HSA ADVOCATES
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Restructuring & Insolvency

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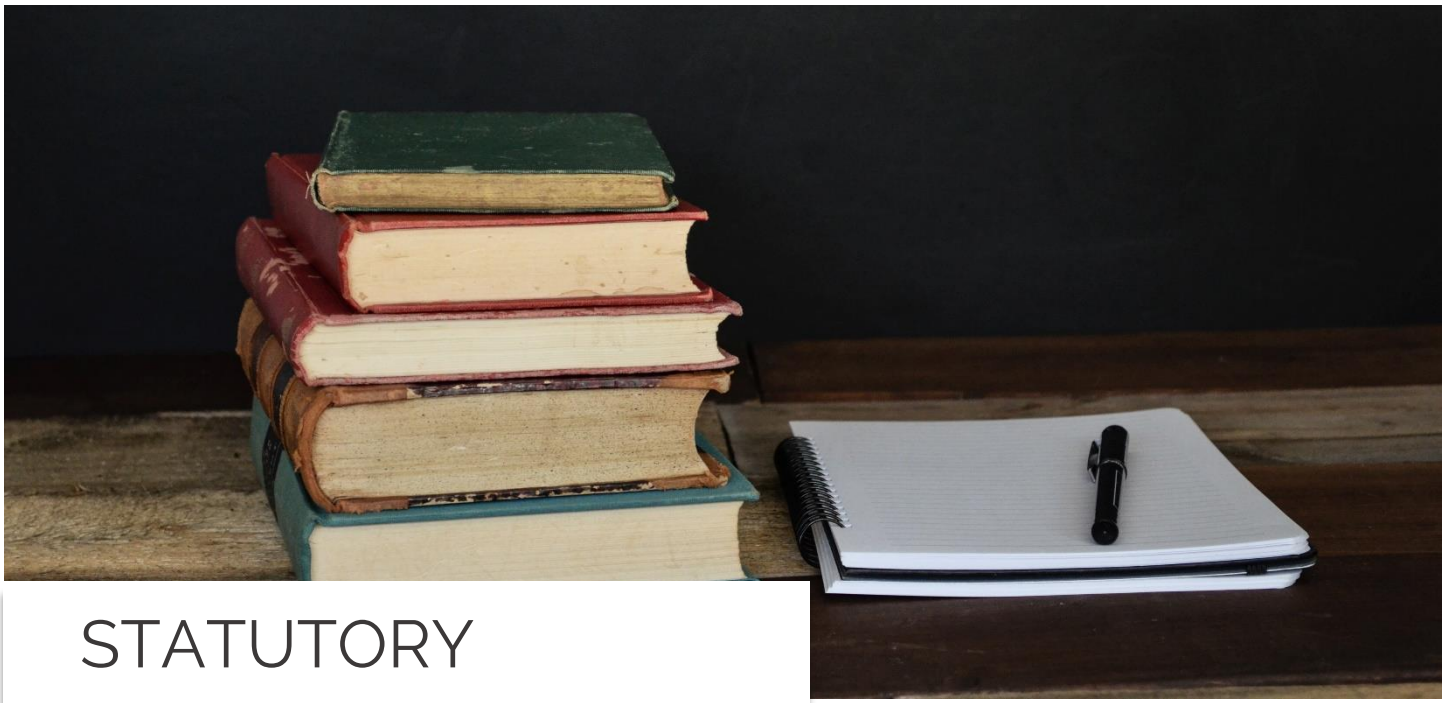


STATUTORY UPDATES

Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020

- In exercise of the powers conferred by Clause (t) of Sub-Section (1) of Section 196 read with Section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (**IBC**), the Insolvency and Bankruptcy Board of India (**IBBI**) notified the Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020 on November 13, 2020 into the IBBI (Liquidation Process) Regulations, 2016 (**Liquidation Regulations**).
- The key features of the said amendment are as follows:
  - **Insertion of Regulation 30A:** In addition to the present 'Regulation 30 - Verification of claims' in the Liquidation Regulations, a new 'Regulation 30A - Transfer of debt due to Creditors' has been inserted which allows creditors who are not willing to wait for the completion of the liquidation process, to exit the process by assigning or transferring the debt due to them, to other creditors of the company. In case of assignment or transfer of debt, the parties are required to provide the terms of such assignment/transfer and the identity of the assignee and transferee to the liquidator and the liquidator is required to amend its stakeholders' list in accordance with Regulation 31.
  - **Insertion of Regulation 37A:** In furtherance to the present 'Regulation 37 - Realization of security interest by secured creditor' in the Liquidation Regulations, 'Regulation 37A - Assignment of not readily realizable assets' has been inserted to envisage early closure of liquidation process by allowing the liquidator to assign or transfer a 'not readily realizable asset' to any person in consultation with the stakeholders' consultation committee.
  - **Broadened definition of 'not readily realizable asset':** The explanation to the newly inserted Regulation provides that the definition of 'a not readily realizable asset' would include any assets of the Corporate Debtor, which could not be sold through the available options and includes contingent or disputed assets and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions referred to in Sections 43 to 51 and Section 66 of the IBC.
  - **Inclusion of contentious assets in liquidation process:** The purpose of introducing the present Regulation is to include the contentious assets in the Liquidation Process to be transferred to someone willing to take the risk. Such addition would not only facilitate a quick closure of the Liquidation Process but would also improve the realization value of the assets.
  - **Amendment to Regulation 38(1) of Principal Regulations:** To facilitate the Application of aforementioned Regulation 37A, a slight amendment has been brought about in Regulation 38(1) of the Principal Regulations wherein the words 'cannot be readily or advantageously sold' have been substituted by the words 'could not be sold, assigned or transferred'.

