micro, Small and Medium Enterprises (**Ministry of MSMEs**) notified the following criteria for classification of MSMEs and specified the form and procedure for filing the memorandum with effect from July 01, 2020. The criteria and other distinct points of the procedure are mentioned as under:
 - Classification of enterprises based on investment in plant and machinery or equipment and turnover.
 - A micro enterprise is one where the investment in plant and machinery or equipment does not exceed INR 1 crore and turnover does not exceed INR 5 crore
 - A small enterprise is one where the investment in plant and machinery or equipment does not exceed INR 10 crore and turnover does not exceed INR 50 crore
 - A medium enterprise is classified as one where the plant and machinery or the equipment does not exceed INR 50 crore and the turnover does not exceed INR 250 crore
 - Any individual who intends to establish a micro, small and medium enterprise may file for Udyam registration online in Udyam registration portal based on self-declaration, without uploading any documents or proof. Upon registration, enterprise would be assigned a permanent identity number known as 'Udyam Registration Number'. An e-certificate, namely 'Udyam Registration Certificate', would be issued on completion of the registration process.
 - For facilitation and grievance redressal of enterprises, Notification provides that Champions Control Rooms functioning in various institutions and offices of Ministry of MSMEs including Development Institutes would act as single window systems for facilitating registration process and further providing any necessary guidance and help. The District Industries Centers will also act as single window facilitation systems in their districts. Any person not being able to file Udyam Registration for any reason including lack of Aadhar number, can approach these single window systems for Udyam Registration purposes. Single window systems will facilitate Udyam Registration. In case there is any discrepancy or complaint, General Manager of District Industries Centre of concerned district would undertake an enquiry for verification of details of registration submitted by enterprise and thereafter forward matter with appropriate remarks to Director or Commissioner or Industry Secretary concerned of State Government who after issuing a notice to enterprise and after giving an opportunity to present its case and based on findings may amend details or recommend to Ministry of MSMEs for cancellation of Udyam Registration Certificate.

- Composite criteria of investment and turnover would apply for classification of an enterprise. If an enterprise crosses ceiling specified for its category in either of two criteria, it will cease to exist in category and be placed in next higher category but no enterprise shall be placed in lower category unless it goes below the ceiling limits specified for its present category in both criteria.
- Notification clearly lays down criteria for classification of MSMEs as well as process for Udyam registration. The same is extremely significant, especially considering current circumstances wherein investments in MSMEs should be encouraged. Notification also explains Udyam registration process in detail and also provides a grievance redressal mechanism for same. This is also a step in aforesaid desired direction of encouraging investments in such enterprises which would help in reviving economy. This notification is therefore a step in the right direction in pursuance to new notification.

Notification No. S.O. 1702(E) dated June 01, 2020 issued by the Ministry of Micro, Small and Medium Enterprises

- On June 01, 2020, Central Government notified following criteria for classification of micro, small and medium enterprises:
 - A micro enterprise would be one where the investment in plant and machinery or equipment does not exceed INR 1 crore and turnover does not exceed INR 5 crore.
 - A small enterprise would be one where the investment in plant and machinery does not exceed INR 10 crore and turnover does not exceed INR 50 crore.
 - A medium enterprise would be one where the investment in plant and machinery does not exceed INR 50 crore and turnover does not exceed INR 250 crore.
- Notification has been introduced to revise threshold limit in respect of MSMEs. It is pertinent to note that the same is related to Section 240A of Insolvency and Bankruptcy Code, 2016 (IBC) which provides certain relaxations in respect of persons qualified for submitting Resolution Plans in terms of Section 29A of IBC for MSMEs. Increase in threshold limits should result in increased participation by investors for distressed companies in these categories and should help in optimal realization of value of assets of the Corporate Debtors, as envisaged under IBC.



