

# Restructuring & Insolvency

## Monthly Newsletter

August 2020

### TABLE OF CONTENTS

#### STATUTORY UPDATES

- Fair Practices Code for Asset Reconstruction Companies issued by Reserve Bank of India on July 16, 2020
- NCLT and NCLAT (Procedure for investigation of misbehavior or incapacity of Chairperson, President and other Members) Rules, 2020
- Insolvency and Bankruptcy Board of India Research Initiative, 2019

#### RECENT JUDGMENTS

- V Nagarajan, Resolution Professional in respect of M/s Cethar Ltd v. SKS Ispat and Power Ltd & Ors
- GE Power India Ltd v. NHPC Ltd
- Rajeev Suri v. Union of India & Anr
- C.A Venkata Siva Kumar v. IBBI & Ors

#### RECENT DEALS

- Resolution of Amtek Auto Ltd by Deccan Value Investors

**SECTOR FOCUS** | Wholesale & Retail Trade



# STATUTORY UPDATES

## Fair Practices Code for Asset Reconstruction Companies issued by Reserve Bank of India on July 16, 2020

- On July 16, 2020, Reserve Bank of India (**RBI**) introduced a Fair Practices Code for the Asset Reconstruction Companies (**ARCs**). The salient features of the Code are as under:
  - ARCs have been advised to put in place Fair Practices Code (**FPC**) duly approved by board. FPC issued by RBI prescribes minimum regulatory expectations but the ARCs' boards are free to enhance its scope and coverage.
  - ARCs would have to follow a transparent and non-discriminatory practice in acquisition of assets.
  - To enhance transparency in process of sale of secured assets, invitation for participation in auction would have to be publicly solicited to enable participation of as many prospective buyers as possible. The terms and conditions of such sale may be decided in wider consultation with investors in security receipts as per SARFAESI Act, 2002. It is interesting to note that this Code also provides that the spirit of Section 29A of IBC may be followed while dealing with prospective buyers.
  - ARCs would release all securities on repayment of dues or realization of outstanding amount, subject to any other rights or lien for any other claim which they may have against the borrower. If such right of set off is to be exercised, the borrower has to be given notice about the same.
  - ARCs would have to put in place Board approved policy on management fee, expenses and incentives, if any claimed from trusts under their management. The said policy has to be transparent and ensure that management fee is reasonable and proportionate to financial transactions.
  - ARCs intending to outsource will have to put in place a comprehensive outsourcing policy approved by their board, incorporating criteria for selection of such activities, service providers, delegation of authority depending on risks and systems to monitor and review the operations of these activities and service providers. ARCs would ensure that the outsourcing arrangements neither diminish its ability to fulfil its obligations to customers and RBI nor impede supervision by RBI. If outsourced agency is owned/controlled by a director of ARC, same may be disclosed.
  - In relation to matters of recovery of loan or outstanding amounts, the ARCs would not resort to harassment of the debtor. Further, ARCs would ensure that their agents are properly trained to handle their responsibilities with utmost care and sensitivity, particularly with regards to aspects such as hours of calling, privacy of customer information etc. The ARCs have to ensure that their recovery agents do not adopt uncivilized, unlawful and questionable behavior or recovery process.

- ARCs would have to constitute grievance redressal machinery within the organization. The name and contact number of the designated grievance redressal officer needs to be mentioned in the communication with borrowers. The designated grievance redressal officer would ensure that the grievances are redressed promptly. ARCs grievance redressal machinery would also deal with issues relating to services provided by outsourced agency and recovery agents, if any.
- ARCs shall keep the information that they acquire in the course of their business, strictly confidential and shall not disclose it to anyone, including companies forming part of the group except under following circumstances:
  - Required by law
  - Duty towards public to reveal information
  - Borrower's permission
- Compliance with the Fair Practices Code would be subject to periodic review by the Board.

