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YOUR INSIGHT JOURNAL



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) is a section 8 company incorporated under the Companies Act 2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enroll and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfill all requirements set out in its byelaws on payment of membership fee. We are established with a vision of providing quality services and adhere to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavor to disseminate information in aspect of Insolvency and Bankruptcy code to Insolvency professionals by conducting Round tables, webinars and sending daily newsletter namely "IBC Au courant" which keeps the insolvency professionals updated with the news relating to Insolvency and bankruptcy domain.

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● FROM THE MD & CEO'S DESK	4
● PROFESSIONAL DEVELOPMENT INITIATIVES	5
● IBC AU COURANT	8
● ARTICLES	9
✓ <i>Relevance of financial analysis for resolution</i>	
<i>Professionals</i>	10
✓ <i>The Insolvency and Bankruptcy Code</i>	
<i>(amendment) ordinance, 2019</i>	15
● CASE LAWS	19

From the MD & CEO's desk

CMA DR. S.K. GUPTA

Parliament has passed amendments to the insolvency law that will help ring-fence successful bidders of insolvent companies from risk of criminal proceedings for offences committed by previous promoters. The Insolvency and Bankruptcy Code (Amendment) Bill, 2020 was passed by voice vote in Rajya Sabha. It was approved by Lok Sabha on March 6. The bill seeks to remove bottlenecks and streamline the corporate insolvency resolution process. It aims to provide protection to new owners of a loan defaulter company against prosecution for misdeeds of previous owners. Replying to a short debate on the bill, Finance Minister Nirmala Sitharaman said amendments are in sync with time and also adhere to a Supreme Court order in "letter and spirit". The minister said need for amendment in the IBC arose because of "changing requirement" and "requirement of fine tuning" the law.

The insolvency law provides a new lifeline for stressed companies to save them from premature death. The IBC provides for a time-bound and market-linked resolution of stressed assets. As many as 190 companies have been rescued till December 2019 through resolution plans and they owed Rs 3.8 lakh crore to creditors. A total of 561 cases were admitted during the quarter October to December, 2019 the second highest number since data are available and following the 565 admitted in the quarter ended September. However, Realisation by financial creditors through the Insolvency and Bankruptcy Code (IBC) has fallen drastically in the fiscal third quarter. Data from the Insolvency and Bankruptcy Board of India (IBBI) showed that financial creditors realised just 12% of their claims in the quarter-ended December, down from 34% in the quarter-ended September. The slow pace of resolution continues to be a deterrent. Out of 1,961 ongoing admitted cases, 635 cases have passed 270 days since admission, while another 247 cases have crossed 180 days since admission.

PROFESSIONAL DEVELOPMENT INITIATIVES

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Accountants Of India

INSOLVENCY AND BANKRUPTCY WORKSHOP JAIPUR



COLLOQUIUM ON PERSONAL GUARANTORS TO CORPORATE DEBTORS NEW DELHI



IBC AU COURANT

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news on
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ARTICLES

Insolvency Professional Agency of Institute of Cost
Accountants of India

RELEVANCE OF FINANCIAL ANALYSIS FOR RESOLUTION PROFESSIONALS

Ashok Kumar Gulla
Insolvency Professional

BRIEF INTRODUCTION

1. The Insolvency and Bankruptcy Code, 2016 came into effect in December, 2016 with an intention to provide a mechanism for faster debt recovery and revival of companies under Insolvency by way of their Resolution.
2. The Role of Interim Resolution Professional ("IRP") and/or Resolution Professional ("RP") comes into effect when the corporates are facing financial stress and going through liquidity crunches making them incapable of settling their financial and operational dues. This gives power to the creditors of these corporates to drag the corporates into Corporate Insolvency Resolution Process ("CIRP") under the provisions of Insolvency & Bankruptcy Code, 2016 ("IBC"). National Company Law Tribunal is the Adjudicating Authority for IBC that admits the CIRP of Corporate and confirms the IRP and thereafter RP for carrying out the process. It is a multidimensional role involving understanding of operations of the Corporate Debtor enabling the Resolution Professional to manage the ongoing business and ensure its continuity as a going concern simultaneously negotiating with various stakeholders and eventually inviting plans from prospective Resolution Applicants. All these roles involve adequate understanding of the financial aspects of Corporate Debtor in addition to the various provisions under IBC, relevant regulations and other applicable laws. It is expected that Resolution Professional is well equipped to deal with all these issues and has got adequate support of the professionals working with him/her on the assignment.
3. Section 18 of IBC lays down the duties to be performed by Interim Resolution Professional that also involves following-