RECENT JUDGMENTS

Indus Biotech Pvt Ltd v. Kotak India Venture Fund – I

Order dated May 27, 2020 in IA 144/2020 in CP (IB) 594/NCLT/AHM/2018

Relegating parties to Arbitration notwithstanding a Financial Debt

Background facts

- Kotak India Venture Fund – I (**Kotak**) filed an Application under Section 7 of IBC against Indus Biotech Pvt Ltd (**Indus**) on the ground that Indus had failed to redeem the Optionally Convertible Redeemable Preference Shares (**OCRPS**) on or before April 15, 2019 in terms of Share Subscription and Shareholders Agreement (**SSSA**).
- It is relevant to note that in 2007, Kotak subscribed to OCRPSs issued by Indus. Thereafter, a dispute arose between Kotak and Indus. While the said dispute was ongoing, Kotak contended that they were entitled to trigger provisions relating to early redemption of OCRPS.
- Since Indus failed to redeem the OCRPS, on August 16, 2019, Kotak approached the NCLT under Section 7 of IBC against Indus.
- On September 20, 2019, Indus invoked arbitration agreement under SSSA seeking to refer disputes between the parties to arbitration. Indus also filed an interim application before NCLT seeking reference to arbitration on account of existence of an arbitration agreement between the parties.

Issue at hand?

- Will the provisions of the Arbitration & Conciliation Act, 1996 prevail over provisions of IBC? If so, in what circumstances?

Decision of the Tribunal

- Indus contended that the Corporate Debtor is a debt free, highly profitable company which doesn't need resolution. Further, Indus relied upon Section 8 of Arbitration & Conciliation Act, 1996 and stated that it is mandatory in nature. SSSA contains an arbitration clause which is wide enough to cover the present dispute between the parties, which is in the nature of a commercial dispute. It was further contended that Company Petition is in nature of a 'dressed-up' Petition, in as much as real dispute between parties is with regard to matters pertaining to agreement reached between parties and interpretation of its various clauses.

- Kotak contended inter alia that a Section 7 IBC Petition belongs to that class of litigation which are incapable of being referred to arbitration. Initiation of CIRP cannot be granted by an arbitrator. It was further contended that a dispute is irrelevant for a Section 7 petition, though it may assume significance for a Petition under Section 9 of IBC.
- NCLT observed that in a Section 7 IBC Petition, there has to be a judicial determination by NCLT as to whether there has been a 'default' within meaning of Section 3(12) of IBC. NCLT further observed that in the case at hand, there were various issues requiring determination with respect to which invocation of arbitration seemed to be justified. In view of the same, NCLT held that they were not satisfied that a default had occurred.
- NCLT also noted that Applicant/Corporate Debtor is a solvent, debt-free and profitable company. It will unnecessarily push an otherwise solvent, debt-free company into insolvency, which is not a very desirable result at this stage. Also, no meaningful purpose will be served by pushing the Applicant/Corporate Debtor into CIRP at this stage.
- NCLT allowed interim application filed by Corporate Debtor and dismissed Section 7 Petition.

Our viewpoint

This is not a well-reasoned order as it goes against the basic premise of thresholds mentioned under Section 7 of IBC. NCLT has held that there is no default and has referred matter for arbitration without elaborating upon rationale for the same. NCLT has also not elucidated upon whether provisions of Arbitration & Conciliation Act would prevail over IBC. Further, it is well within powers of NCLT to determine existence of a financial debt and default. Hence, reference to arbitration was not expressly warranted. Moreover, decision is against settled law that pre-existing disputes are not relevant for Petitions under Section 7 of IBC. It is also to be considered that this is a dangerous precedent which can be misused by Corporate Debtors to delay adjudication of pending Section 7 Petitions.

Sunil Kumar Agarwal RP of DIGJAM Ltd v. Suspended Board of Directors of DIGJAM Ltd & Ors

Order dated May 27, 2020 in IA 144/2020 in CP (IB) 594/NCLT/AHM/2018

Modifications/Relaxations in Resolution Plan in view of COVID-19

Background facts

- Vide Order dated April 26, 2019, NCLT, Ahmedabad Bench has initiated Corporate Insolvency Resolution Process (**CIRP**) proceedings against DIGJAM Ltd, Corporate Debtor.
- Thereafter, CIRP proceedings were carried out and one M/s Finquest Financial Solutions Pvt Ltd emerged as successful Resolution Applicant with Resolution Plan being approved by 100% voting share of Committee of Creditors (**CoC**).
- Consequently, Resolution Professional (**RP**) of Corporate Debtor approached NCLT seeking approval of the Resolution Plan in terms of Section 31(1) of IBC.
- While Application for approval of Resolution Plan was pending before NCLT, successful Resolution Applicant filed an Affidavit seeking certain modification/relaxation in respect of time frame for making payments under Resolution Plan, due to financial difficulties arising out of Covid-19 pandemic and lockdown.

