

# Restructuring & Insolvency

## Monthly Newsletter

**October 2021**

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# STATUTORY UPDATES

## Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021

- 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) on September 30, 2021 notified the following amendments into the IBBI (Liquidation Process) Regulations, 2016 (**Principal Regulations**).
- Regulation 31A of the Principal Regulations provides for formation of a consultation committee known as Stakeholders' Consultation Committee (SCC), which has representation from secured Financial Creditors, unsecured Financial Creditors, workmen and employees, government, other operational creditors, and shareholder/partners to advise the Liquidator on matters relating to sale. In terms of the present amendment, following substitutions have been made in Regulation 31 A of the Principal Regulations:
  - The scope of the SCC has been increased since the sub-Regulation (1) of Regulation 31A of the Principal Regulation limited the scope of the SCC only in the matters pertaining to sale of assets as mentioned under Regulation 32 of the Principal Regulations. However, in terms of the present amendment, the sub-Regulation (1) of the Principal Regulations has been substituted, namely:

*“(1) The liquidator shall constitute a consultation committee within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under Regulation 31, to advise him on matters relating to-*

*(a) appointment of professionals and their remuneration under Regulation 7*

*(b) sale under Regulation 32, including manner of sale, pre-bid qualifications, reserve price, amount of earnest money deposit, and marketing strategy:*

*Provided that the decision(s) taken by the liquidator prior to the constitution of consultation committee shall be placed before the consultation committee for information in its first meeting.”*
  - Further, sub-Regulation (4) has also been substituted, in terms of which, in case the stakeholders fail to nominate their representative for the SCC, the same shall be selected by a majority of voting share of the class present and voting.
  - Lastly, in terms of the amendment in sub-Regulation (10), whenever the Liquidator rejects the suggestion of the SCC, the same shall be recorded in writing and be mentioned in the next progress report.
- The participation of large number of buyers in the process is key to better realization of value for the stakeholders. Keeping this in view, a proviso to Clause (3) of Para 1 of

Schedule I of the Principal Regulations has been added, in terms of which a Liquidator shall not require payment of any non-refundable deposit or fee for participation in an auction. It also provides that the earnest money deposit shall not exceed 10% of the reserve price in an auction.

- Also, with a view to improve visibility for the liquidation assets, the words 'issue of public notice' in sub-Clause (5) of Para1 of Schedule I have been substituted with 'make a public announcement'. The IBBI has made available an electronic platform at [www.ibbi.gov.in](http://www.ibbi.gov.in) for hosting public notices of auctions of liquidation assets of ongoing liquidation processes.
- Further, for increased transparency and accountability, a new clause 11A has been inserted that provide for the Liquidator to intimate the reasons for rejection of the highest bid to the highest bidder and report the same in the next progress report.

## Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2016

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- In exercise of the powers conferred by Clause (t) of Sub-Section (1) of Section 196 read with Section 240 of IBC, IBBI on September 30, 2021 notified the following amendments (third amendment) into the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations**).
- To streamline the power and the statutory role of Committee of Creditors (**CoC**), the IBBI, by way of inserting sub-Regulation (1A) under Regulation 17 of the CIRP Regulation, has provided that in discharge of its functions and exercise powers under the IBC and regulations in respect of Corporate Insolvency Resolution Process, the CoC and its members shall be in compliance with the guidelines as and when the same may be issued by the IBBI.
- Further, in order to comply with the cardinal principle of 'value maximization' enshrined under the IBC, the IBBI has given relaxation to make changes in the invitation of Expression of Interest. However, such modification shall be allowed to be made only once. This will not only ensure the value maximization but also adherence of timeline envisaged under the IBC. Additionally, by way of insertion of sub-Regulation (1B) to Regulation 39 of the CIRP Regulation, the CoC has been given the following directions pertaining to the consideration of the Resolution Plans submitted by the Resolution Applicants:
  - The committee shall not consider any Resolution Plan
    - Received after the time as specified by the committee under Regulation 36B
    - Received from a person who does not appear in the final list of prospective resolution applicants
    - Does not comply with the provisions of sub-Section (2) of Section 30 and sub-Regulation (1)



# RECENT JUDGMENTS

## Ebix Singapore Private Ltd. v. Committee of Creditors of Educomp Solutions Ltd & Anr

Judgment dated September 13, 2021 [Civil Appeal No. 3224 of 2020 along with other Civil Appeals]

