

Restructuring & Insolvency

Monthly Newsletter

July 2021

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STATUTORY UPDATES

Securities Contracts (Regulation) (Amendment) Rules, 2021

- On June 18, 2021, in exercise of the powers conferred by Section 30 of the Securities Contracts (Regulation) Act, 1956, the Central Government through Ministry of Finance notified the following amendments into the Securities Contracts (Regulation) Rules, 1957 (SCRR):
 - **Amendment in Rule 19 Sub-rule (2) Clause (b) which deals with the requirements with respect to the listing of securities on a recognized stock exchange:**
 - Insertion of the words ‘but less than or equal to one lakh crore rupees’ after the words ‘four thousand crore rupees’ in Sub-Clause (iii)
 - Insertion of Sub-clause (iv) after Sub-clause (iii) and before the provisos of Rule 19 Sub-rule (2) Clause (b), wherein the minimum offer and allotment to public in case of companies with post issue capital at offer price of above INR 1 lakh crore is reduced from 10 % of issue to 5% along with value of INR 5,000 crore
 - The amendment further adds a proviso after Sub-clause (iv) stating that for these companies, the time period to bring the public shareholding up to 25% is increased from 3 years to 5 years
 - Insertion of the words ‘referred to in Clause (b)’ after the words ‘applicant company’ in the third proviso
 - **Amendment in Rule 19A Sub-rule (5) which deals with continuous listing requirements:**
 - A proviso has been inserted which directs that the public shareholding in every listed company should not fall below 5% as a result of implementation of the resolution plan approved under Section 31 of IBC
 - Substitution of the word ‘twelve’ for the word ‘eighteen’ in the proviso of Sub-rule (5) of Rule 19A, which means that if the public shareholding falls below 10 % due to implementation of resolution plan approved under Section 31 of IBC, it should be brought up to 10 % within a period of 12 months instead of the earlier timeline of 18 months (it is to be noted that the time period of 3 years to bring the public shareholding to 25 % in such case remains the same)
- These amendments are a welcome step to boost initial or further listings and are an opportunity for retail investors. The government’s initiatives have eased the listing norms for listed companies with a market capitalization of over INR 1 lakh crore. The amendment with respect to IBC amounts to putting a condition on resolution plans and has been introduced in order to avoid wild speculation in the stock prices of listed companies and protect the investor’s interest.



RECENT JUDGMENTS

Rakesh Kumar Agarwal & Ors v. Devendra P Jain

Order dated June 01, 2021 | Company Appeal (AT) (Insolvency) No. 1034 of 2020

Background facts

- Asis Logistics Ltd (**Corporate Debtor**), filed an Application for initiation of Corporate Insolvency Resolution Process (**CIRP**) under Section 10 of the Insolvency and Bankruptcy Code, 2016 (**IBC**). The NCLT Ahmedabad bench admitted the Application and passed an order to initiate the CIRP of Corporate Debtor. However, due to the failure to receive a Resolution Plan, NCLT, Ahmedabad Bench passed order liquidating the Corporate Debtor on August 28, 2019. Accordingly, Devendra P Jain, the Resolution Professional, was appointed as the Liquidator of the Corporate Debtor.
- During the liquidation process, Rakesh Kumar Agarwal and others (**Appellants**), in the capacity of being the promoters of the Corporate Debtor, submitted a scheme of arrangement under Section 230 of the Companies Act, 2013, and the same was approved by the stakeholders and an application for approval of the scheme was filed before the NCLT.
- The said Application was dismissed as withdrawn in view of Notification 1 dated January 06, 2020 issued by Government of India whereby an amendment was made in Regulation 2B of Insolvency and Bankruptcy Board of India (**IBBI**) (Liquidation Process) Regulations 2016 (**Liquidation Regulations**), by virtue of which a promoter and guarantor, including the Appellants, became ineligible to submit a scheme in the liquidation process of the Corporate Debtor.
- Subsequently, the Government of India vide notification dated June 01, 2020 introduced certain amendment to the Micro, Small and Medium Enterprises Development Act, 2006 (**MSME Act**), whereof the limits for an entity to be classified as MSME was enhanced. Accordingly, the Appellant filed an application seeking permission to propose a scheme and a direction to consider the said scheme in view of the amendment.
- NCLT vide order dated October 15, 2020 (**Impugned Order**) rejected the application on the ground that the Corporate Debtor at such stage cannot take the benefit of being a MSME on basis of retrospective effect of the notification dated June 01, 2020, when the Corporate Debtor did not fall under the criteria of MSME at the time of filing of application under Section 10 of IBC.
- Aggrieved by the Impugned Order, the Appellant filed an Appeal before the National Company Law Appellate Tribunal (**NCLAT**).