Issue at hand?

- Whether modification/concession/relaxation can be allowed in respect of timeline for payments under a resolution plan due to the COVID-19 pandemic?

Decision of the Tribunal

- NCLT heard parties and directed Resolution Applicant to approach CoC with revised timelines. While some Financial Creditors agreed to revised timelines in toto, others had issues with certain aspects of same.

- NCLT observed that there is no material change in Resolution Plan save and except modifications/relaxations sought by Resolution Applicant which appear to be genuine and bonafide on account of Covid-19 pandemic and consequent lockdown. NCLT also took note of recent initiatives undertaken by Reserve Bank of India, specially extension of moratorium on loan EMI by three months and fact that under IBC, Resolution is rule and Liquidation is an exception. In view of the same, NCLT approved modified Resolution Plan.

Our viewpoint

This decision reinstates the belief that apart from Regulators such as Reserve Bank of India and Supreme Court, judicial forums such as NCLTs are also recognizing financial distress caused to companies on account of pandemic and are willing to accommodate same, as long as it is in best interest of the economy and is in line with the object of statute at hand.

Srikanth Dwarakanath, Liquidator of Surana Power Ltd – In Liquidation v. Bharat Heavy Electricals Ltd

Judgment dated June 18, 2020 in Company Appeal (AT) (Insolvency) No. 1510 of 2019

Enforcing security interest in liquidation with other Secured Creditors sharing common security

Background facts

- Surana Power Ltd, the Corporate Debtor, is undergoing liquidation proceedings and Appellant is Liquidator of said Corporate Debtor.
- It is pertinent to note that during liquidation of Corporate Debtor, Bharat Heavy Electricals Ltd (BHEL) succeeded in an arbitration against Corporate Debtor. Based on arbitral award, BHEL had been granted lien over equipment and goods lying at the site of Corporate Debtor (secured assets) and charge over entirely or partially erected facilities at site of Corporate Debtor was created. It is further pertinent to note that secured assets over which BHEL had been granted lien or a charge were already hypothecated to all other Secured Creditors.
- In this matter, Liquidator could not commence liquidation process on account of some of the secured lenders not intimating in time about their decision concerning relinquishment of their securities.
- Thereafter, BHEL informed Appellant about their unwillingness to relinquish their security interest. Meanwhile, all other secured creditors relinquished their security interest to Liquidation Estate of Corporate Debtor. Consequently, secured creditors with a value of 73.76% of secured assets relinquished security interest into Liquidation Estate. However, in light of proviso to Regulation 32 to Liquidation Process Regulation, Liquidator was unable to proceed with any further sale of assets without receipts of relinquishment of security interest from all secured creditors to whom said assets are charged.
- Consequently, Liquidator filed a Misc. Application seeking permission from NCLT, Chennai Bench to sell assets of Corporate Debtor. The said Application was rejected by NCLT vide Impugned Order dated November 20, 2019. Hence, Appellant filed present Appeal.

Issue at hand?

- Does Respondent, who does not have a requisite 60% value in secured interest, have right to realize its security interest as per Section 13(9) of Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**SARFAESI Act**), even though it would be detrimental to Liquidation process and interest of other secured creditors?

Decision of the Tribunal

- NCLAT observed that Respondent is also a secured creditor at par with ten other secured creditors. Further, enforcement of security interest is governed by the Section 13 of SARFAESI Act. As per terms of Section 13(9) of SARFAESI Act, any steps about realization of assets by secured creditors requires confirmation from creditors having at least 60% of value of total debt.
- Thereafter, NCLAT held that in the present case, secured creditors with a value 73.76% of secured assets have already relinquished Security Interest into liquidation estate. Thus, it would be prejudicial to stall liquidation process at instance of a single creditor having only 26.24% share (in

value) in secured assets. Respondent does not hold a superior charge from rest of secured financial creditors in secured assets. Therefore, it was held that Section 13(9) of SARFAESI Act would be applicable in this case to end this deadlock, and decision of 73.76% of majority secured creditors, who have relinquished security interest shall also be binding on the dissenting secured creditors, i.e. Respondent.