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020

- The IBBI on November 13, 2020 notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020 which has brought about amendment into the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**Principal Regulations**).
- The key amendments are as follows:
  - Insertion of 'Regulation 2A - Record or evidence of default by Financial Creditor' to the Principal Regulations that provides for the documents as proof of default namely
    - Certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of Section 2 of the Bankers' Books Evidence Act, 1891 (18 of 1891)
    - An order of a Court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired, to be furnished by the Financial Creditor along with the Application under Section 7 of the IBC for the same to be admitted by the Adjudicating Authority against the Corporate Debtor.
  - The IBBI amended the Regulations 13 of the Principal Regulations by inserting Clause (ca) to Sub-Regulation 2, that require the Interim Resolution Professional/Resolution Professional to submit the list of creditors on an electronic platform for dissemination on its website. The proviso to the aforementioned clause provides that the Application of the same shall be prospective in nature i.e. on or after November 13, 2020.
  - Additionally, Sub-Regulation 5A has been inserted in Regulation 39 of the Principal Regulation that creates a mandate on the Resolution Professional to intimate each claimant, the principle or formulae, as the case may be, for payment of debts within 15 days of the order of the Adjudicating Authority approving a Resolution Plan. The proviso to the aforementioned newly inserted clause also provides that the Application of the same shall be prospective in nature.

RECENT JUDGMENTS

Kiran Gupta v. State Bank of India & Anr.

Judgment dated November 02, 2020 in [W.P.(C) 7230/2020 & CM. APPL. 24414/2020]

Background factscxx

- Ms. Kiran Gupta (**Petitioner**) was the guarantor to M/s. Metenere Ltd (**Metenere**), the Principal Borrower, who had obtained loans from State Bank of India (**SBI**) (**Respondent**). On the failure by Metenere to repay the loan, SBI filed an insolvency petition against Principal Borrower under the provisions of the IBC before the National Company Law Tribunal, New Delhi (**NCLT**).
- During the pendency of the insolvency proceedings against Metenere, SBI issued a Notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**) to Petitioner. This was followed by the issuance of a Possession Notice dated July 16, 2019, under Section 13(4) of the SARFAESI Act. Both these notices were challenged by Petitioner before Debt Recovery Tribunal (**DRT**) and subsequently withdrawn due to possibility of a settlement between Metenere and SBI.
- Thereafter, a fresh Notice under Section 13(2) of the SARFAESI Act was issued by SBI on June 11, 2020 and it has also been contended that the Respondent allegedly without issuing a notice under Section 13(4) of the SARFAESI Act, issued a sale notice for sale of residential house of Petitioner via a public auction.
- Petitioner filed the present Writ before the Delhi High Court against the action taken by SBI and contended that proceedings against Metenere under the IBC and against the Guarantor under the SARFAESI Act cannot be instituted and continued simultaneously. The argument was reasoned by stating that if the Resolution Plan is approved under Section 31 of the IBC, all the guarantees become ineffective and the liability of the Guarantor also comes to an end.
- It was also contended on behalf of the Petitioner that from the date of admission of an Application for initiating Corporate Insolvency Resolution Process (**CIRP**) by NCLT, moratorium under Section 14 is imposed prohibiting institution or continuation of suits, arbitrations and other proceedings against the entity against which the insolvency proceedings have commenced. Thus, concluding that a co-joint reading of Section 14 and Section 31 of IBC would warrant a stay on all proceedings against the Guarantor under SARFAESI Act during the continuation of the CIRP of Corporate Debtor.
- Per Contra, it was argued by Respondent that the liability of a Guarantor is co-extensive with the Principal Borrower. Furthermore, reliance was placed on the decision of the Supreme Court in the matter *State Bank of India v. V.Ramakrishan & Anr*[1], which holds that Sections 14 and Section 31 of the IBC do not bar initiation and continuation of the SARFAESI proceedings against the Guarantor.

[1] (2018) 17 SCC 394

Issue at hand?

- Whether a bank/Financial Institution can institute or continue with proceedings against a guarantor under the SARFAESI Act, when proceedings under the IBC have been initiated against the Principal Borrower and the same are pending adjudication?

Decision of the Court

- HC herein while reiterating Sections 14 and 31 of the IBC and Section 128 of the Contract Act, 1872 referred to the decision of the Supreme Court in the matter of *Industrial Investment Bank of India Ltd v. Biswanath Jhunjhunwala*[2] wherein it was observed that a creditor is not bound to exhaust his remedy against the Principal Borrower before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt.
- Furthermore, the Court also discussed the extent of the word 'Co-extensive' as defined in Pollock & Mulla on Indian Contract and Specific Relief Act and Halsbury's Laws of England, and observed that a surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued.
- Finally, while observing the facts of the present case the Court was of the view that liability of a guarantor is co-extensive with that of the Principal Debtor and not in the alternative, it cannot be said that proceedings in the NCLT against the Principal Debtor can be a bar to institution or continuation of proceedings against the guarantor under the SARFAESI Act. Neither Section 14 nor Section 31 of the IBC place any fetters on Banks/Financial Institutions from initiation and continuation of the proceedings against the guarantor for recovering their dues.
- Therefore, it was held that the Petitioner cannot escape her liability qua the Respondent in such a manner. The liability of the Principal Borrower and the Guarantor remain co-extensive and the Respondent entitled to initiate proceedings against the Petitioner under the SARFAESI Act during the continuation of the CIRP against the Corporate Debtor.

Our viewpoint

In our opinion, this judgment makes it crystal clear that the Guarantor of a Principal Borrower cannot avoid their liability to make the payment when it is endowed upon them by seeking shelter under the moratorium imposed on the Corporate Debtor/Principal Borrower. This judgment is a ray of light to many creditors who were unclear about reclaiming their debt from a party other than the Debtor when the Debtor is undergoing the Resolution Process.