¹ Notification No. IBBI/2019-20/GN/REG053

Issue at hand?

- Whether the notification dated June 01, 2020 is applicable retrospectively to the Corporate Debtor which is still under liquidation, thereby making the promoters eligible to file a scheme under Section 230 of the Companies Act, 2013?

Decision of the Tribunal

- NCLAT set aside the Impugned Order and held that the Corporate Debtor fell into the category of MSME in terms of the notification dated June 01, 2020 (Section 7 of the MSME Act) and Section 240A of the IBC. Therefore, the Appellants were considered to be eligible to submit a scheme under Section 230 of the Companies Act.
- While arriving at this decision, NCLAT was of the view that since the liquidation process of the Corporate Debtor remained pending and the notification dated June 01, 2020 was issued during its pendency, the said notification was indeed applicable to the Corporate Debtor.
- NCLAT further referred to the decisions Supreme Court in Swiss Ribbons Pvt Ltd & Anr v. Union of India & Ors² and Kridhan Infrastructure Pvt Ltd (Now Known as Krish Steel and Trading Pvt Ltd) v. Venkatesan Sankaranarayan & Ors³ and reiterated that the liquidation of the Corporate Debtor is only the last resort and as per the preamble of IBC, the main object of the Code is in resolving corporate insolvencies and not the mere recovery of monies due and outstanding.

Our viewpoint

In our opinion, the issue relating to the retrospective implementation of notification dated June 01, 2020 as dealt with in the present Order still seems to be unsettled. The present decision of NCLAT is contrary to the various precedents set out regarding the issue in question. Some of the precedents are as under:

- NCLAT in Harkirat Singh Bedi v. The Oriental Bank of Commerce & Anr. [Company Appeal (AT) (Ins.) No. 40 of 2020] (upheld vide Company Appeal No. 1054 of 2021), held that the Corporate Debtor is ineligible to take benefits of Section 240A of IBC as the date of registration of the Corporate Debtor as MSME was after the CIRP initiation order.
- In Ashish Mohan Gupta v. The Liquidator of Hind Motors India Ltd (In Liquidation [Company Appeal (AT) (Insolvency) No. 875 of 2019] (upheld vide Company Appeal No. 1698/2021), the NCLAT dismissed the appeal filed by the promoter of Corporate Debtor and held that it is not necessary for the bench to pursue Section 230 of the Companies Act, 2013 at the stage of liquidation, the same not being part of procedure of IBC when the Corporate Debtor is in liquidation.

Therefore, in our view, even though the said judgment of the NCLAT seems to fulfil the objects of the IBC, it may have inadvertently taken a contrary view than in the past. This judgment also opens a backdoor entry to the promoters who seek to regain control over the enterprise after losing such control due to initiation of CIRP or liquidation proceedings.

Dwarkadhish Sakhar Karkhana Ltd v. Pankaj Joshi & Anr

Judgment dated June 28, 2021 [Company Appeal (AT)(Insolvency) No. 233 of 2021]