- In view of the same, NCLAT allowed the Appeal and set aside Impugned Order.

Our viewpoint

It is very common for multiple creditors to hold charge over the same assets of the borrower. In such situations, sale of assets in case of liquidation becomes a difficult task as some creditors relinquish their security interest while the others don't (so as to pursue action under Section 52 of the IBC). Relinquishing of security under Section 52 of the IBC, where multiple secured creditors hold a security interest was a grey area till now. This decision would help to resolve the deadlock which arises in the aforesaid situation.

R. R. Gopaljee v. Indian Overseas Bank & Ors.

Judgment dated June 24, 2020 in Company Appeal (AT) (Insolvency) No. 748 of 2019

Issues of limitation with respect to date of default for the purposes of initiating CIRP

Background facts

- Indian Overseas Bank filed an Application under Section 7 of IBC against Corporate Debtor, Malar Energy and Infrastructure Pvt Ltd. NCLT, Chennai Bench, by Order dated July 05, 2019 admitted the Application. This Order for admission was challenged by Appellant promotor and shareholder before NCLAT by way of present Appeal.
- Indian Overseas Bank granted financial assistance to Corporate Debtor at various dates between June 13, 2011 to May 29, 2015. Corporate Debtor defaulted in payment of loan and, therefore, on April 01, 2015, Corporate Debtor's account was declared as a Non-Performing Asset (NPA). Subsequently, Indian Overseas Bank issued a legal notice dated March 15, 2017 demanding repayment of outstanding amount. Corporate Debtor in his reply to notice acknowledged the debt and stated that they are in process of settling their dues to Financial Creditor.
- On April 13, 2017, Corporate Debtor sent One Time Settlement Proposal to Financial Creditor which was accepted on certain terms and conditions vide letter dated July 03, 2017. Thereafter, Corporate Debtor requested for extension of One Time Settlement period vide letter dated August 05, 2017. Indian Overseas Bank vide letter dated August 28, 2017 extended time for payment of One Time Settlement. However, Corporate Debtor failed to repay loan amount as per One Time Settlement. Hence, vide letter dated November 22, 2017, Financial Creditor cancelled One Time Settlement Proposal and thereafter initiated proceedings under Recovery of Debts and Bankruptcy Act, 1993 and also under SARFAESI Act, 2002 but proceedings could not reach a logical end. Hence, on March 19, 2019, Indian Overseas Bank filed Application under Section 7 of IBC before NCLT.

Issue at hand?

- Appellant contended before NCLAT that Section 7 Application is defective because in Application, date of default is not disclosed. Further, in demand notice under Section 13(2) of SARFAESI Act dated July 09, 2015 sent by Financial Creditor, NPA date is mentioned as June 30, 2015 whereas in Additional Affidavit filed before NCLT, NPA date is disclosed as April 01, 2015. Thus, correct date of NPA is not cleared by Financial Creditor. In both cases, debt is time barred.

Decision of the Tribunal

- NCLAT relied upon the Judgment of Supreme Court in matter of *J.C. Budhraja v. Chairman, Orissa Mining Corporation Ltd.*¹ and observed that a writing, to be an acknowledgement of liability, must involve an admission of subsisting Jural relationship between parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The admission need not be in regard to any precise amount nor by expressed words. If a Defendant writes to Plaintiff requesting him to send his claim for verification of payment it amounts to an acknowledgement.

¹ (2008) 2 SCC 444

- Thereafter, NCLAT observed that in reply to demand notice dated March 27, 2017, Appellant has admitted subsisting Jural relationship between parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. It is also mentioned in reply that they have visited officials of Financial Creditor number of times. NCLAT also took note of One Time Settlement offer and consequently, was of view that Corporate Debtor had acknowledged debt. In view of same, NCLAT dismissed Appeal.

Our viewpoint

This decision would help to resolve the deadlock which arises in the aforesaid situation. Issue of acknowledgement of debt in terms of Section 18 of Limitation Act, 1963 is a widely contested issue which arises in a lot of cases these days. This decision would help in bringing clarity in resolving such situations and in adjudication of such cases.