## **NCLT and NCLAT (Procedure for investigation of misbehavior or incapacity of Chairperson, President and other Members) Rules, 2020**

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- Vide Notification dated July 28, 2020, the Central Government notified National Company Law Tribunal and National Company Law Appellate Tribunal (Procedure for investigation of misbehavior or incapacity of Chairperson, President and other Members) Rules, 2020. The salient features of the Rules are as under:
  - The Rules would be applicable to the President, Judicial Members and Technical Members of the NCLT and the Chairperson, Judicial Members and Technical Members of the NCLAT.
  - The Rules provide for the constitution of a Committee for investigation of complaints. This Committee would consist of the Cabinet Secretary, Secretary (Ministry of Corporate Affairs and Secretary (Department of Legal Affairs, Ministry of Law and Justice). The Committee would have the discretion to devise its own procedure of investigation and its findings would be submitted to the President of India.
  - The President of India, on being convinced of the presence of reasonable grounds to conduct an inquiry into the matter of any alleged misbehavior or incapacity of a Member, shall appoint a Judge of the Supreme Court nominated by the Chief Justice of India for conducting the said inquiry.
  - In terms of the Rules, the Member concerned would be given the opportunity of presenting a written statement of defence and the Central Government would appoint an officer/advocate to present the case against the Member. The Member also has the right to be represented by an advocate of his choice.
  - After conclusion of the investigation, the Judge would be required to submit his report to the President of India.
  - Further, while the investigation is being conducted, the Central Government may, with the concurrence of the Chief Justice of India, suspend the concerned Member of the Tribunal until an order has been passed by the Central Government on receipt of the abovementioned Judge's report.

## **Insolvency and Bankruptcy Board of India Research Initiative, 2019**

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- On July 31, 2020, IBBI updated the terms of IBBI Research Initiative, 2019. This is an initiative by IBBI to promote research and discourse in areas relevant for evolution of insolvency and bankruptcy regime in India. It commenced from August 01, 2019 and research proposals were invited.
- Researchers under this initiative can be individuals, teams of individuals or academic institutions.
- IBBI has provided an illustrative list of areas of research topics, such as Insolvency law during Covid-19, measuring impact of IBC on corporate finance, matrix for assessing outcome of IBC processes, etc. However, a researcher is free to work in any area relating to insolvency and bankruptcy.
- IBBI has also specified mechanism for evaluation of research proposals, specifics of research paper which would have to be submitted by the researcher as well as mechanism for evaluation of papers.
- Research paper may be published by Board on IBBI website or researcher may publish the paper anywhere else with an acknowledgement that it has been prepared under IBBI Research Initiative.
- This initiative by the IBBI would be reviewed from time to time.



# RECENT JUDGMENTS

## V Nagarajan, Resolution Professional in respect of M/s Cethar Ltd v. SKS Ispat and Power Ltd & Ors

Judgment dated July 13, 2020 in Company Appeal (AT) (Insolvency) No. 561 of 2020

### Background facts

- This Appeal in NCLAT arose from order of NCLT, Chennai Bench dated December 31, 2019 wherein NCLT declined to interfere with invocation of bank guarantee given by bankers on behalf of Corporate Debtor.
- It is relevant to note that in terms of Section 61 of the IBC, an Appeal may be filed before the NCLAT within a period of 30 days of the order of the NCLT. However, in cases wherein there is sufficient cause for delay, another 15 days may be given to the Appellant for filing an Appeal.
- In the present case, Appeal was filed on June 08, 2020. Further, Appellant did not file an Application seeking condonation of delay in filing.
- Regarding the delay, Appellant contended that certified and free copy of Impugned Order was not issued to him till date and unsigned Order was uploaded on the website on March 12, 2020. Thus, 30 days' time limit was available till April 11, 2020. After that, in terms of Order dated March 23, 2020 passed by Supreme Court (SC) in Sua Moto Civil Writ Petition No. 3/2020, period starting March 15, 2020 would have to be excluded while computing limitation period. Hence, Appellant contended that the present Appeal has been filed within limitation period.

### Issue at hand?

- Whether the Appeal is time barred under Section 61 of the IBC?

### Decision of the Tribunal

- NCLAT observed that the principal objective of IBC is to ensure a speedy insolvency resolution process.
- It was also observed that this Appeal was filed without any certified copy of Order and there was no proof to substantiate the claim that certified copy had not been issued to Appellant. Further, Appellant had failed to file an Application showing sufficient cause for seeking condonation of delay in filing the Appeal. Therefore, question of automatic extension of time limit does not arise.
- In view of the above, NCLAT held that the Appeal is not maintainable as it is time barred and no interference is called against impugned Order of NCLT.

### Our viewpoint

While the Appellant was unable to establish a sufficient cause for delay in the present case, had the Appellant submitted an Application seeking condonation of delay and furnished sufficient proof establishing that they had not received certified or free copy of Impugned Order till date, then in interest of justice and in light of Order dated March 23, 2020 passed by SC in Sua Moto Civil Writ Petition No. 3/2020, NCLAT may have condoned the delay.