UCO Bank v. MR. G. Ramachandran (Resolution Professional, M/s. Sai Regency Power Corporate Pvt Ltd)

Judgment dated November 03, 2020 in Company Appeal (AT) (Insolvency) No. 761 of 2020

Background facts

- UCO Bank, the Appellant, had granted two vehicle loans to M/s. Sai Regency Power Corporate Pvt. Ltd (**SRPC**), Corporate Debtor, and had also sanctioned certain demand loan to the group companies of the Corporate Debtor for which the Corporate Debtor offered two Fixed Deposit Receipts (FDRs) as security.
- Thereafter, an Application filed under Section 7 of the IBC against the Corporate Debtor was admitted on March 27, 2019. Consequentially, the Corporate Debtor was admitted into insolvency and a moratorium was imposed under Section 14 of the IBC. Mr G. Ramachandran, the Respondent, was appointed the Resolution Professional of the Corporate Debtor.
- While the moratorium was imposed under Section 14 of the IBC, UCO Bank adjusted Fixed Deposits aggregating to INR 2,07,31,503 on September 09, 2017 against the outstanding amount in relation to vehicle loans and loans taken by the group companies of SRPC (Outstanding Dues).
- A letter was issued by Mr G. Ramachandran on December 06, 2019 to release the adjusted amount back to the accounts of SRPC.

[2] (2009) 9 SCC 478

- On failure by the Appellant to restore the adjusted amount back into the account of SRPC, Mr G. Ramachandran filed an Application before the NCLT, Special Bench, Chennai having M.A. No. 39 of 2020 in IBA/92/2019 and claimed that UCO Bank was required to refund INR 2,27,94,706/- which had been adjusted during CIRP by the UCO Bank from Fixed Deposits of SRPC.
- The NCLT passed the Impugned Order directing UCO Bank to restore the credit to SRPC's account as the same could not have been adjusted while a moratorium was imposed on SRPC and to facilitate Resolution Plan.
- Aggrieved by the Impugned Order of the NCLT for the restoration of the adjusted amount, UCO Bank filed the present Appeal before the National Company Law Appellate Tribunal (NCLAT).

Issue at hand?

- Could UCO Bank recover the Outstanding Dues from the account of the Corporate Debtor while a moratorium was imposed under Section 14 of the IBC?

Decision of the Tribunal

- The NCLAT in the present matter decided on the merits of the case and took cognizance of the fact that the moratorium was imposed in March and UCO Bank attempted to recover the Outstanding Dues while the SRPC was undergoing the CIRP. As per Section 14 of the IBC, such adjustment by UCO Bank is not legally tenable. Lack of knowledge of initiation of CIRP cannot be a ground for allowing the recovery until the moratorium under Section 14 does not cease to end. When CIRP was initiated, UCO Bank could not have adjusted the amounts as has been done in this matter.

Our viewpoint

The present judgment sheds light on the fact that once CIRP has been initiated and Section 14 of IBC applied on the Corporate Debtor, Fixed Deposit adjustment with demand loans by Bank cannot be made until the Resolution Process of such Corporate Debtor is concluded. It has been made clear that on imposition of moratorium, a creditor cannot recover (even by way of adjustment or set off) any dues whatsoever and must stand in line with the other creditors of the Corporate Debtor.

Stressed Assets Stabilization Fund v. Royal Brushes Pvt Ltd

Order dated November 04, 2020 [Company Appeal (AT) (Insolvency) No. 949 of 2020]

Background facts

- An Application under Section 7 of the IBC was filled by Stressed Asset Stabilization Fund (**SASF**), the Appellant, against Royal Brushes Pvt. Ltd. (Royal Brushes), the Corporate Debtor, before the NCLT, Special Bench, Mumbai for initiation of CIRP of the Corporate Debtor.
- The above-mentioned Application was rejected vide order dated March 18, 2020 (**Impugned Order**) by the NCLT on the grounds that an Application for CIRP cannot be initiated beyond a limitation period of 3 years as provided under Section 137 of the Limitation Act, 1963.
- Aggrieved by the Impugned Order SASF filed the present Appeal before the NCLAT.
- SASF herein to support its Appeal contended that Royal Brushes had made a One Time Settlement (**OTS**) proposal in the year 2006 for INR 353 Lakh which was subsequently revised on July 07, 2006, but the negotiated settlement was removed on December 13, 2006 due to failure on the part of Royal Brushes to comply with the terms of restructuring of debt, therefore, there is a continuing cause of action.

Issue at hand?

- Would a subsequent restructuring of debt vide negotiated settlement which was admittedly aborted and failed would give rise to a fresh cause of action to SASF?

Decision of the Tribunal

- The NCLAT, while rejecting the Appeal, held that plea would not sustain even if the limitation is computed from the date of failure of such negotiated settlement as the Application is still hit by limitation. Thus, concluding that subsequent restructuring of debt vide negotiated settlement which admittedly aborted and failed, would not give a fresh cause of action to SASF.

- In the present case, the default arose on July 01, 2001, giving rise to the cause of action and the same cannot shift due to a subsequent settlement proposal. The Limitation Period for initiating CIRP would commence from the date of default i.e. July 01, 2001.
- Furthermore, the NCLAT relied on the decision of the Hon'ble Supreme Court in the matter of *Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industruies Pvt Ltd & Anr.*[3] wherein it was held that the right to apply under the Code accrues on the date when the default occurs and in the event of an account being declared NPA the date of default would be the date when the account was declared as NPA.
- In addition to above, although the remedy via the route of IBC is not available on account of expiry of the limitation period that does not preclude the Appellant from seeking appropriate legal remedy before the Competent Forum for recovery of the amount.

Our viewpoint

The present NCLAT judgment seems to follow a precedent that the date of default is sacrosanct for computing the period of limitation and no subsequent action would extend the period of limitation available for instituting proceedings under the IBC. However, it remains to be seen whether Section 18 of the Limitation Act is made applicable to proceedings under the IBC.