Background facts

- The NCLT, Mumbai vide order dated October 10, 2019 admitted the Application by Canara Bank filed under Section 7 of the IBC, thereby initiating the CIRP of KGS Sugar and Infra Corp Ltd (**Corporate Debtor**). Accordingly, by the admission order, the Interim Resolution Professional (**IRP**) was appointed and thereafter the Resolution Professional was appointed. Thereafter, the Expression of Interest (**Eoi**) was published, wherein the last date for submission of Eoi was February 10, 2020.
- Dwarkadhish Sakhar Karkhana Ltd (**DSKL**), the Appellant, submitted its Eoi on March 12, 2020, but the same was rejected by the Resolution Professional on the grounds of the Eoi being submitted beyond the cut-off date. Upon repeated requests by DSKL, the Resolution Professional placed the Eoi submitted by DSKL and canvassed before the CoC that, for maximization of value of asset of the

² Writ Petition (Civil) No. 99 of 2018

³ Company Appeal (AT) (Insolvency) No. 202 of 2020

Corporate Debtor, it is appropriate to permit DSKL to file EoI. Thus, after deliberation, CoC permitted DSKL to submit EoI.

- Consequently, Gangamai Industries & Construction Ltd (**GICL**), one of the Prospective Resolution Applicant, being aggrieved by the decision of the CoC to accept the EoI of DSKL beyond the cut-off date, filed an application before the NCLT. Thereafter, the NCLT vide order dated March 01, 2021 (**Impugned Order**) allowed the Application filed by GICL and set aside the decision of the CoC to accept the EoI submitted by DSKL beyond the cut-off date.
- Aggrieved by the order dated March 01, 2021, Pankaj Joshi, the Resolution Professional and DSKL filed an Appeal before the NCLAT.

Issues at hand?

- Whether the Adjudicating Authority is vested with the jurisdiction to interfere before a quasi-judicial determination is made under Section 31 of the IBC?
- Whether allowing a party to submit the EoI after the due date is a commercial decision of the CoC and can the same be reviewed by the CoC at any point of time in contravention of Regulation 36-A (6) of the IBBI (Insolvency Process of Corporate Person) Regulations 2016 (**CIRP Regulations**)?