"Collect all the information relating to the assets, finances and operations of the Corporate debtor for determining the financial position of the corporate debtor, including information relating to

- *Business operations for the previous two years*
- *Financial and operational payments for the previous two years*
- *List of assets and liabilities as on the initiation date and*
- *Such other matters as may be specified"*

FINANCIAL ANALYSIS OF CORPORATE DEBTOR

4. Understanding the working of Business Operations of the Corporate Debtor:

- It is important to understand how corporate debtor has been operating and generating revenue for the preceding years before initiation of the CIRP. It enables the Resolution Professional to determine the strength of the Company, business potential it has to sustain in the long run as well as the means required to revive the business.
- Resolution Professional should analyse the various expenses incurred during the previous years by the Corporate Debtor to run the operations, percentage of such expenses to total revenue and income generated from incurring such expense. It helps the Resolution

Professional to critically examine the necessity of the expenses to run the business and helps in cost reduction by either reducing or eliminating items that may be avoided without impacting the operations.

- The corporates under CIRP are facing financial stress, performance as depicted in the financial statements need to be critically examined to find out whether the revenues generated are out of normal business operations or one - time book entries/adjustment made.

5. Analysis of generation of revenues by Corporate Debtor involves following aspects:

- Whether the revenue has been generated from business activities carried by Corporate Debtor and has been realised;
- Percentage of Related party sale to total sales, availability of documentary evidence to determine genuineness of such transactions including transactions entered at arm's length basis and money been realized from these transactions and reflected in the books of corporate debtor.
- Terms and conditions of sales by Corporate Debtor and analysis the company's revenue with industry trend.
- Percentage of trading sales to total sales specially where corporate debtor is predominantly into manufacturing business or providing services. It is vital to check whether trading sales were carried for generating revenues or to inflate topline.
- Proportionate of other income in total revenue and has it raised during the last two years and reasons thereof. Whether 'other income' is out of genuine transaction or book entries without any realization just to present better performance.
- Understanding the customer profile of the Corporate Debtor and check for any unusual change in the customer profile from reputed parties to unknown parties. Knowing the terms of sales and has the increased sale resulted in unusual increase in sundry receivables affecting liquidity of the corporate debtor.

A critical financial analysis on these issues pertaining to revenue generation will provide insight into how best the corporate debtor could continue as going concern and negotiate further with the customers. Sales to Related Parties and trading sales for a corporate which is predominantly into manufacturing activity needs to be looked with suspicion unless there are strong justification to continue such transactions and all these need to be reported to committee of creditors ("CoC") for their approval.

6. Analysis of Expenses involves examination of following aspect:

- Nature of various expenses incurred by the Corporate Debtor during past two years.
- Percentage of expenses incurred to total revenue generated and its analysis with industry trend for any major variation.
- Understand the nature of expenses and bifurcate expenses that are directly involved in operations and that are administrative and miscellaneous expenses. Determine their contribution to total revenue.
- Items forming major proportion of total expenses are genuine or bogus entries made in the books of accounts. A critical analysis of the expenses enables the Resolution Professional to understand whether the Corporate Debtor has incurred more than necessary expenses for running operations and the expenses can be cut down without having major implication on business operations.

7. Analysing of various financial parameters:

- EBITDA - Earnings before Interest tax depreciation and amortization (EBITDA) is an important financial parameter that calculates operational profit/loss after meeting expenses related to operations. It helps in understanding whether the operations are viable and profitable for the company. Where the Company has (-ve) EBITDA for preceding two years, it will be difficult for Resolution Professional to continue it as a going concern unless there is reduction in production and labour costs. The Resolution Professional may examine trend of EBITDA and the predominating factors that have resulted in EBITDA. It could be that sale price negotiated are at a very competitive rate leaving very little margin or (-ve) margin. An understanding of the pricing of key inputs and outputs will help in finding product/services that are unviable and need to be further negotiated. Corporate who are under stress may be incurring manufacturing expenses (like Electricity/Labour/reports and maintenance) which could be controlled to bring further improvement.

Thus the Financial Analysis of EBITDA and its trend over preceding years will help Resolution Professional to negotiate further with customers and suppliers on pricing as well as with the staff for bringing overall improvement.