Venus Recruiters Pvt. Ltd. v. Union of India

Judgment dated November 26, 2020 in W.P.(C) 8705/2019 & CM APPL. 36026/2019

Background facts

- M/s Bhushan Steel Ltd. (now known as Tata Steel BSL Ltd) (**Corporate Debtor**) was the subject of CIRP before the NCLT, New Delhi, initiated by the State Bank of India on July 26, 2017.
- On March 20, 2018, the Committee of Creditors approved the Resolution Plan proposed by Tata Steel Ltd (**Successful Resolution Applicant**) and the said Plan was filed by the Resolution Professional to seek approval before the NCLT on March 28, 2018. While this approval was pending, the Resolution Professional filed an avoidance Application on April 09, 2018 under Section 25(2)(j), Sections 43 to 51 and Section 66 of the IBC. The said Application recalled that various transactions were enumerated as 'suspect transactions' with related parties.
- The NCLT, almost five weeks after the filing of the above-mentioned avoidance Application, approved the Resolution Plan vide a detailed judgment dated May 15, 2018 and disposed of all pending Applications without specifically dealing with the merits of the avoidance Application.
- Thereafter, almost after two months from the approval of the Resolution Plan and the Corporate Debtor been taken over by the new management, the NCLT vide order dated July 24, 2018 passed an order in the avoidance Application and issued notice dated October 25, 2018 to implead certain parties, M/s. Venus Recruiters Pvt Ltd (**Petitioner/Venus Recruiters**) being one of them.
- It is pertinent to note that during the on-going proceedings regarding the said avoidance Application, the NCLAT vide judgment dated August 10, 2018 upheld the judgment dated May 15, 2018 by the NCLT approving the Resolution Plan.
- Aggrieved by the notice dated October 25, 2018 impleading Venus Recruiters to the said avoidance Application, Venus Recruiters filed the present writ before the Delhi High Court praying for the proceedings against it in the NCLT to be quashed.
- Venus Recruiters argued that the said avoidance Application cannot survive since the NCLT had disposed of all the pending Applications when it approved the Resolution Plan. Moreover, with the conclusion of the CIRP of the Corporate Debtor, the Resolution Professional became functus officio and the in terms of Section 60 of the IBC, the jurisdiction of the NCLT could not extend beyond the CIRP completion date.
- The Respondents, including the Union of India and Tata Steel, argued that avoidance transactions have to be treated differently. Relying on Section 26 of the IBC, which provides that avoidance Applications by the RP shall not affect the proceedings of the CIRP, the Respondents contended that such Applications could be prosecuted even after the conclusion of the CIRP. It was further argued that Intention of the IBC is to delink the CIRP proceedings from avoidance transactions since the adjudication of such transactions could take much longer than timelines fixed in the adjudicatory

[3] 2020 SCC Online SC 647

process and there was no fixed time limit for deciding an avoidance Application, and they could always remain pending even after the Resolution Plan is accepted by the NCLT.

Issues at hand?

- Can an avoidance Application survive beyond the conclusion of the Resolution Process and the role of the Resolution Professional in filing/pursuing such Applications?
- Whether the NCLT can adjudicate upon such Application filed for avoidance after the approval of the Resolution Plan?

Decision of the Court

- After acknowledging materials produced, factual arguments advanced by both parties, the Hon'ble High Court observed that that avoidance Applications relating to preferential transactions under Section 43 of IBC do not survive beyond the conclusion of the CIRP.
- While arriving at the above decision, the Court observed that as per Section 60 of the IBC, the NCLT has the jurisdiction to deal with all Applications and petitions 'in relation to insolvency Resolution and Liquidation for Corporate Persons'. In the present matter, the CIRP had already come to an end with the approval of the Resolution Plan by the NCLT on May 15, 2018, yet the NCLT chose to exercise jurisdiction post the approval of the Resolution Plan.
- It was further observed that after the approval of the Resolution Plan and the new management taking over the Corporate Debtor, no proceedings remain pending before the NCLT, except issues relating to the Resolution Plan itself, as permitted under Section 60.
- The Court took note of the fact that an avoidance Application for any preferential transaction is meant to give some benefit to the creditors of the Corporate Debtor. The benefit is not meant for the Corporate Debtor in its new avatar, after the approval of the Resolution Plan and after the new management has taken over. The benefit of these orders would be for the Corporate Debtor, prior to the approval of the Resolution Plan.
- After acknowledging materials produced, factual arguments advanced by both parties, the Hon'ble High Court observed that that avoidance Applications relating to preferential transactions under Section 43 of IBC do not survive beyond the conclusion of the CIRP.
- While arriving at the above decision, the Court observed that as per Section 60 of the IBC, the NCLT has the jurisdiction to deal with all Applications and petitions 'in relation to insolvency Resolution and Liquidation for Corporate Persons'. In the present matter, the CIRP had already come to an end with the approval of the Resolution Plan by the NCLT on May 15, 2018, yet, the NCLT chose to exercise jurisdiction post the approval of the Resolution Plan.
- It was further observed that after the approval of the Resolution Plan and the new management taking over the Corporate Debtor, no proceedings remain pending before the NCLT, except issues relating to the Resolution Plan itself, as permitted under Section 60.
- The Court took note of the fact that an avoidance Application for any preferential transaction is meant to give some benefit to the creditors of the Corporate Debtor. The benefit is not meant for the Corporate Debtor in its new avatar, after the approval of the Resolution Plan and after the new management has taken over. The benefit of these orders would be for the Corporate Debtor, prior to the approval of the Resolution Plan.
- The Court analyzed the IBC and the applicable Regulations and deduced that while the IBC itself does not fix any time limits for filing of avoidance Applications in respect of any transactions, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations**), Chapter X stipulate the structure and methodology for dealing with objectionable transactions. Regulation 35A provides a specific timeline by which the Resolution Professional has to form an opinion if the Corporate Debtor has been subjected to any of the objectionable transactions. The time limit prescribed is of 75 days from the insolvency commencement date. However, what is significant is the fact that under Regulation 39, the RP has to submit, "along" with the Resolution Plans, details of all the objectionable transactions including preferential transactions.
- Therefore, a conjoint analysis of Sections 43 and 44 read with the applicable Regulations clearly shows that the assessment by the Resolution Professional of the objectionable transactions including preferential transactions cannot be an unending process.
- The Court while dealing with the role of the Resolution Professional observed that there is a START line and FINISH line for the Resolution process. Section 23 of the IBC stipulates that the role of the Resolution Professional is to 'manage' the affairs of the Corporate Debtor 'during' the Resolution Process and NOT thereafter.