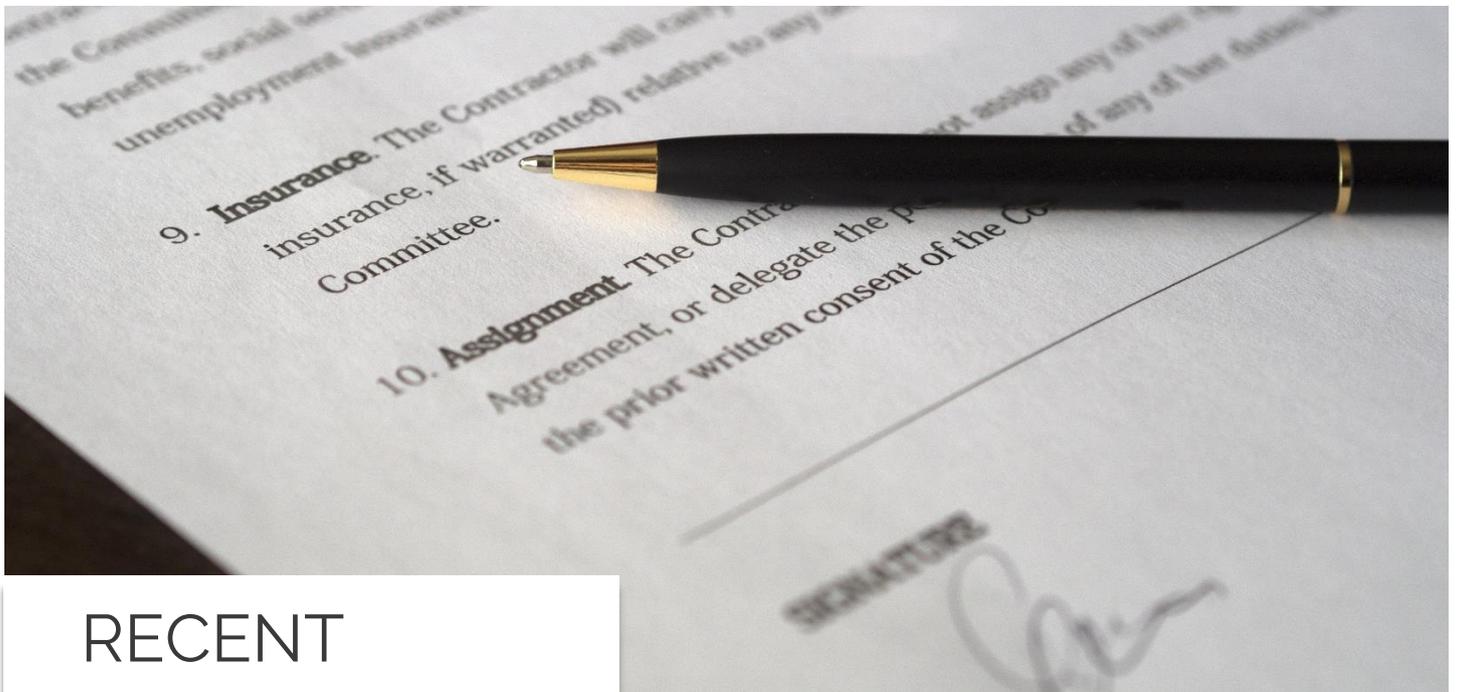
Decision of the Tribunal

- Regarding the issue of the jurisdiction of the NCLT to adjudicate the decision of the CoC in the said matter, the NCLT discussed the scope of intervention in terms of Section 60(5) of the IBC and was of the view that Section 60 (5) (c) empowers to decide 'any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor or Corporate Person under this Code'. Thus, before approval of the Resolution Plan, the NCLT can entertain or dispose of the question of priorities or any question of law or facts, arising out of or in relation to CIRP or Liquidation proceedings. In view thereof, the NCLAT held that the NCLT had complete jurisdiction to adjudicate the issue in question.
- Thereafter, the NCLAT deliberated upon the extent of commercial wisdom of the CoC to accept an EoI after the due date in violation of Regulation 36A(6) of the CIRP Regulations and was of the view that when the CoC approved a Resolution Plan by a vote of not less than 66 % of voting share of the Financial Creditors after considering its feasibility and viability, such decision of CoC is a commercial decision. Thus, the decision taken by the CoC to allow DSKL after due date to file EOI is not a commercial decision.
- Regarding the issue of the power of the CoC to review its own decision at any point of time in contravention of Regulation 36-A (6) of the CIRP Regulations, the NCLAT read the decision of the Supreme Court in *Kalpraj Dharamshi v. Kotak Investment Advisors*⁴ parallelly with the facts and the circumstances of the present case and was of the opinion that that the Resolution Professional did not act in a bona-fide manner and concealed material facts from the CoC. Therefore, the CoC, while reviewing its earlier decision, has not assigned any justifiable reasons for revisiting their earlier decision to reject the EOI and was influenced and misguided by the Resolution Professional. In view of the same, the NCLAT dismissed the appeals filed by the Appellant and held that the decision to revisit its decision and accept the EoI beyond the due date was not a commercial decision.

Our viewpoint

In our view, the decision of the NCLAT reflects upon the mandatory compliance of the Regulation 36A (6) of the CIRP Regulation. The said decision reaffirms that even though the CoC majorly holds the fate of the resolution of a Corporate Debtor, it cannot overstep the boundaries set up by the IBC under the garb of commercial wisdom of the CoC.