- PBT/PAT i.e. Profit Before Tax/Profit After Tax: Understanding bottom line is as crucial as topline growth in the financial statement of corporates. It is often observed that corporates have resorted to various means in showing topline growth despite decline in bottomline. A decline in profitability and overall profits pushes Corporates towards Insolvency. Resolution Professional may have to peruse the financial statement and examine whether PBT and PAT shown in the financial statements are true reflection of affairs of the company.

Analysis of selling and General Administrative expenses, interest and one time other expenses will provide insight of these expenses and whether these could be curtailed to bring down the funds deployed towards incurring such expenses.

8. Examination of Financial and Operational Payments for previous two years:

Analysis of Financial and Operational payments for the previous two years will help in understanding how the funds have been deployed. This could be understood if we carry out comparison of outstanding held preceding two years and as of insolvency commencement.

- The Corporate debtor might have taken loans and advances from various Banks/Financial Institutions/NBFC and third parties. A comparison of outstanding held preceding two years with present exposure will provide clue as whether any has been made to particular creditor in preference over other creditors that may be classified as preferential transaction under Section 43 of IBC.
- The said comparison will help in understanding whether the liquidity stress was addressed through additional funding or the corporate debtor had repaid loan during the period when the cash accruals were not adequate.
- Terms of availing loans and advances from various parties including related parties may be analysed to understand whether these were not extortionate transactions falling under Section 50 of IBC.
- Payments made to various operational creditors including suppliers, workmen/employees and statutory authorities during the last two years will assist in understanding the business profile.

An analysis of operational payments will provide overview of any excessive or preferential payments made. Further, it will help in understanding the terms of payment and negotiating further with various creditors to ensure that Corporate Debtor continues as a going concern.

9. Understanding of Assets and Liabilities of the Corporate Debtor:

a) Current Assets

- The Corporate Debtor has got assets various assets in the form of cash and bank balance, inventory, receivables, advances made to third parties and other current assets.
- A control on all these assets is of paramount importance as these assets are considered to be liquid and fungible in nature i.e. considered to be realizable in short span of time.
- Balance in banks and cash to be studied to check for any major variation in the balances in proceeding years.
- Details of inventory to be collated & immediately inspection to be carried out to know about its availability, condition and obsolescence. It has been observed that in financial statement, appropriate valuation as per cost or market price whichever low is not carried out. The Resolution Professional to make a fair assessment of its utility and arrange for security so that the value cannot get further eroded.
- Details of receivables and advances provided need to be perused carefully specially advances and recoverable pertaining to related parties. Age-wise breakup of these receivables and advances to be studied. Receivables and advances pending for more than a year may affect the liquidity of the assets.

b) Fixed Assets and Investments

- The Fixed Assets of the Corporate Debtor comprises of Property, plant and equipment. The Resolution Professional will have to ascertain availability of these assets and authenticity of the ownership of these assets.
- It is important to understand various investments made by the Company specially in group companies.

- c) Liabilities – Corporate Debtor may have various liabilities towards repayments of debt taken from financial institutions and public, statutory dues and other payments such as to vendors, suppliers etc. It is very vital for Resolution Professional to analyse the volume of liabilities against assets as it is required in claim verification received in IBC and also to determine net asset position of the Company.

Based on the above analysis of key performance indicators, Resolution Professional may develop following strategies:

- Negotiate with customers and suppliers where pricing is unremunerative and not generating enough revenues.
- Discuss with employees for reduction in various costs including manufacturing and selling and General administrative expenses.
- Prepare cash flows bases on business targets to ensure that the liquidity issues do not hamper the going concern status.

The Resolution Professional is required to analyse assets and liabilities along with revenue and expenses of the Corporate Debtor to get an understanding of the financial position of the Corporate Debtor. Further, Resolution Professional is to take control of all the assets of the Corporate Debtor for which understanding of the Financial position will provide overview of the assets shown in the books of accounts and their physical existence.

Conclusion

The intent of IBC is revival of Company going through Insolvency by way of its Resolution and maintain its going concern status till the Resolution is complete. It is important for the Resolution Professional to have an understanding of business profile and a control over financial aspects so as to ensure the continuity of the business. Resolution Professional is further required to invite Prospective Resolution Applicants for acquiring the Company by inviting Expression of Interests from them and assisting them in carrying out due diligence of Company enabling them to submit a viable financial proposal for the Company. Understanding of financial aspects will enable the Resolution Professional to assist these Applicants in understanding the business potential of the Company and help them in submitting a feasible plan for the Company and its creditors.