### Background facts

- Educomp Solutions Ltd. (**Corporate Debtor**) filed an Application for initiation of Corporate Insolvency Resolution Process (**CIRP**) under Section 10 of the IBC. The NCLT admitted the Application and passed an order to initiate the CIRP of Corporate Debtor.
- Subsequently, Resolution Plans were invited, and the plan submitted by Ebix Corporation Singapore Private Ltd. (**Ebix**) received 74.16% vote of the CoC, falling short of the 75% requirement stipulated under Section 30(4) of the IBC as it stood then. However, a member who had earlier abstained from voting, later voted in favor of Ebix's Resolution Plan, and Ebix was declared as the successful resolution applicant of the Corporate Debtor and its Resolution Plan was approved by the CoC.
- Pursuant to such approval and during the pendency of the Resolution Plan Approval Application before the NCLT filed under Section 31 of the IBC, Ebix filed several Withdrawal Applications under Section 60 (5) of the IBC before the NCLT to withdraw its Resolution Plan inter-alia on account of inordinate delay in the approval of the Resolution Plan by the NCLT beyond the period of 6 months envisaged under Request for Resolution Plan (**RFRP**) and pending/ongoing SFIO and CBI investigations into the management and affairs of the Corporate Debtor.
- The first and the second Withdrawal Application filed by Ebix was dismissed by the NCLT. However, the NCLT vide Order dated January 02, 2020 allowed the third Withdrawal Application filed by Ebix and held that the Resolution Plan becomes binding only after it is approved by the NCLT, and an unwilling successful resolution applicant could not be expected to effectively implement the Resolution Plan. Consequently, NCLT vide Order dated January 03, 2020 dismissed the Resolution Plan Approval Application filed by the RP being infructuous.
- Being aggrieved by the NCLT's decision, the CoC of the Corporate Debtor preferred an Appeal before the NCLAT, which vide its Order dated July 29, 2020 (**Impugned Order**) set aside the NCLT's Order permitting withdrawal of the Resolution Plan and held that after approval of the Resolution Plan by the CoC, the NCLT had no jurisdiction to permit its withdrawal and the third Withdrawal Application was barred by the res judicata.



- Being aggrieved by the Impugned Order, Ebix along with two other appellants filed Appeals before the SC.

### Issues at hand?

- Whether a Resolution Plan is a contract?
- Whether a resolution applicant is allowed to withdraw or modify its Resolution Plan after it has been approved by the CoC but pending approval by NCLT?
- Whether NCLTs or NCLAT can compel the CoC to re-negotiate with a successful resolution applicant?

### Decision of the Court

- Prior to deciding the present Appeal, SC analyzed the objective and the intent of the legislature behind the enactment of IBC i.e., to inter alia maximize the value of assets of all persons and balance the interest of all stakeholders. A reading together of the UNCITRAL Guide and the BLRC Report clarifies that the procedure laid down for the insolvency process is critical for allocating economic coordination between the parties and produces substantive rights and obligations.
- Thereafter, SC referred to the NCLTs residuary power under Section 60(5)(c) of the IBC and NCLT's inherent power under Rule 11 of the NCLT Rules, 2016 and noted that any judicial creation of procedural or substantive rights, which is not envisaged by the legislature or goes against the objectives it seeks to further, may potentially alter the delicate coordination that is designed by the IBC framework and have grave implications.
- Regarding the first issue, SC carefully examined the legal nature of the CoC approved Resolution Plan and arrived at the conclusion that a Resolution Plan cannot be construed as pure contract or statutory contract under the realm of the Indian Contract Act, 1872 in the period intervening its acceptance by the CoC and the approval by the NCLT. SC observed that certain stages of the CIRP resemble the stages involved in the formation of a contract; however, the Resolution Plans are finalized based on the commercial negotiations which are completely governed by IBC. Accordingly, SC held that in the absence of any specific provision in the IBC or the regulations and the lack of clarity in the BLRC report characterizing the nature of the CoC approved Resolution Plan as a contract, the CoC approved Resolution Plans will not be governed by the Indian Contract Act, 1872 and common law principles governing contracts, save and except for the specific prohibitions and deeming fictions under the IBC.
- SC laid emphasis on the strict timelines envisaged under the IBC for completion of the CIRP in a time bound manner and reiterated its decision in the case of CoC of Essar Steel India Ltd. v. Satish Kumar Gupta & Ors<sup>1</sup>, wherein it was held that the statutory period of 330 days for completion of the CIRP may be extended only in exceptional circumstances. SC further observed that any such extensions must only be in cases where the CIRP is at near conclusion and serves the object of the IBC.
- Regarding the second issue, SC took note of Section 12A of IBC read with Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which allows the applications admitted under Sections 7, 9 or 10 to be withdrawn, subject to the approval of CoC with atleast 90% of the voting share. However, it was observed that there is no such provision in the IBC giving a similar right to a resolution applicant. SC referred to the case of Maharashtra Seamless v. Padmanabhan Venkatesh<sup>2</sup> wherein SC denied such an application of withdrawal by a resolution applicant. Accordingly, SC held that the resolution applicant cannot propose to withdraw or modify the Resolution Plan presented by himself, negotiated, agreed upon and approved by the CoC.
- Thereafter, SC deliberated upon the binding character of the Resolution Plan and held that negotiations between a resolution applicant and the CoC come to an end after the CoC's approval of the Resolution Plan. SC placed reliance on the decision of Committee of Creditors Amtek Auto Ltd. through Corporation Bank v. Dinkar T Venkatasubramanian & Ors<sup>3</sup> wherein SC held that there was no scope for negotiations