- The Court was of the view that the continuation of a Resolution Professional for filing of an Application to prosecute an avoidance Application as a 'Former RP' is beyond the contemplation of the IBC. The RP ceases to be one after an order under Section 31 is passed and the successful Resolution Applicant takes charge of the Corporate Debtor.
- The Court finally held that the NCLT ought not to be permitted to adjudicate the preferential nature of the transaction, after the approval of the Resolution Plan and the order of the NCLT impleading the Petitioner and any consequential orders were set aside.

Our viewpoint

In our view, while this judgment helps cut down on the cumbersome and stretched proceedings, but it does not take into account the fact that often a Resolution Application bids for a Corporate Debtor specifically accounting for the prospective receivables from avoidance Applications. In such a scenario, recalcitrant promoters, who are most often beneficiaries of such avoidable transactions might go scot free, at the expense of a bona fide resolution applicant.

Gajendra Sharma v. Union of India & Anr.

Judgment dated November 27, 2020 in WRIT PETITION (CIVIL) NO. 825 OF 2020

Background facts

- Mr Gajendra Sharma (**Petitioner**) had availed a home loan of an amount of INR 37,48,000 from the ICICI Bank. Thereafter, the Reserve Bank of India (**RBI**) on March 27, 2020 issued Statement of Development and Regulatory Policies (**RBI notification**) where inter alia certain regulatory measures were announced to mitigate the burden of debt servicing brought about by disruptions on account of COVID-19 pandemic and to ensure the continuity of viable businesses.
- The Notification dated March 27, 2020 was issued by the RBI was for rescheduling of payments – Term Loans and Working Capital Facilities. As per the RBI notification, all the commercial banks, co-operative banks, all India Financial Institutions, and NBFCs were permitted to grant a moratorium of three months on payment of all instalments falling due between March 1, 2020 and May 31, 2020 and the repayment schedule for such loans as also the residual tenor, will be shifted across the board by three months after the moratorium period. Thereafter, due to the extension of the nationwide lockdown the RBI by a subsequent notification dated May 23, 2020 directed all commercial banks to extend the moratorium by another three months, i.e., from June 01, 2020 to August 31, 2020.
- The relief in the notifications dated March 27, 2020 and May 23, 2020 by the RBI was followed by a condition that interest shall continue to accrue on the outstanding portion of the term loans during the moratorium period.
- Mr. Gajendra Sharma, via the present Writ, approached the Supreme Court seeking a waiver of the interest during the moratorium period, as the imposition of interest during the moratorium period is ultra vires and is completely devastating and causes hindrance and obstruction in right to life guaranteed by Article 21 of the Constitution. It has also been contended that the notification qua payment of interest violates the principle of natural justice.

Issue at hand?

- Whether the RBI notification demanding interest during the period of moratorium on payment of EMIs is ultra vires and liable to be quashed?