With the ongoing evolution of IBC and its various regulations, financial understanding of the business of Company under IBC plays a vital role for Resolution Professional in meeting his/her roles and responsibilities as laid down in IBC.

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2019

Promulgated by President of India on 28/12/2019

CA Anil Goel
Insolvency Professionals

KEY AMENDMENTS

1. CIRP Commencement date

Proviso to section 5(12) has been omitted mean: CIRP commencement date would always be the date of admission of an application and the appointment of IRP would be done on the same day.

2. Interim Finance

Definition of Interim Finance was restricted to financial debt raised during CIRP under section 5(15). The amendment proposes that the Govt will notify other kinds of debt also that can be raised during CIRP and can qualify as Interim Finance and will have priority of payment in case of Resolution or Liquidation.

3. Threshold for filing the insolvency petition by Homebuyers(allottees), debenture or bond holders, public depositors

a) **Homebuyers /Allottees:** Joint application by minimum 100 allottees or 10% of the allottees of the same real estate project (not all the projects of Corporate Debtor), whichever is less. The application should be joint application and not through the RWAs or Home-buyers' Association or Welfare Society.

b) **Debenture /Bond Holders or Public Depositors:** Joint application by minimum 100 such creditors or 10% of such creditors, whichever is less. Each class of creditors e.g.

Debenture holders, bond holders or public depositors would be considered as a separate class.

c) **Existing Pending applications:** 30 days have been given to all the pending applications filed where the minimum threshold is not met for compliance, otherwise the application would be considered as withdrawn. The applicants would have to work for gathering the support of required number of such creditors.

The individual creditors or small group of these classes of creditors would not be able to pressurise the Corporate Debtor for settlement is a good protection to real estate industry and other Corporate Debtors who have raised debt as debentures or bonds.

On the other hand, the collective action of these classes of creditors would get immediate response either from Corporate Debtor or from the Tribunal.

4. Filing of Applications for initiating CIRP against the debtors of Corporate Debtor by IRP / RP/ Liquidator / Resolution Applicant /Monitoring Agency / Corporate Debtor

Section 11 is amended to provide that IRP/ RP/ Liquidator / Resolution Applicant/ Monitoring Agency / Corporate Debtor can file application against any other Corporate Debtor for initiating CIRP of that other Corporate Debtor in case of default of debt owed to Corporate Debtor.

This amendment is made to address some judgements giving varied views. It would be easier to recover debts of Corporate Debtor during CIRP or Liquidation or even after the Resolution Plan is approved.

5. Moratorium is extended to protect the license, permit, registration, quota, concession, clearances or a similar grant or right during CIRP Period

a) A non-obstante clause has been inserted in section 14 of the Code wherein it is provided that following would not be suspended or terminated on the grounds of commencement of CIRP: -

1. A licence, permit, registration, quota, concession, clearances or a similar grant or right given by
2. The central, state or local authority, sectoral regulator or any other authority subject to the condition
3. That there is no default in dues arising for the use or continuation of the said licence, permits, etc during the moratorium period.

b) The supply of goods or services would also not be terminated, suspended or interrupted during moratorium if IRP/RP considered that the supply is critical to protect and preserve the value of the Corporate Debtor and to manage the Corporate Debtor as a going concern.

Unless the payment for the current supply is not being made by the Corporate Debtor to the supplier.

These provisions would bring revival of many companies, otherwise there are doubts in the minds of Resolution Applicant about the revival of licences, permits, etc. or about the availability of critical raw material.

6. RP to continue managing the Corporate Debtor and to do all such acts as required from RP till the Resolution Plan is approved or liquidation order is passed.

It is clarificatory amendment that Resolution Professional will continue to function till Resolution Plan is approved or Liquidation order is passed.