### Our viewpoint

In our view, this judgment of SC provides much needed clarity with respect to the legal status and nature of the CoC approved Resolution Plans and its withdrawal during the intervening period when a plan is pending approval of the NCLT. If at all the withdrawal of Resolution Plans was permitted, it would have added additional rounds of negotiation, discussions and approvals, resulting in significant delays and costs. SC has re-emphasized that the speed of resolution as contemplated under the IBC is sacrosanct and directed the NCLTs/NCLAT to strictly adhere to the timelines stipulated under the IBC, which would boost the confidence of the potential resolution applicants and keep the current insolvency regime effective and result oriented. However, the SC has left the doors open for the legislature to recognize the concept of withdrawals or modifications to a Resolution Plan after it has been submitted to the NCLT.

<sup>1</sup> (2020) 8 SCC 531

<sup>2</sup> (2020) 11 SCC 467

<sup>3</sup> (2021) 4 SCC 457

between the parties once the Resolution Plan has been approved by the CoC. Further, SC clarified that the NCLT has limited jurisdiction to confirm or deny the legal validity of a CoC approved Resolution Plan in terms of Section 30(2) of the IBC and if the requirements prescribed therein are satisfied, the NCLT must confirm the plan as approved by the CoC. Consequently, the NCLAT's scope of scrutiny also gets defined.

- Furthermore, SC clarified that the IBC does not recognize walk away conditions under clauses of Resolution Plans and the Resolution Plans which contains conditions for withdrawal or re-negotiation including material adverse event clause, may be viewed as not being viable.
- Regarding the third issue, SC emphasized upon the commercial wisdom of the CoC and held that the NCLT under Section 31(2) of the IBC can only examine the validity of the plan and either approve or reject the plan' however, it cannot compel CoC to negotiate further with a successful resolution applicant. Further, SC held that the residual powers of the NCLT under the IBC cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency.
- In view of the above, SC dismissed the Appeal filed by Ebix and Seroxo Lighting Industries Private Ltd. However, with respect to the Appeal filed by Kundan Care Products Ltd., the SC exercised its powers under Article 142 of the Constitution of India and granted a one-time relief of modification to the Resolution Plan.

## National Spot Exchange Ltd v. Mr. Anil Kohli, Resolution Professional for Dunar Foods Ltd

Judgment dated September 14, 2021 [Civil Appeal No. 6187 of 2019]

### Background facts

- State Bank of India filed an Application under Section 7 of the IBC for initiating Corporate Insolvency Resolution Process (**CIRP**) against Dunar Foods Ltd. (**Corporate Debtor**) on the ground that Corporate Debtor had taken credit limits by hypothecating the commodities kept in the warehouses of the National Spot Exchange Ltd. (**NSEL**). Accordingly, the IRP was appointed, and claims were invited by the then IRP.
- Thereafter, NSEL submitted its claim in Form-F basis the decree passed by the Hon'ble High Court of Bombay in favor of NSEL and against PD Agro Processors Pvt. Ltd. (**PD Agro**), an alleged sister concern of the Corporate Debtor. This decree was passed in a money suit filed by NSEL before the Hon'ble High Court of Bombay in which the court restrained PD Agro from alienating its assets. After investigation on basis of the FIR filed, the Directorate of Enforcement (**ED**) revealed that PD Agro had siphoned off funds to the tune of INR 455 crore in the year 2011-12 and INR 289 crore in the year 2012-13 to the Corporate Debtor. On basis of the ED report and other circumstances, the Hon'ble High Court of Bombay passed a decree in favor of the NSEL amounting to INR 633,66,98,350.40 with 9% interest p.a. However, the claim was rejected by the IRP on the grounds that no privity of contract existed between NSEL and the Corporate Debtor.
- Subsequently, NSEL challenged the rejection of its claim before the NCLT, which vide its Order dated March 06, 2019 dismissed the application and affirmed the decision of the IRP.
- Being aggrieved by the NCLT's Order, NSEL filed an Appeal before the NCLAT but the same was delayed by 44 days above and beyond the maximum period of 45 days (30 days + 15 days) prescribed in Section 61(2) of the IBC. NCLAT vide Order dated July 05, 2019 dismissed NSEL's Appeal on the ground that NCLAT had no jurisdiction to condone the delay beyond 15 days and therefore, the Appeal was barred by limitation.
- Aggrieved by the decision of NCLAT, NSEL filed an Appeal before the SC.