Kotak Resources v. Dharmendra Dhelaria & Ors.

Order dated June 26, 2020 in Company Appeal (AT) (Insolvency) No. 569 of 2020

Who will bear CIRP Costs if admission order is set aside?

Background facts

- Kotak Resources filed an Application under Section 7 of IBC against Corporate Debtor, M/s Raninga Ispat Pvt Ltd which was admitted by NCLT vide Order dated February 21, 2018.
- Dharmendra Dhelaria was appointed as IRP and was subsequently confirmed as RP. He managed operations of Corporate Debtor as a going concern.
- Thereafter, an erstwhile director of Corporate Debtor filed an Appeal against Order for admission before NCLAT which was allowed by NCLAT vide Judgment dated August 29, 2018 setting aside Order for admission.
- Thereafter, vide Impugned Order dated February 24, 2020, NCLT, Ahmedabad Bench held that liability for reimbursement of CIRP costs to RP would be upon CoC consisting of Kotak Resources and Asset Reconstruction Company (India) Ltd (**ARCIL**) in equal proportion.
- Aggrieved by same, Kotak Resources filed present Appeal with respect to issue of reimbursement of CIRP cost.

Issue at hand?

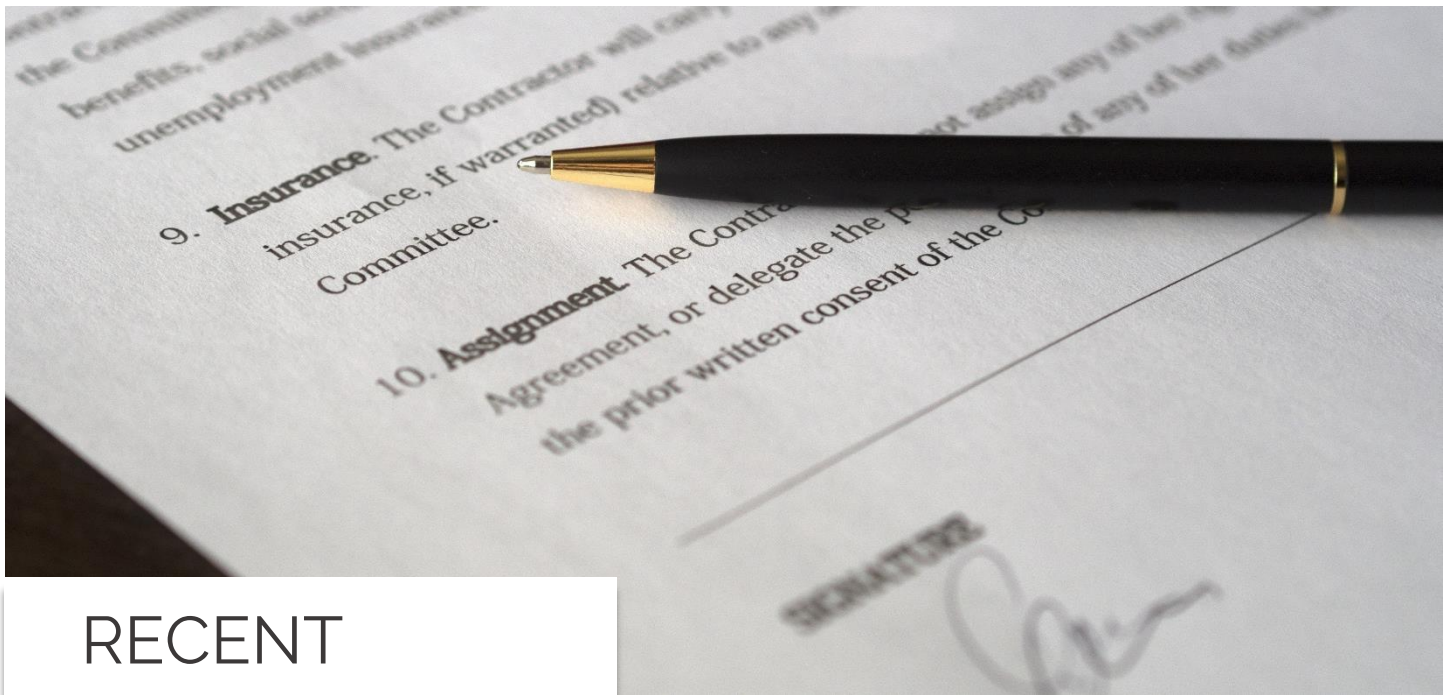
- If an admitted Application was rejected by Appellant Tribunal, then would CIRP cost be borne by members of CoC?