## GE Power India Ltd v. NHPC Ltd

Judgment dated June 26, 2020 in CS(COMM) 140/2020

### Background facts

- In this matter, a copyright infringement suit had been filed against NHPC by GE Power that is the successor of Alstom India.
- It is relevant to note that Alstom India entered into a contract with Lanco Infratech Ltd (**LIL**) for Teesta VI Project. This project was awarded to Lanco Teesta Hydropower Ltd (**LTHPL**) which is a Special Purpose Vehicle Company as part of Lanco Group of Companies. As part of the agreement, Alstom shared inter alia engineering drawings and documents with LIL which were to be used in the Teesta VI Project, subject to copyright therein vesting with Alstom.
- Thereafter, Corporate Insolvency Resolution Process was initiated against LIL which eventually resulted in its liquidation. Subsequently, NHPC acquired Teesta VI Project from LTHPL.
- In the present matter, NHPC (**Defendant**), issued an open tender for this Project, and GE Power (**Plaintiff**) bid was rejected on account of price being higher than tender check document. Defendant issued another tender post this, wherein Plaintiff has alleged that Defendant published and disclosed to third parties, six copyrighted and highly confidential drawings of Plaintiff.
- Aggrieved by the abovementioned, the Plaintiff approached Delhi High Court (**HC**) by way of present matter alleging violation of Plaintiff's copyright.
- It is pertinent to note that LIL and LITPL were not impleaded as parties to the present suit.
- Defendant contended that in present circumstances, jurisdiction of a civil court is barred as dispute can only be decided by NCLT.

### Issue at hand?

- Whether the present suit is maintainable before HC or is a dispute to be decided by NCLT?

### Decision of the Court

- On the issue of copyright infringement, HC observed that Clause 16(b) of Resolution Plan of NHPC ensures that benefits that accrue in favor of LHTPL continue with the Defendant. Therefore, the dispute raised in the present suit falls within the ambit of Section 60(5) of IBC, as the same arises out of and/or is in relation to Resolution Plan of LHTPL.
- Further, in the absence of necessary parties i.e. LIL and LTHPL, it cannot be determined how rights of use were transferred. HC observed that even if LTHPL was infringing copyright of Plaintiff, Defendants right to use cannot be decided by this proceeding.
- HC dismissed the suit as not maintainable in view of Sections 230 and 231 read with Section 60 (5) of IBC that bar jurisdiction of civil courts. It was held, for these reasons, that any question of law or fact in relation to insolvency resolution has to be determined by NCLT.

### Our viewpoint

This decision is an important one, as it clarifies that the NCLT has exclusive jurisdiction in case of an overlap of issues between the IBC and other statutes. Thus, this decision would help avoid multiplicity of proceedings in the resolution of disputes related to the insolvency resolution process.



## Rajeev Suri v. Union of India & Anr

Order dated July 28, 2020 in W.P.(C) 4622/2020

### Background facts

- On June 05, 2020, President of India promulgated Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 (**Ordinance**). The salient features of the Ordinance are as under:
  - It provides for insertion of Section 10A to IBC which lays down that no application for initiation of CIRP shall be filed for any default arising on or after March 25, 2020 for a period of six months or for a further period of up to one year, as may be notified.
  - The proviso to Section 10A provides that no application for initiation of CIRP can ever be filed for a default occurring during the above-mentioned period. Hence, in effect, such defaults have been excluded from the ambit of 'default' under Section 3(12) of IBC. Consequently, any default arising in or after March 25, 2020 would be exempted from rigors of IBC for a period of six months i.e. up to September 25, 2020. This period can be further extended up to one year if Government decides to do so.
  - It has been further clarified that the said Ordinance would not apply to any default arising before March 25, 2020. Consequently, an application for initiation of CIRP can still be filed in cases where default occurs before March 25, 2020.
  - Ordinance also provides for insertion of Section 66(3) which provides for an absolute restraint on Resolution Professionals for filing applications pertaining to fraudulent trading or wrongful trading transactions in respect of such defaults against which initiation of CIRP is suspended as per Section 10A.
- Thus, by way of Ordinance, operation of Sections 7, 9 and 10 of IBC have been suspended qua the cases specified in Ordinance.
- By way of instant Writ Petition, Petitioner has impugned suspension of Section 10 of IBC on the ground that such suspension is arbitrary and unjust and would deprive a Corporate Debtor of an opportunity to resolve itself by way of a Corporate Insolvency Resolution Process overseen by NCLT.