### Issue at hand?

- Whether the NCLAT has the power to condone a delay beyond 15 days under Section 61(2) of the IBC?

### Decision of the Court

- At the outset, SC noted that the limitation prescribed to prefer an Appeal under Section 61(2) of the IBC was 30 days. However, the proviso to Section 61(2) provides that the NCLAT may allow an Appeal after the expiry of the said period of 30 days

provided there was a sufficient cause for not filing the Appeal, but such period shall not exceed 15 days. Therefore, the NCLAT had no jurisdiction at all to condone the delay in excess of 15 days from the period of 30 days.

- SC took note that NSEL applied for the certified copy of the NCLT order after a delay of 34 days, which is beyond the prescribed limitation period of 30 days. Further, SC observed that since the Appeal was filed by NSEL before NCLAT after a delay of 44 days, the NCLAT rightly refused to condone the delay which was beyond the period of 15 days from the completion of 30 days, i.e., 44 days. Hence, SC held that the NCLAT did not commit any error in not condoning the delay of 44 days.
- Thereafter, SC placed reliance to the judgment given in the matter of Union of India v. Popular Construction Co<sup>4</sup> and New India Assurance Company Ltd. v. Hilli Multipurpose Cold Storage Private Ltd<sup>5</sup>, wherein the Court held that where the special act provides for a specific limitation period, there would be no power to condone such a delay under Limitation Act.
- SC then referred to the decision in the case of Popat Bahiru Goverdhane v. Special Land Acquisition Officer<sup>6</sup> wherein it was observed that while the law of limitation may adversely affect a particular party, the Court must apply and enforce it strictly if the statute so prescribes and the Courts did not possess the power to extend the limitation period on equitable grounds. SC also referred to the decision in Oil & Natural Gas Corporation Ltd. v. Gujarat Electricity Transmission Corporation Ltd.<sup>7</sup> wherein a delay of 120 days beyond the prescribed limitation in the Electricity Act was not condoned by the Appellate Tribunal. Accordingly, SC held that the delay could not be condoned by using its powers under Article 142 of the Constitution of India as it would be in direct contravention of the law to do so as the limitation is itself provided in the statute.
- In view of the above, considering that Section 61(2) of IBC expressly provides for an extension 15 days beyond the 30-day limit, SC dismissed the Appeal.

### Our viewpoint

This judgment reflects upon the mandatory compliance of limitation contemplated under Section 61(2) of IBC for preferring an Appeal before NCLAT and brings clarity with respect to condonation of delay. In our view, this decision promotes one of salutary objectives of IBC, i.e., bringing efficient resolution in a time-bound manner, and the parties will now be more cautious in avoiding undue delays and following the process under IBC in a timely manner.

## Anjali Rathi and Ors v. Today Homes & Infrastructure Pvt Ltd and Ors

Judgment dated September 08, 2021 (SLP (C) No. 12150 of 2019, Civil Appeal Nos. 5231-38 of 2019 and SLP (C) Diary No. 45043 of 2019)

### Background facts

- Anjali Rathi and 10 others (**Petitioners**) entered into homebuyer agreements with Today Homes & Infrastructure Pvt. Ltd. (**Respondent/Corporate Debtor**), which envisaged that the possession of the apartments would be delivered within a period of 36 months. However, the Respondent abandoned the project and, as a result, the Petitioners instituted proceedings against the Respondent before the National Consumer Dispute Redressal Commission (**NCDRC**) seeking refund of their investment with interest.
- Thereafter, NCDRC allowed the Petitioners claim and directed the first Respondent to refund the principal amount along with interest to the Petitioners. In the execution proceedings instituted by the Petitioners, NCDRC required the personal presence of the Managing Director of the Respondent. Against this, the Respondent approached the Delhi High Court which directed that no coercive steps could be taken against the Managing Director of the Respondent. Challenging this Order of the Delhi High Court, the home buyers approached the SC.
- Subsequently, NCDRC passed an order in the execution proceedings, directing taking into custody of the Managing Director of the Respondent and attachment of properties, subject to the Delhi High Court's final decision. Being aggrieved by the final decision of NCDRC, the Petitioners preferred Appeals before the SC.