Decision of the Court

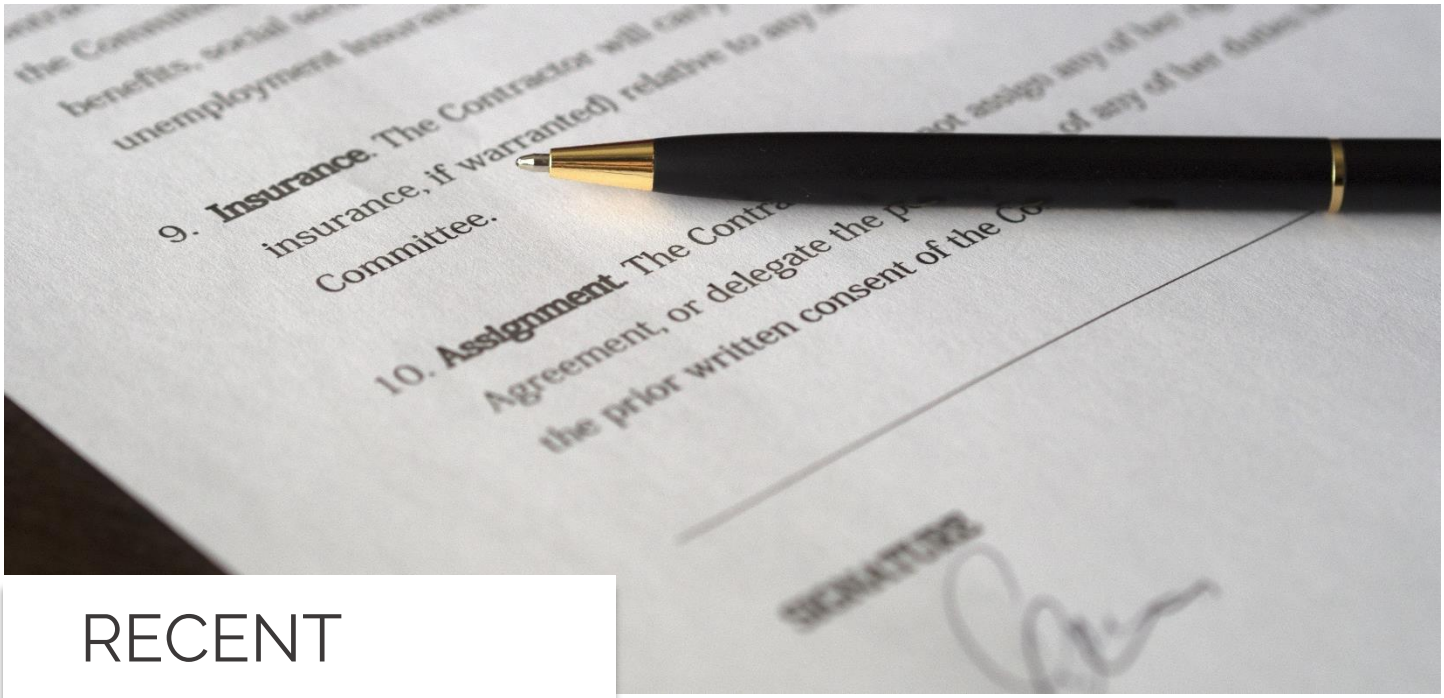
- SC took note of the decision taken by the Central Government dated October 23, 2020 releasing the '*Operational Guidelines with regard to Covid-19 Reliefs*' which provides for:
  - Ex-gratia payment of the difference between compound interest and simple interest by ways of relief for the period from March 01, 2020 to August 31, 2020 to borrowers in specified loan accounts.
  - Furthermore, granting benefit of waiver of interest up to INR 2 Crore in eight categories (Micro, Small & Medium Enterprises (MSME), Education, Housing, Consumer durable, Credit card, Automobile, Personal and Consumption)
- That during the course of the proceedings, the petitioner had even expressed its satisfaction on the measures taken by the Government of India redressing grievances of the Petitioner to the issues

raised with the effect of RBI notification by releasing Operational Guidelines with regard to COVID-19 Reliefs.

- Basis the above observations, SC disposed of the present Writ and directed the government to ensure that all steps are taken to implement its decision to forego interest on aforementioned eight specified categories in view of the coronavirus pandemic.

Our viewpoint

The outbreak of the Covid-19 pandemic globally has resulted in potential problems faced by several sectors and in several spheres of all financial worlds. The present judgment has provided much-needed relief and clarity to the borrowers who have suffered financial hardship due to the lockdown imposed and could not take the burden of the extra accumulated interest during the period of the moratorium imposed under the RBI notification.



RECENT **DEALS**

NCLT, Principal Bench, New Delhi approves Resolution Plan by a consortium of Shailendra Khirwar and Rishabh Verma in a partnership with N-Homes Pvt Ltd for NIIL Infrastructure Pvt Ltd

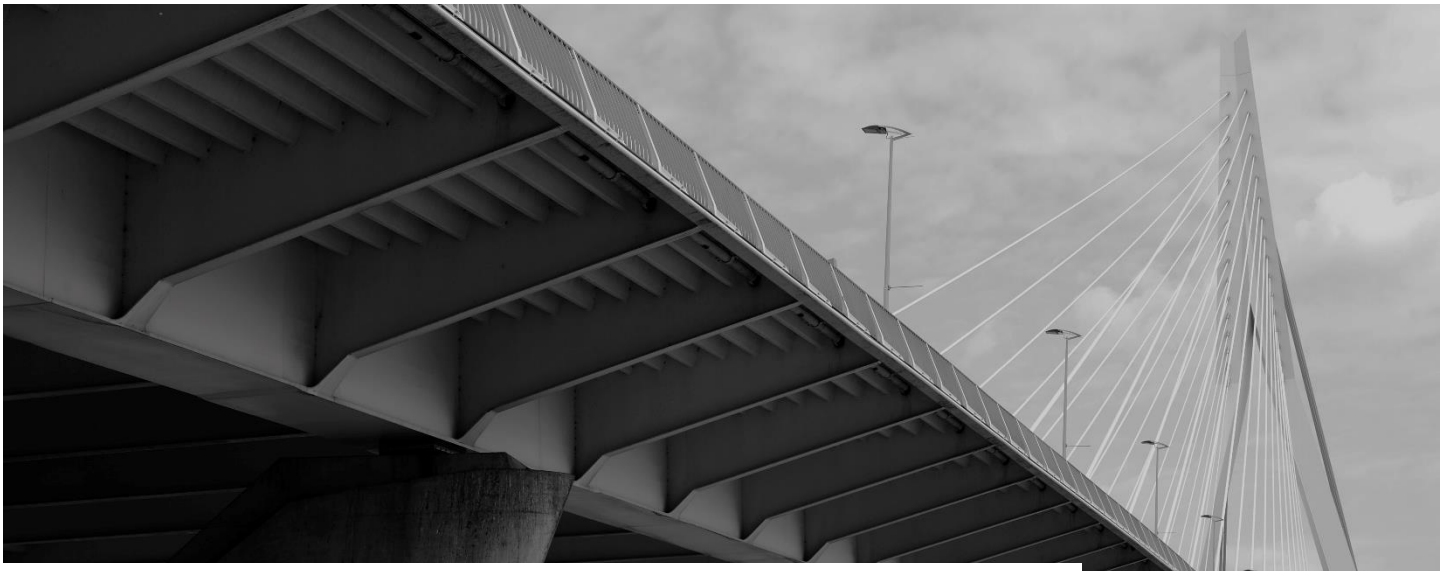
- NIIL Infrastructure Pvt Ltd (**NIIL**), the Corporate Debtor, in the business of building & road construction services, was undergoing insolvency process on an Application was preferred by Alchemist Asset Reconstruction Private Limited under Section 7 of the IBC. The NCLT, Principal Bench, New Delhi vide order dated March 23, 2018 admitted the aforementioned Application for initiation of CIRP and subsequently imposed moratorium under Section 14 of the IBC.
- Thereafter, the appointed Resolution Professional of NIIL published an invitation for Expression of Interest (**EoI**) on December 24, 2018 in newspapers. Due to lack of any response to the initial invitation for EoIs, another attempt was made on January 16, 2019 to invite interested parties to submit their Resolution Plan.
- Pursuant to the second public invitation, two parties namely SSG Infratech Pvt Ltd and consortium of Shailendra Khirwar and Rishabh Verma in a partnership with N-Homes Private Limited expressed their interest in submission of Resolution Plan.
- After various deliberations, the members of the Committee of Creditors of NIIL in the 11th meeting of the Committee of Creditors via e-voting approved the Resolution Plan of the consortium of Shailendra Khirwar and Rishabh Verma in a partnership with N-Homes Pvt Ltd (**Successful Resolution Applicant**), by a majority of 77.04%.
- The Successful Resolution Applicant submitted its unconditional acceptance and submitted a Performance Bank Guarantee of INR 4.77 crore. The approved Resolution Plan offered an amount of INR 103 Crore as against the liquidation value of INR 90,98,89,698. The approved plan provided 73.65% of amount against the admitted claim of the Financial Creditors, 20% of amount admitted was offered to the Operational Creditors and 100% of the amount admitted was offered to the Workmen & Employee and towards other debts and dues.
- The plan was placed before the NCLT for approval under Section 30(6) and 31 of the IBC read with Regulation 39 of CIRP Regulations. The NCLT after examining the compliance with aforementioned provisions and the manner of distributions of debts to the respective class of creditors observed that the plan was not in contravention of any existing law as provided under Section 30(2) and approved the Resolution Plan vide order dated November 04, 2020.