### Issue at hand?

- Whether the suspension of Section 10 of the IBC is arbitrary, unjust and violative of Article 14 and 19(1)(g) of the Constitution of India?

### Decision of the Court

- Delhi High Court has issued notice to Respondents, Central Government and IBBI, seeking their reply.

#### Our viewpoint

Ordinance specifies that these Sections have been suspended to protect companies from being forced into insolvency proceedings at a time when it is probable that distressed companies may default. It is necessary to provide relaxations in insolvency process as pandemic has disrupted normal business operations. Further, this relaxation is not indefinite as a cap of one year has been provided in the Ordinance. Even if insolvency process is initiated, it will be difficult to find Resolution Applicants and Company may be liquidated. Thus, in view of the above, we are of the opinion that it is a well-reasoned Amendment, issued in the interest of corporate persons and to ensure that Indian economy is able to revive itself in the near future.

## C.A Venkata Siva Kumar v. IBBI & Ors

Order dated July 28, 2020 in W.P No. 9132 of 2020 and W.M.P No. 11134 of 2020

### Background facts

- The Petitioner is a Chartered Account and an Insolvency Professional (IP) registered with the IBBI.
- This Petition has been filed as a challenge to Regulations 7(2)(ca) and 13(2)(ca) of IBBI (Insolvency Professionals) Regulations 2016, on the ground that they are an improper exercise of discretion, patently unrelated to or inconsistent with the purpose of the statute and a violation of Articles 14, 19 and 21 of Constitution of India.
- The impugned Regulations stipulate that an IP or Insolvency Professional Entity (IPE) should pay to the IBBI, a fee calculated at 0.25% of professional fee earned for services rendered or of the turnover of the IPE in the preceding financial year.
- The Petitioner contended that:
  - The impugned Regulations are ultra vires Sections 196 and 207 of the IBC as these sections do not empower the IBBI to levy fee on the basis of the annual remuneration/turnover of the IP or IPE
  - There is excessive delegation towards IBBI
  - There is no quid pro quo between the IBBI and IPs to justify the fees

### Issue at hand?

- Whether Regulations 7(2)(ca) and 13(2)(ca) of IBBI (Insolvency Professionals) Regulations, 2016 are an improper exercise of discretion, patently unrelated to or inconsistent with the purpose of the statute and a violation of Articles 14, 19 and 21 of Constitution of India?

### Decision of the Court

- At the outset, the High Court observed that since the Petitioner is not a partner or director of an IPE, he does not have the locus standi to challenge Regulation 13(2)(ca) of the IBBI (Insolvency Professionals) Regulations, 2016. However, the Court examined the constitutional and statutory challenge to Regulation 7(2)(ca).
- On the first contention of the Petitioner, the Court found that the IBBI is duly empowered under Sections 196 and 207 to levy a fee on IPs, including as a percentage of the annual remuneration as an IP in the preceding financial year.
- Secondly, on the issue of excessive delegation, the Court concluded that the IBC contains adequate safeguards to ensure that the Parliament effectively supervises all rules and regulations, with the power to modify or annul the same. These safeguards are also in place to ensure that the funds of the IBBI are utilized for the purposes of fulfilling its role under the IBC. Thus, there is no unfettered power or excessive delegation.
- Lastly, the Court concluded that the IBBI provides significant services, including in relation to IPs and hence there is a broad correlation between fees and services. Further, it is not necessary that a direct or arithmetical correlation between the fee received and service rendered should exist in the context of regulatory fees. Thus, it was observed that there is no constitutional infirmity on account of lack of quid pro quo.
- In view of the above, the High Court dismissed the Writ Petition.

### Our viewpoint

We are of the opinion that there are ample safeguards to keep a check on the functioning of the IBBI and to prevent any arbitrary action on its part. In view of the same, the High Court was correct in its decision to not interfere with the Regulations stipulated by the IBBI for levying fees on the IPs and IPEs.