In the meantime, an Operational Creditor filed an application for initiation of Corporate Insolvency Resolution Process (**CIRP**) against the Respondent under Section

<sup>4</sup> (2001) 8 SCC 470

<sup>5</sup> (2020) 5 SCC 757

<sup>6</sup> (2013) 10 SCC 765

<sup>7</sup> AIR 2017 SC 1352

9 of the IBC. The NCLT admitted the application, following which the CIRP was initiated, and a moratorium was declared under Section 14 of the IBC.

- Thereafter, the Petitioners participated in the proceedings before the RP and CoC. The CoC approved the Resolution Plan submitted by the consortium of homebuyers, and the proceedings were pending before the NCLT awaiting further approval under Section 31(1) of the IBC.
- Being aggrieved that a direction should be made to attach the personal properties of the promoters given the provisions contained in the Resolution Plan, the Petitioners filed Appeals before the SC.

### Issue at hand?

- Whether the moratorium under Section 14 of the IBC applies to promoters/directors of a Corporate Debtor?

### Decision of the Court

- At the outset, SC observed that the Resolution Plan was pending before the NCLT for approval under Section 31(1) of the IBC. Hence, it was held that while the Resolution Plan was awaiting approval, it would not be appropriate for the SC to issue a direction allowing the personal properties of the promoters of the Corporate Debtor to be attached. Accordingly, the SC directed the NCLT to dispose of the application for approval within six weeks of the receipt of a certified copy of the present Order.
- SC further held that since the moratorium under Section 14 of the IBC was declared in respect of the Corporate Debtor, no new proceedings could be undertaken or pending proceedings could be continued against the Corporate Debtor. However, SC clarified that the Petitioners reserved the right to initiate proceedings against the promoters of the Corporate Debtor, even though a moratorium had been declared under Section 14 of the IBC.
- SC placed its reliance on *P. Mohanraj v. Shah Bros. Ispat (P) Ltd*<sup>8</sup>, wherein it was clarified that the moratorium under Section 14 of the IBC was only in relation to the corporate debtor and not in respect of its directors/management, against whom the proceedings could continue. However, given that the Resolution Plan in the present case is still pending before the NCLT and did not attain finality, SC could not issue such a direction relying on the Resolution Plan.
- Furthermore, SC granted liberty to the Petitioners to take recourse to the remedies available in law subsequent to the decision of the NCLT on the approval of the Resolution Plan under Section 31(1) of the IBC, and subject to the consequences thereafter.

### Our viewpoint

The SC's judgment that the moratorium imposed under Section 14 of the IBC is applicable against the Corporate Debtor only and not against its promoters, is cardinal as it fulfils the objectives of Section 14 of the IBC. This essentially means that when a Corporate Debtor is undergoing CIRP, all litigations against it will be stayed; however, the proceedings will continue against its directors/management. This decision has rightly reiterated the law laid down in *P. Mohanraj* case and held that Petitioners would not be prevented from initiating proceedings against the promoters of the Corporate Debtor. In our opinion, this decision will benefit the aggrieved homebuyers to prosecute actions against the promoters/directors.

## Mr. Jayesh N. Sanghrajka v. The Monitoring Agency nominated by the CoC of Ariisto Developers Pvt Ltd

Judgment dated September 20, 2021 in Company Appeal (AT) (Insolvency) No. 392 of 2021.

### Background facts

- The Corporate Insolvency Resolution Process (CIRP) of Ariisto Developers Pvt Ltd, the Corporate Debtor, was initiated vide order dated November 20, 2018. Whereafter the formation of the CoC, Mr. Jayesh N. Sanghrajka, the Applicant, was appointed as the Resolution Professional of the Corporate Debtor. During the CIRP, various plans were received and finally the CoC approved the Resolution Plan submitted by Prestige Estates Projects Ltd.
- The Applicant thereafter filed an Application for approval of Resolution Plan in terms of Sections 30(6) and 31 of IBC. The National Company Law Tribunal while approving the Resolution Plan disallowed the 'Success Fee' of INR 3 crore that was to be disbursed to the Resolution Professional.
- Aggrieved by the disallowance by the NCLT, the Applicant filed an Appeal before the National Company Law Appellate Tribunal (NCLAT).

### Issue at hand?

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<sup>8</sup> (2021) 6 SCC 258



- Can fee for successful resolution of the Corporate Debtor i.e., 'Success Fee' be granted to the Resolution Professional upon the resolution of a Corporate Debtor? What is reasonable standard of such fee?