Decision of the Tribunal

- Appellant submitted that NCLT had no jurisdiction to pass Impugned Order and that Appellant could not be burdened with CIRP costs in view of the fact that CIRP was not only for benefit of members of CoC.
- NCLAT observed that RP managed operations of Corporate Debtor as a going concern. ARCIL was included in CoC upon its constitution by RP with its consent and CIRP cost of INR 12,12,831/- was ratified and approved by CoC. Hence, viewed in this background, it is incorrect to contend that NCLT lacked jurisdiction to provide for resolution costs while closing the case in consequence of order of admission of application under Section 7 of IBC being set aside by this Appellate Tribunal.
- NCLAT further observed that since CoC comprised of both, Appellant and ARCIL, CIRP costs had necessarily to be borne by them in equal proportion. It was also held that Corporate Debtor could not be saddled with liability of CIRP costs.
- In view of the same, NCLAT dismissed the Appeal.

Our viewpoint

This Order by NCLAT brings clarity to the issue of distribution of CIRP costs among members of CoC. Though, as per bird's eye view, it may not seem to be of much significance, however, in our opinion, it would have wide implications on ongoing CIRPs.



RECENT DEALS

Takeover of Aircel and its group companies by UVARC

- Vide Order dated June 09, 2020, NCLT, Mumbai Bench approved Resolution Plans submitted by UV Asset Reconstruction Company Ltd (**UVARC**) for Aircel Ltd, Dishnet Wireless Ltd and Aircel Cellular Ltd.
- Resolution Plan so approved envisages a comprehensive strategy spanning all three entities. This Resolution Plan was approved by CoC with voting share of 73.88%
- On Feb 28, 2018, Aircel Ltd, Dishnet Wireless Ltd and Aircel Cellular Ltd filed Applications under Section 10 of IBC for voluntary initiation of CIRP proceedings. These were admitted by NCLT, Mumbai Bench and Vijaykumar V. Iyer was appointed as common Interim Resolution Professional (**IRP**) of Corporate Applicants. Common IRP was subsequently confirmed as common RP for Corporate Applicants.
- It is pertinent to note that the total loan amount outstanding to all Financial Creditors by all three companies is approximately INR 58,760 crore. Under approved Resolution Plan, UVARC has proposed to pay INR 19,600 crore to such creditors.
- Further initially, UVARC would hold 76% equity while financial creditors would be allotted 24% equity. After a period of five years, financial creditors may get up to 74% equity in three Corporate Applicants against outstanding debentures if they cannot be paid back through asset monetization.
- This approval has finally bought an end to a highly contentious and contested CIRP and would bring brand name "AIRCEL" back to market. Moreover, such approval should be welcomed as it has resulted in not just one but three Corporate Debtors, each playing a significant role in country's economy.
- However, it remains to be seen whether this resolution plan is actually for resolution and continuation of operations of Aircel group companies or for hiving off its assets to different interested parties.



SECTOR FOCUS

FOOD & BEVERAGES

- Food and beverages companies have been reeling under significant outstanding debts and IBC regime not being kind to this sector.

Admitted ²	Closed ³	Ongoing
196	76	120

- Various companies in this sector have undergone insolvency and liquidation proceedings. Some of these companies are:

– Mrunmaha Agro Foods Pvt Ltd

Vide Order dated May 26, 2020, NCLT Principal Bench ordered for Liquidation of Mrunmaha Agro Foods Pvt Ltd. It is pertinent to note that CIRP against Corporate Debtor was initiated vide Order dated November 20, 2018 when NCLT admitted a Section 9 Application filed against Corporate Debtor. Thereafter, since no Prospective Resolution Applicant submitted Resolution Plans for Corporate Debtor, RP approached NCLT seeking liquidation based on resolution passed by CoC with 100% voting share. Application stated that no one came forward with Expression of Interest, except for suspended directors of Corporate Debtor with an OTS proposal which was rejected by CoC. Even after extension of CIRP period there was no progress and therefore, CoC resolved to liquidate Corporate Debtor. In light of such facts and circumstances, NCLT allowed Application praying for liquidation.