## RECENT DEALS

### Resolution of Amtek Auto Ltd by Deccan Value Investors

- The highly prolonged Resolution Process of M/s Amtek Auto Ltd (**AAL**) finally came to an end vide an order dated July 09, 2020 passed by NCLT, Chandigarh Bench wherein it approved resolution plan submitted by Deccan Value Investors (**DVI**) in Corporate Insolvency Resolution Process of AAL, the Corporate Debtor.
- Corporate Insolvency Resolution Process of AAL commenced on July 24, 2017, following an order passed by NCLT, Chandigarh Bench. Thereafter, after following due process, Resolution Plan of Liberty Housing group (**LHG**) was approved in a meeting of Committee of Creditors (**CoC**) held on April 02, 2018.
- Subsequent to the approval of Resolution Plan of LHG by NCLT, financial creditors of AAL filed an Application before the Tribunal on grounds that LHG had contravened terms of Resolution Plan and had failed to implement the same.
- The NCLT vide an order dated February 13, 2019 held that Resolution Plan submitted by LHG was not capable of implementation and restored CoC for considering the plan of DVI. The order stated that CIRP of AAL was vitiated by misrepresentation/fraud/mistake of fact.
- In an Appeal filed against this order, National Company Law Appellate Tribunal ordered liquidation of AAL, vide an order dated August 16, 2019. This was impugned before Supreme Court by the CoC and consequently, Supreme Court permitted Resolution Professional to invite fresh offers vide order dated September 24, 2019. Resolution Professional shortlisted four Resolution Applicants, amongst which, Resolution Plan submitted by DVI was approved by 70.07% voting in CoC meeting held on February 7, 2020.
- It is relevant to note that while approving Resolution Plan of DVI, NCLT ordered that DVI shall furnish balance Performance Bank Guarantee of INR 150 crores within 15 days of receipt of a certified copy of the order. NCLT also directed DVI to submit application of seeking approval from Competition Commission of India within this time.
- This is a much-needed boost for Automobile Industry, which was reeling even prior to the onset of the pandemic.





# SECTOR FOCUS

## WHOLESALE & RETAIL TRADE

- The IBC regime has had a notable impact on all the industrial sectors across the spectrum, including the wholesale and retail trade industry.

Admitted <sup>1</sup>	Closed <sup>2</sup>	Ongoing
378	168	210

- Of late, wholesale and retail trade industry has been particularly impacted by the pandemic and consequent slowdown of business operations. As may be noticed, many such companies under the wholesale and retail trade industry have undergone insolvency proceedings. A few of such instances are analyzed here below:

### – M/s Priknit Retails Ltd

Vide order dated May 18, 2020, NCLT Chandigarh Bench directed the commencement of liquidation proceedings of M/s Priknit Retails Ltd. Thereafter, Corporate Insolvency Resolution Process was commenced vide order dated September 11, 2019 passed by NCLT, Chandigarh Bench after admitting an Application filed by State Bank of India under Section 7 of IBC. Committee of Creditors comprised of two Financial Creditors – State Bank of India (90.92% voting share) and ASREC (India) Ltd (09.08% voting share). Resolution Professional duly invited Expression of Interest by Prospective Resolution Applicants but only two such Prospective Resolution Applicants came forward. However, no Resolution Plan was tendered by such Prospective Resolution Applicants. Further, Corporate Debtor had not been operating since many years and there was no inventory or plant and machinery or proper books of accounts. In light of these circumstances, Committee of Creditors recommended liquidation, consequent to which Resolution Professional approached the NCLT, Chandigarh Bench seeking liquidation of M/s Priknit Retails Ltd. As mentioned hereinabove, this Application seeking liquidation was allowed vide order dated May 18, 2020.

<sup>1</sup> As per IBBI Quarterly Newsletter, January-March 2020

<sup>2</sup> Out of Total Closed – 26 have been Appeal/Reviewed, 12 have been withdrew under Section 12A, Resolution was approved for 13 and Liquidation has commenced for 117

## – V2 Retail Ltd

Vide Order dated June 25, 2020, the NCLT, New Delhi Bench admitted an Application filed against the Corporate Debtor under Section 9 of the IBC by Totem Media Solutions Private Limited for an amount in default on account of purchase of advertising print space. Thereafter, once the Corporate Insolvency Resolution Process commenced, the Interim Resolution Professional so appointed in the matter filed an Application under Section 12A of the IBC read with Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 seeking withdrawal of the Application filed under Section 9 of the IBC. This Application was allowed by the NCLT, New Delhi Bench vide order dated July 10, 2020 and accordingly, the Corporate Insolvency Resolution Process of the Corporate Debtor was set aside.

- In light of the situation caused on account of the ongoing slowdown in business operations, this sector needs special impetus from the government inter alia in terms of aid for servicing of debt and measures for increasing the demand, which is at an all-time low. Further, it should not be overlooked that this sector provides employment to a lot of people. Therefore, it is imperative that a focused package is introduced for bringing sustenance in this sector.

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