### Decision of the Tribunal

- The NCLAT upheld the decision of the NCLT and observed that 'Success Fee' is more in the nature of contingency and speculative, it is not part of the provisions of the IBC and the Regulations and the same is not chargeable. While arriving at the said decision, the NCLAT relied upon the submissions made by the appointed Amicus Curiae wherein the extent of application of Circular dated June 12, 2018 issued by the IBBI regarding the 'Fee and other Expenses incurred for Corporate Insolvency Resolution Process' was discussed.
- It was also argued that the NCLT could not have interfered with the commercial decision of the CoC regarding CIRP costs which were made part of the Resolution Plan. To this, the NCLAT stated that in the IBC and the Regulations, there is no express provision for grant of success fee; however, the Resolution Professional can charge remuneration only in a transparent manner and the remuneration should be a 'reasonable reflection' of the work and should not be inconsistent with the Regulations. The quantum of fee can be fixed by the CoC, but it would be subject to scrutiny by the NCLT as what reasonable fee, is context specific and it is not part of the commercial decision of the CoC. The CoC exercised commercial decision with regard to Resolution Plan which is required to be approved and although CIRP Costs are required to be paid on priority, the reasonableness of fee is not part of commercial decision.
- The NCLAT thereafter discussed the extent of powers of IBBI in terms of Section 196 of the IBC in consonance with Regulation 34A of the IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016, particularly with regard to CIRP Costs. The NCLAT was of the opinion that by pushing in a big amount at last moment in the name of success fee and making it part of CIRP costs at the time of approval of the Resolution Plan does not make the same a commercial decision of the CoC.
- Lastly, the NCLAT was of the opinion that fee payable to IRP/RP have been made part of CIRP costs so as to safeguard interest of the IRP/RP. Section 30(2) provides that the Resolution Plan should provide for payment of Insolvency Resolution Process costs in a manner specified by the Board in priority to the payment of other debts of the Corporate Debtor. This is regarding protection is to the CIRP costs validly incurred. However, the interest of IRP/RP cannot be equated with the interest of the Corporate Debtor and other stakeholders, creditors. The fee charged by the Resolution Professional cannot be disproportionate to eat into the percentage of other claimants of the Corporate Debtor.
- Therefore, the Appeal by the Resolution Professional was rejected.

### Our viewpoint

This decision is important from the viewpoint of keeping a track on the fees charged by the Resolution Professionals. In many cases, the Resolution Professionals charge exorbitant amount of fees in comparison to the amount realized by the stakeholders of the Corporate Debtor. The NCLAT by approving the disallowance of success fees of the Resolution Professional, laid down the extent of power of NCLT to interfere in the disbursement of costs approved in a Resolution Plan.

## Rajendra Narottamdas Sheth & Anr v. Chandra Prakash Jain & Anr

Judgment dated September 30, 2021 [Civil Appeal No. 4222 of 2020]

### Background facts

- M/s R.K Infratel Ltd, the Corporate Debtor, approached the Union Bank of India (UBI), the Respondent Bank for sanctioning of term loans of INR 4.5 Crores and INR 3.5 Crores respectively. Due to the Non-Payment of the term loans, the Corporate Debtor's account was declared as a Non-Performing Asset (NPA).
- Subsequently, UBI filed an Application under Section 19 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 before the DRT and also simultaneously filed an Application for initiation of CIRP under Section 7 of the IBC against the Corporate Debtor. The NCLT vide order dated June 01, 2020 passed an order for initiation of CIRP of the Corporate Debtor (**Admission Order**).
- Aggrieved by the Admission Order the Corporate Debtor filed an Appeal before the NCLAT contending that the Application filed by the UBI was barred by limitation and Section 18 and 19 of the limitation Act, 1963 are not applicable. It was also argued that the power of attorney in favor of the individual who has signed the application under Section 7 of the IBC had been granted prior to the IBC coming into force without any specific authorization to initiate proceedings under the IBC, and therefore, the application was not maintainable

- The NCLAT after examining the aforementioned contentions rejected the Appeal filed by the Corporate Debtor. Consequently, by way of the present Appeal, the Corporate Debtor approached the Supreme Court against the decision of the NCLAT.

### Issues at hand?

- Whether the Application filed by a power of attorney holder under Section 7 of the IBC is maintainable?
- Whether the Application filed by UBI was barred by limitation?