– Vintage Foods & Industries Ltd

Vide Order dated June 15, 2020, NCLT Bengaluru Bench directed for initiation of liquidation of Vintage Foods & Industries Ltd. Corporate Debtor filed an Application under Section 10 of IBC which was admitted by NCLT vide order dated July 23, 2019. Pursuant to commencement of CIRP, RP had invited Expression of Interest which did not yield any viable results and as Corporate Debtor was not carrying on any business at present, CoC recommended liquidation of Corporate Debtor. Consequently, RP filed an Application for liquidation before NCLT, Bengaluru Bench which was allowed by way of an Order dated June 15, 2020.

² Total number of Companies under 'Food, Beverages & Tobacco Products' sector as per IBBI Quarterly Newsletter, January-March, 2020

³ Out of Total Closed – 9 have been Appeal/Reviewed, 7 have been withdrew under Section 12A, Resolution was approved for 11 and Liquidation has commenced for 49

– Ruchi Soya Industries

On December 18, 2019, after a long but successful insolvency resolution process, Patanjali Ayurved Ltd (**Patanjali**) completed the acquisition of Ruchi Soya Industries Ltd (**Ruchi Industries**) for an amount of INR 4,350 crore. Insolvency proceedings against Ruchi Industries commenced in December 2017 on the admission of an application filed by Standard Chartered Bank and DBS Bank. Patanjali became successful resolution applicant after Adani Wilmar withdrew from insolvency resolution process and in April 2019, when Patanjali's resolution plan was approved by CoC of Ruchi Industries. Thereafter, in September 2019, resolution plan submitted by Patanjali was approved by NCLT. There were minor impediments in way, such as in the proceedings instituted by DBS Bank before NCLAT and thereafter before Supreme Court challenging distribution of proceedings under resolution plan without taking into account value of security held by secured creditors. However, as mentioned hereinabove, despite legal proceedings, acquisition was completed on December 18, 2019.

- In a disturbing trend, a significant number of Corporate Debtors in this sector are ending up in liquidation. One of the key reasons for this is high capital investment in sector, but negligible liquidation value. This trend would be fueled even further with possible loss of business due to the ongoing pandemic. This warrants immediate review action and government support for revival of this sector, which is a significant source of employment in the country.

CONTRIBUTIONS BY:

Abhirup Dasgupta | **Partner**

Pratik Ghose | **Partner**

Ramya Hariharan | **Partner**

Asmita Rakhecha | **Associate**

Avishek Chowdhury | **Associate**

Ishaan Duggal | **Associate**

HSA AT A GLANCE

FULL-SERVICE CAPABILITIES



BANKING & FINANCE



COMPETITION & ANTITRUST



CORPORATE & COMMERCIAL



DEFENCE & AEROSPACE



DISPUTE RESOLUTION



ENVIRONMENT, HEALTH & SAFETY



INVESTIGATIONS



PROJECTS, ENERGY & INFRASTRUCTURE



PROJECT FINANCE



REAL ESTATE



REGULATORY & POLICY



RESTRUCTURING & INSOLVENCY



TAXATION



TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

GLOBAL RECOGNITION



STAY CONNECTED



www.hsalegal.com



mail@hsalegal.com



[HSA Advocates](#)

PAN INDIA PRESENCE

New Delhi

81/1 Adchini
Sri Aurobindo Marg
New Delhi – 110 017

Phone: (+91) (11) 6638 7000

Email: newdelhi@hsalegal.com

Mumbai

Construction House, 5th Floor
Ballard Estate
Mumbai – 400 001

Phone: (+91) (22) 4340 0400

Email: mumbai@hsalegal.com

Bengaluru

Aswan, Ground Floor, 15/6
Primrose Road
Bengaluru – 560 001

Phone: (+91) (80) 4631 7000

Email: bengaluru@hsalegal.com

Kolkata

No. 14 S/P, Block C,
Chowringhee Mansions
Kolkata – 700 016

Phone: (+91) (33) 4035 0000

Email: kolkata@hsalegal.com