Resolution Plan approved for Shree Bhomika International Ltd

- Shree Bhomika International Ltd was admitted into insolvency vide order dated July 11, 2019 by the NCLT, Delhi after an Application for commencement of CIRP was filed by Stressed Asset Stabilization Fund (**SASF**) under the provisions of the IBC.
- Pubic announcement for the collation of claims in terms of Regulation 6(1) of the CIRP Regulations was made on July 17, 2019 and subsequently, the Committee of Creditors of the Corporate Debtor was formed.
- The Appointed Resolution Professional published the Form G inviting the EoI on September 25, 2019, in response to which two Resolution Plans were submitted. In the 4th meeting of the Committee of Creditors held on January 04, 2020, the plan submitted by M/s Commodities Trading offering INR 4.5 Crore was approved by 100% voting share by the Committee. The approved Plan offered INR 4 Crore to the Financial Creditors namely, SASF and IDBI Bank Ltd. and the Operational Creditor Noida SEZ was allotted INR 50 Lacs.
- The amount provided in the Resolution Plan was higher than the Liquidation Value but was less than the Fair Value of the Corporate Debtor.
- The Resolution Applicant in the present case is a Registered Partnership having its works at the Kandla SEZ in Gujarat and is mainly involved in Trading and Warehousing. By way of the Resolution Plan, the Resolution Applicant has proposed infusion of funds and change in composition of the board by taking over the Corporate Debtor.
- The approved Resolution Plan in CP IB No. 324/ND/2019 was placed for approval before the Adjudicating Authority as required under Section 30(6) and Section 31 of the IBC and the same was approved vide order dated October 05, 2020. Along with approval in the order, the Adjudicating Authority also stated that the order of Moratorium passed under Section 14 of the IBC shall cease to have effect from the of passing the order of approval of Resolution Plan.

Resolution of Fourth Dimension Solution Ltd

- Ms Pooja Bahry, the Resolution Professional of Fourth Dimension Ltd., the Corporate Debtor (**Fourth Dimension**), an entity providing solution and services on administration, marketing and IT, placed the approved Resolution Plan by Linkstar Infosys Pvt Ltd (**Linkstar**) and Mr Dhaval Jiterndra Kumar Mistry, the Successful Resolution Applicants, before the NCLT, New Delhi for approval under Section 30(6) and Section 31 of the IBC.
- Fourth Dimension was admitted to insolvency after an Application under Section 7 of the IBC for initiation of CIRP was filed by one of the Financial Creditor i.e. M/s American Express Banking and the same was allowed by the NCLT vide order dated July 25, 2019.
- A Public Announcement in Form A was made on August 08, 2019 whereafter the claims of creditors were collated.
- The Resolution Professional of the Fourth Dimension published Form G on January 15, 2020 inviting EoI. The Resolution Plan by Linkstar and Mr. Mistry was received and the same was placed for consideration and approved by the members of the Committee of Creditors with 100% in the 14th meeting held on April 24, 2020.
- Linkstar and Mr. Mistry in their plan have offered a total amount of INR 12 Crore against the total admitted claims of INR 102.68 Crore. It is pertinent to mention that average fair value of Corporate Debtor was assessed as INR 3.98 Crore and average liquidation value was assessed at INR 2.7 Crore.
- Subsequently, a Performance Bank Guarantee amounting to INR 10 lakhs in compliance of Regulation 36-B(4A) of CIRP Regulations was submitted by the Resolution Applicants.
- A demand of INR 2,30,34,010/- was raised against Fourth Dimension by SEBI vide its Order dated March 17, 2020, the same did not come to effect via an addendum by SEBI to its order dated March 17, 2020 as the moratorium had already come into force under Section 14(1) of the IBC.
- The Resolution Plan for Fourth Dimension was approved after 1 year from the initial order of admission by the NCLT vide order dated September 25, 2020. While approving the approved Resolution Plan by the Committee of Creditors observed that the Linkstar and Mr. Mistry shall obtain all the necessary approvals as may be required under any law for time being in force within one year from the date of approval of the Resolution Plan.