### Decision of the Court

- With regard to the maintainability of the Application filed under Section 7 of the IBC, particularly in terms of the extent of the power of attorney of the authorized signatory, the Supreme Court discussed the decision of the NCLAT in Palogix Infrastructure Private Ltd. v. ICICI Bank Ltd<sup>9</sup>. It was discussed that in case such power of attorney provides a general authorization given to an officer of the Financial Creditor by means of a power of attorney, this would not disentitle such officer to act as the authorized representative of the Financial Creditor while filing an application under Section 7 of the IBC. Hence, in the present case, since the person filing the application under Section 7 had been given general authorization by the Bank with respect to all the business and affairs of the Bank, including commencement of legal proceedings, therefore, the objection of the Appellants on the maintainability of the application was found untenable.
- With regard to the maintainability of the Application on the ground that the Application is barred by limitation in terms of Sections 18 & 19 of the IBC, the Supreme Court took in account the decision passed by it in Asset Reconstruction Company (India) Ltd. v. Bishal Jaiswal & Anr<sup>10</sup> and Dena Bank v. C. Shivakumar Reddy & Anr<sup>11</sup> and held that the burden of prima facie proving occurrence of the default and that the application filed under Section 7 of the IBC is within the period of limitation, is entirely on the Financial Creditor. With regard to the facts of the case in hand, the Court was of the opinion that the materials placed on record by the UBI were sufficient enough to provide that the application filed under Section 7 was not barred by limitation.

### Our viewpoint

This decision of the Supreme Court is of prime importance with regard to recognizing the extent of power of a 'Power of Attorney' holder who is filing an application for initiation of CIRP. By discussing the extent of Power of Attorney in filing a Section 7 application in consonance with the decision of NCLAT in *Palogix Infrastructure Private Ltd. v. ICICI Bank Ltd.*, the Supreme Court has upheld the decision taken by NCLAT regarding the general authorization granted in a Power of Attorney.

<sup>9</sup> 2017 SCC Online NCLAT 266

<sup>10</sup> Civil Appeal No. 323 of 2021

<sup>11</sup> 2021 SCC Online SC 543



## RECENT DEALS

### Resolution of Fedders Electric and Engineering Ltd

The Resolution Professional (Mr. Ashok Kumar Gulla, RB SA Advisors) was represented by HSA team comprising of **Abhirup Dasgupta** (Partner), **Ishaan Duggal** (Senior Associate) and **Bhawana Sharma** (Associate).

- The NCLT, Allahabad Bench, vide an order dated October 06, 2021 approved the Resolution Plan submitted by IM+ Capitals Ltd., the Successful Resolution Applicant, in the CIRP of Fedders Electric and Engineering Ltd (**FEEL**), the Corporate Debtor.
- Vide order dated August 14, 2019 the NCLT, Allahabad Bench, admitted the Company Petition filed by State Bank of India under Section 7 of the IBC and ordered for initiation of the CIRP of FEEL. Mr. Ashok Kumar Gulla of RB SA Advisors was appointed as the IRP and thereafter confirmed the Resolution Professional.
- The Resolution Professional issued Form-G inviting Eols from Prospective Resolution Applicants. Pursuant to the public announcement, Eols and Resolution Plans were received from various Prospective Resolution Applicants. However, before the CoC could approve any Resolution Plan, all the Resolution Plans were withdrawn by the Prospective Resolution Applicants.
- Thereafter, the CoC of FEEL was of the opinion that since liquidating the company would have an adverse effect upon all stakeholders, therefore, time was sought to re-issue form G for invitation of fresh Eols and seek Resolution Plans for the successful resolution of FEEL.
- A total 12 of Eol were received out of which 4 Prospective Resolution Applicant submitted the Resolution Plans. After due discussion and deliberation, the Resolution Plan received from IM+ Plus Capitals Ltd. was approved with 74.61% Voting share by the CoC.
- A perusal of the Resolution Plan shows that the term of the plan is distributed over a period of 150days from the date of approval by the NCLT. The Resolution Plan provides for a total payment of INR 96.50 crore against an admitted debt of INR 1100 crore. Additionally, the Plan also proposes to reduce the current value of the existing equity and preference share to NIL and thereafter infuse fresh share capital into Corporate Debtor to the tune of INR 30 crore by way of subscription of Equity Shares at face value and/or by way of infusion of debt.