⁴ 2021 SCC Online 204- para 157



RECENT DEALS

Takeover of Jet Airways by the Jalan–Kalrock Consortium

- The NCLT, Mumbai Bench, vide an order dated June 22, 2021 approved the Resolution Plan submitted by a consortium of Murari Lal Jalan and Florian Fritsch of Kalrock Capital Partners Ltd, Cayman (**Jalan-Fritsch Consortium**), in the CIRP of Jet Airways (India) Pvt Ltd (**Jet Airways**), the Corporate Debtor. The plan was approved with a majority of 99.22% voting share, almost 2 years after Jet Airways was admitted to insolvency.
- Vide order dated June 20, 2019, the NCLT, Mumbai Bench admitted the Company Petition filed by the Financial Creditor, i.e., State Bank of India representing a total of 26 lenders, under Section 7 of the IBC and ordered for initiation of the CIRP of Jet Airways. Thereafter, the CoC was formed which approved the Resolution Plan submitted by Jalan- Fritsch Consortium by 99.22% voting share in its 17th meeting held on October 17, 2020.
- The plan put forward by Jalan- Fritsch Consortium offers a total cash infusion of INR 1,375 crore out of which INR 600 crore will be invested in Year 1, including INR 350 crore as upfront sum, and it will acquire 89.79% stake in Jet Airways. Further, public shareholders like banks and financial institutions will get a stake of 0.21%, whereas employees of Jet Airways will hold a 0.5% stake in Jet Airways.
- Pertinently, various applications were also filed by the employees and workmen of Jet Airways seeking a copy of the Resolution Plan to raise contentions regarding their dues and other pre-requisite terminal benefits. However, the NCLT was of the view that although the employees are an integral asset of the Corporate Debtor, they still come under the category of Operational Creditors. Therefore, the petitioners were not considered to be eligible to intervene during the process of consideration of the Resolution Plan by the NCLT.
- While approving the plan, NCLT further directed Jalan-Fritsch Consortium to get necessary approvals including permissions for obtaining airport slots, from Director General of Civil Aviation and Ministry of Civil Aviation, Government of India within 90 days.
- The decision of NCLT is a favorable move and a major milestone for Jet Airways and the Successful Resolution Applicant. Meanwhile, a 7-member monitoring committee, including members appointed by the Jalan- Fritsch Consortium and the lenders, is now carrying out the day-to-day operations and management of Jet Airways till the resolution plan proposed by the Jalan-Fritsch consortium is completed.

Takeover of Videocon by Twin Star Technologies

- The CIRP of Videocon Industries, inclusive of 13 group entities, was initiated by a consolidated admission order dated August 08, 2019, passed by NCLT, Mumbai Bench in the petition filed by State Bank of India under Section 7 of the IBC. Pertinently, the Resolution Plan submitted by Twin Star Technologies was approved by the NCLT vide order June 08, 2021.
- A perusal of the plan shows that the fair value of the Corporate Debtors was INR 4069.95 crore whereas the liquidation value was INR 2568.13 crore. Against this, the consolidated resolution amount for 13 companies offered by Twin Star stands at INR 2,962 crore against the admitted claims of INR 64,838 crore. This accounts for only 4.15% of the total outstanding claim and a total haircut of 95.85% to all the creditors. The dissenting creditors are being paid the liquidation value arrived in terms of Section 53 of the IBC.
- In terms of the implementation of the plan, the Resolution Plan envisages the delisting of the shares of the Corporate Debtor and Value Industries Ltd shall be undertaken in accordance with the order of the NCLT read with Regulation 3(3) of the SEBI (Delisting of Equity Shares) Regulations, 2009. This means the stock value of these shares will ultimately become zero.
- The Adjudicating Authority, while observing the major haircut that is being borne by the creditors, suggested and requested both CoC and the Successful Resolution Applicant to increase the pay-out amount to these Operational Creditors, especially MSMEs, as this is the First Group Consolidation Resolution Plan of 13 companies having large number of MSMEs.
- The CIRP of Videocon Industries was the first in the line of 'Group Insolvency' framework and has come to an end almost after 2 years from the date of its initiation.

Resolution of Evo Con Pvt Ltd

- Resolution Process of Evo Con Pvt Ltd (**ECPL**) came to an end vide an order dated June 04, 2021 passed by NCLT, Chennai Bench wherein it approved the Resolution Plan submitted by Eden Garden Residential Owners Association in the Corporate Insolvency Resolution Process of ECPL.
- The said CIRP commenced on May 29, 2019, following an order passed by NCLT, Chennai Bench for admitting Section 7 Application filed against the ECPL. Thereafter, after following the due process, Resolution Plan of Eden Garden Residential Owners Association was approved with 79.06% votes in the 5th meeting of Committee of Creditors held on February 14, 2020.
- The said resolution plan offers a total payment of INR 76.09 crore against the Liquidation Value of INR 27.26 crore.
- This is a positive outcome especially under the current economic contraction.