SECTOR FOCUS

ROADS & HIGHWAYS

- India has a total road network of 5.5 million km comprising of national and state highways, urban and rural roads. National highways account for 2% of the total road network and carry over 40% of total traffic. National Highways Authority of India (**NHAI**) has accomplished construction of 3,979 km of national highways in the Financial Year 2019-20. During April to September 2020 itself, despite the lockdown, 3951 km of road network was constructed, and a target of 11,000 km has been set for this fiscal year. Furthermore, the Government of India is planning to expand the national highway network to over 200,000 km and to simultaneously increase the contribution of MSMEs to the Indian economy from 30% of the GDP to 40% in five years.
- The Government has also launched the Bharatmala Pariyojana, which aims to build 66,100 km of economic corridors, border and coastal roads, and expressways to boost the highway network. It is envisaged that the programme will provide increase in the vehicular speed by 20-25% and reduce the supply chain costs by 5-6%.
- India has a well-developed framework for Public-Private-Partnerships (PPP) in the highway sector. Asian Development Bank ranked India at first spot in PPP operational maturity and also designated India as a developed market for PPPs.
- Traditionally, under the public-funded National Highway (NH), the contractors exited the projects upon completion and the entire onus of regular and periodic maintenance including day-to-day operations such as toll collection was on the NHAI. Monetization of public-funded NH roads was seen as a long-term institutional investment opportunity. In 2016, the Government of India authorized the NHAI to monetize public-funded NH projects which were operational and generating toll revenues for the past two years after the Commercial Operations Date (COD) through the Toll Operate Transfer (**TOT**) model. Under the TOT model, the NHAI passes over the toll collection rights, operations and maintenance obligation for a period of thirty years to the private developer against payment of upfront, one-time, lump-sum concession fees quoted by the private developer during the bidding process. This monetization technique requires the approval of the NHAI or any other competent authority in the Ministry of Road Transport and Highways
- It is pertinent to note that India has been quite liberal in inviting FDI in the development of Road and Highway sector. Prior to the relations getting soured between India and China, there were approximately nine Chinese companies in joint ventures with Indian contractors implementing six highway projects worth INR 2,478.32 Crore. Since the souring of Indo-China relations, the Indian Government has decided to ban any kind of participation from Chinese companies in the development of highway projects.
- Although the Road and Highway sector is one of the major contributing sectors to the GDP of India, yet, due the global pandemic, and inordinate delays and disputes with NHAI, there has been a major financial crunch which has severely impacted this sector. Many such companies in this sector have undergone insolvency proceedings, such as:

- *Lanco Hoskote Highway Ltd*. is undergoing the insolvency proceedings after an Application preferred by Edelweiss Asset Reconstruction Company Limited under Section 7 of IBC was admitted by the NCLT Hyderabad Bench vide an order dated October 17, 2019. The matter pertains to an agreement entered into by the Corporate Debtor and NHAI wherein the Corporate Debtor was entrusted with the contract of strengthening and maintaining the existing carriageway at Mulbagal-Hoskote-Bangalore Section of National Highway 95 in the State of Karnataka and widening to 4/6 lanes and maintenance thereof, and in return the Corporate Debtor was given the right to levy and collect fee from vehicles using the said highway. A default to the tune of INR 188,16,05,665/- was committed and the Adjudicating Authority observed that the Financial Creditor had established sanction to the Corporate Debtor and the default.
- *Mahavir Roads & Infrastructure Pvt Ltd* is undergoing CIRP proceedings after an Application preferred by Bank of India under Section 7 of the IBC was admitted by the NCLT Mumbai Bench vide an order dated February 21, 2019. The Financial Creditor had preferred the Application against the Corporate Debtor for a default of INR 1,95,18,66,910.55/-.
- In case of *Dehradun Highways Project Ltd (**DHPL**),* ICICI Bank Ltd filed an Application under Section 7 of the IBC before the NCLT, New Delhi Bench for initiation of CIRP. Interestingly, DHPL had also filed an Application under Section 10 of the IBC before the NCLT, New Delhi Bench for voluntary initiation of CIRP. The NCLT heard the parties and by way of judgment dated September 18, 2020, the NCLT admitted the Section 7 Application filed by ICICI Bank and ordered for initiation of CIRP against DHPL. One of the suspended directors of DHPL has impugned the order of NCLT before the NCLAT and as on date, the Appeal is sub judice before the NCLAT for further consideration. Our team comprising of Mr. Abhirup Dasgupta (Partner) and Mr. Ishaan Duggal (Associate) successfully represented ICICI Bank before the NCLT and are also acting as their counsels before the NCLAT. This is part of Era-Infra group which has several SPVs which are also undergoing insolvency with exposures of more than INR 10,000 Crore.

- The private sector has emerged as a key player in the development of road infrastructure in India. Increased industrial activities, along with increasing number of two and four wheelers have supported the growth in road transport infrastructure projects. The Government's policy to increase private sector participation and include the MSME contribution has proved to be a boon for the infrastructure industry with many private players entering the business through the PPP model. Cumulative FDI in construction development stood at US$ 25.66 Billion between April 2000 and March 2020. The roads sector is likely to account for 18% capital expenditure over FY 2019–25 bringing a positive outlook in the economy and help in uplifting the financial health of the sector.

CONTRIBUTIONS BY:

Abhirup Dasgupta | **Partner**

Faranaaz G Karbhari | **Counsel**

Pratik Ghose | **Partner**

Ishwar Ahuja | **Senior Associate**

Avishek Roy Chowdhury | **Associate**

Ishaan Duggal | **Associate**

Mahafrin Mehta | **Associate**

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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