# COMPANIES ADMITTED TO INSOLVENCY IN SEPTEMBER 2021

## Companies admitted to insolvency

#	Name of Corporate Debtor	NCLT Bench	Industry
1	Al Tabarak Frozen Foods Private Ltd.	New Delhi	<b>Trading</b> The company is involved in the export of frozen meat
2	Archon Engicon Ltd.	Ahmedabad	<b>Services</b> The company is engaged in the business of providing EPC and turnkey solutions in the field of Power Transmission. It is also involved in manufacturing of Solar panel module structure Wind Energy Towers
3	Bilpower Ltd.	Mumbai	<b>Manufacturing</b> The company is involved in the business of manufacturing electrical power equipments such as market transformers, electrical laminations and stamping equipments
4	Chandra Net Ltd.	Ahmedabad	<b>Services</b> Chandra Net Ltd. is a Service Provider of telecom infrastructure solutions, telecom systems & internet services
5	Color Home Developers Private Ltd.	Chennai	<b>Real Estate</b> The company has specialization in designing, planning and execution of residential apartments and commercial projects
6	EAP Infrastructures Private Ltd.	Chennai	<b>Real Estate</b> The company is a real estate developer
7	GCCL Infrastructure & Projects Ltd.	Ahmedabad	<b>Real Estate</b> GCCL infrastructure and Projects Ltd. is engaged in real estate development with a wide portfolio of commercial and residential projects in Gujarat
8	Jai Bharat Fabrics Mills Ltd.	Ahmedabad	<b>Textile</b> The company is involved in the business of dying and printing of fabrics
9	OCL Iron and Steel Ltd.	Cuttack	<b>Manufacturing</b> OCL Iron and Steel Ltd is in the business of manufacturing and sale of cement and refractory products, steel and sponge iron products
10	Pandhe Infracons Private Ltd.	Mumbai	<b>Real Estate</b> The company is engaged in construction of residential, commercial, industrial, infrastructure projects, institutional buildings and social rehabilitation projects with a pioneering focus on Affordable Mass Housing
11	Power Car India Private Ltd.	Chennai	<b>Manufacturing</b> The company is involved in the in manufacturing and wholesaling of battery-operated vehicle, golf cart etc

12	<b>Radius Estate Projects Private Ltd.</b>	Mumbai	<b><u>Real Estate</u></b> Radius Estate Projects Private Ltd. operates as a real estate developer
13	<b>Sai-Tech Pharmaceuticals Private Ltd.</b>	Mumbai	<b><u>Services</u></b> The company is engaged in engaged in the development and marketing of the APIs and Intermediates in both domestic and international market
14	<b>Shivani Trendz Private Ltd.</b>	Mumbai	<b><u>Textile</u></b> Shivani Trendz Private Ltd. operates in the Textile Industry and is in the business of manufacturing apparels
15	<b>Subhashri Bio Energies Private Ltd.</b>	Chennai	<b><u>Agriculture</u></b> Subhashri Bio Energies Private Ltd. is engaged in the agriculture industry. It is in the business of producing manure. Alternatively, it is also a power generator from biogas
16	<b>Sysco Industries Ltd.</b>	Ahmedabad	<b><u>Manufacturing</u></b> Sysco Industries Ltd. operates as a packaging company. It is engaged in manufacturing of Zari / Metallic Yarn grade Coated and Metallizing Films
17	<b>Techno Power Combines Private Ltd.</b>	Chennai	<b><u>Services</u></b> Techno Power Combines Private Ltd. is involved in the trading of VRV AC, roof top ac & chillers
18	<b>Thiruchitambalam Projects Ltd.</b>	Chennai	<b><u>Infrastructure</u></b> The company is engaged in the business of construction and infrastructure development business
19	<b>VME Properties Private Ltd.</b>	Chennai	<b><u>Real Estate</u></b> The company is involved in the Real Estate business

## Companies directed to be liquidated

#	Name of Corporate Debtor	NCLT Bench	Industry
1	<b>Air Odisha Aviation Private Ltd.</b>	Cuttack	<b><u>Transportation</u></b> Air Odisha Aviation Private Ltd. (AOAPL) is an Indian air charter company
2	<b>Emco Ltd.</b>	Mumbai	<b><u>Power</u></b> Emco Ltd. is involved in the business of power generation, transmission, and distribution utilities
3	<b>Aikya Infrastructure Private Ltd.</b>	Hyderabad	<b><u>Infrastructure</u></b> The company is in the business of construction of roads and highways, ports and airports, railways etc.
4	<b>Aster Private Ltd.</b>	Hyderabad	<b><u>Telecommunication</u></b> Aster Private Ltd. is in the business of providing Telecom Engineering Services (RF Engineering, Design, Manufacture & Supply of towers, Equipment Installation & Commissioning, O&M) and Power Transmission & Distribution (Design & Supply of transmission towers, sub-stations)
5	<b>A.B.M Concrete Pvt. Ltd.</b>	Allahabad	<b><u>Manufacturing</u></b> The company is in the business of production of cement
6	<b>Doshion Water Solution Pvt. Ltd.</b>	Mumbai	<b><u>Manufacturing</u></b> The company is in the business of manufacturing of a wide range of Excipients, Active Pharmaceutical Ingredients and specialty Pharma Resins



## CONTRIBUTIONS BY:

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