COMPANIES ADMITTED TO INSOLVENCY IN JUNE 2021

Companies admitted to insolvency

#	Name of Corporate Debtor	NCLT Bench	Industry
1	Intertek Appliances Pvt Ltd	Chandigarh	<u>Manufacturing</u> Involved in manufacturing of electronic household and home appliances
2	KSBL Securities Ltd	New Delhi	<u>Services</u> Involved in business of providing financial consultancy services
3	Aarti Suitings Pvt Ltd	Jaipur	<u>Textile</u> Involved in manufacturing of apparels
4	ADIG Jemtex Pvt Ltd	Jaipur	<u>Textile</u> Involved in manufacturing of textiles and fabrics
5	Vij Agro-Exports Pvt Ltd	Chandigarh	<u>Agri-business</u> Manufacturing of grain mill products, starch and products thereof and animal feed
6	Asterism Pharmaceutical Pvt Ltd	Mumbai	<u>Pharmaceutical</u> Involved in manufacturing of healthcare medicines and pharmaceutical drugs
7	Simova India Lifesciences Pvt Ltd	New Delhi	<u>Healthcare</u> Involved in providing healthcare facilities which primarily includes proactive health and wellness management for all age groups
8	Hariom Rice Mills Pvt Ltd	Mumbai	<u>Trading</u> Involved in end-to-end manufacturing and trading of rice
9	Silventa Ceramic Tiles Ltd	Ahemdabad	<u>Manufacturing</u> Involved in manufacturing and trading of various types of tiles
10	Tuff Tubes (Orissa) Pvt Ltd	Cuttack	<u>Mining</u> Engaged in the business of mining and manufacturing metals
11	Apex Electro Devices Pvt Ltd	New Delhi	<u>Manufacturing</u> Involved in wholesale business of mixers, grinders, ceiling fans etc.

12	UCAL Auto Pvt Ltd	Chennai	Trading Engaged in trading of oil pumps, manual & auto fuel cocks, auto chain tensioners etc.
13	Chowdhry Rubber & Chemical Pvt Ltd	New Delhi	Manufacturing Involved production and export of pigment powder, stearic acid, magnesium oxide, synthetic rubber chemical, zinc oxide, and other chemicals
14	Dalmia Ploymers LLP	New Delhi	Trading Engaged in wholesaling, trading, importing, exporting, buyer-individual and supplying a wide range of Synthetic Rubber, Polyethylene Material, Silane Coupling Agent, Titanium etc.

Companies directed to be liquidated

#	Name of Corporate Debtor	NCLT Bench	Industry
1	V.A.M Resorts and Hotels Pvt Ltd	Allahabad	Hospitality Involved in the business of provision of short – stay accommodation such as hotels, camping sites etc.
2	Lanco Vidarbha Thermal Power Ltd	Hyderabad	EPC Operates in domains of EPC, Power, Solar, Natural Resources and Infrastructure business
3	Churakulam Tea Estate Pvt Ltd	Kochi	Agriculture Engaged in the agriculture business of tea leaves
4	Moonriver Resorts Pvt Ltd	Kochi	Hospitality Involved in the business of provision of short – stay accommodation such as hotels, camping sites etc.
5	Ajit Automative Services Pvt Ltd	New Delhi	Automobiles Involved in business of automotive sales, servicing and repair work etc.
6	UM Lohia Two Wheelers Pvt Ltd	New Delhi	Automobiles Involved the business manufacturing and trading of two-wheelers
7	Fusible Metals Pvt Ltd	New Delhi	Mining Involved in the business of extraction of coals and manufacturing its products thereof
8	Noble Publicity Service Pvt Ltd	Mumbai	Services Involved in the business of providing advertisement and PR services
9	Atlasgold Townships (India) Pvt Ltd	Kochi	Real Estate Involved in the real estate business
10	Smile Care Multi Speciality Hospitals India Pvt Ltd	Hyderabad	Healthcare Involved in the business of healthcare facilities including but not limited to dental care

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