7. Liability of Corporate Debtor for offences prior to CIRP (PMLA, FEMA, SEBI, etc.) and Attachment of Assets for the offences

1. New Section 32A is inserted
2. This is non-obstante section/clause and provide as under:
 - The liability of Corporate Debtor for any offence committed prior to CIRP shall cease;
 - Corporate Debtor shall not be prosecuted for such offence from the date Resolution Plan is approved
 - Even if the prosecution is instituted during CIRP, this section would be applicable;

- Any person of officer who is in default for the offence, would continue to be liable for the offence and punishment, notwithstanding that the liability of the Corporate Debtor is ceased;
- No action shall be taken against the property of the Corporate Debtor in relation to an offence committed prior to CIRP if that property is part of a Resolution Plan approved by AA, which results in to change in the management
- No action shall be taken against the property of the Corporate Debtor in relation to an offence committed prior to CIRP if that property is sold during liquidation process under IBC
- An action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;
- The Corporate Debtor and any other person including Resolution Professional or Liquidator shall provide all the assistance and co-operation to the investigating agency regarding the offence committed before the commencement of CIRP

Conditions for this section:

- Resolution Plan or sale during liquidation process results in change in the management or control of Corporate Debtor
- The new management or the buyer during liquidation process is not a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- The new management or the buyer during liquidation process is not a person with regard to whom the relevant investigating authority has reason to believe that he had abetted or conspired for the commission of the offence

List of Some Acts, where offences are committed (inclusive)

- Prevention of Money Laundering Act, 2002 (PMLA Act); Information Technology Act, 2000 (IT Act); The Securities and Exchange Board of India Act, 1992 (SEBI Act); The Securities Contracts (Regulations) Act, 1956; The Companies Act, 2003; The Prevention of Corruption Act, 1988; The Benami Transactions (Prohibition) Act; The Indian Penal Code; The Protection of Depositors Act, 1999;
- Tax Crimes under Income-tax Act, 1961; The Customs Act, 1962; The Central Excise Act, 1944; Goods and Services Tax Act,
- Environmental Crimes under The Environment (Protection) Act, 1986; The Water (Prevention and Control of Pollution) Act, 1974; The Air (Prevention and Control of Pollution) Act, 1981; The Representation of People Act, 1951
- Foreign Transactions crimes under the Foreign Trade (Development and Regulation) Act, 1992; Foreign Exchange Management Act, Foreign Contribution (Regulation) Act, 1976;
- Banking Regulation Act, 1949 for bank frauds
- Offences under the investigation of State Governments: Prize Chits and Money Circulation Schemes (Banning) Act, 1978; The Protection of Interest of depositors, 1999

Agencies to Enforce Criminal Law (inclusive):

- The Directorate of Enforcement (ED) for PMLA & FEMA; Central Bureau of Investigation (CBI); Criminal Investigation Department (CID);
- Serious Fraud Investigation Office (SFIO), Ministry of Corporate Affairs;
- The Central Economic Intelligence Bureau (CEIB) for various economic offences and COFEPOSA
- The Central Bureau of Narcotics (CBN) for drug related offences
- The Directorate General of Anti-Evasion (DGA) for central excise related crimes
- The Directorate General of Revenue Intelligence (for customs, excise and service tax related offences)
- The SEBI for protection of interest of investors and securities related offenses
- The Directorate General of Income-tax (Investigation)
- The Competition Commission of India for anti-competitive trade practices)

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

Santosh Shinde v. Fairmacs Shipping & Transport Services (P.) Ltd. - [2019] 108 taxmann.com 132 / 155 SCL 14 (NCL-AT)(MAG)

Where in response to demand notice no dispute was raised by corporate debtor about deficiency in service rendered by operational creditor, application to initiate CIRP against corporate debtor was rightly admitted by Adjudicating Authority.

The operational creditor provided logistic services to the corporate debtor. The corporate debtor failed to make payment towards same. In response to demand notice, the corporate debtor had not communicated any dispute about deficiency of service rendered by the operational creditor but claimed that bank guarantee was required by it for participation in Export Promotion Capital Goods (EPCG) scheme and same was to be dealt by the operational creditor but, the operational creditor failed to fulfil its obligation. However, there was nothing on record to suggest that such job was entrusted to the operational creditor.

Held that in absence of pre-existing dispute, Adjudicating Authority had rightly admitted application under section 9

Case Review : Fairmacs Shipping & Transport Services (P.) Ltd. v. Trimurti Corns. Agro Foods (P.) Ltd. [2019] 108 taxmann.com 131 (NCLT - Mum.), affirmed

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

Sumeet Kumar v. Jay Ace Technologies Ltd. [2019] 108 taxmann.com 136 / 155 SCL 102 (NCL-AT)

Where operational creditor supplied batteries to corporate debtor and corporate debtor did not raise any dispute regarding quality of goods supplied by operational creditor, impugned order passed by Adjudicating Authority admitting application under section 9 could not be interfered with.

The operational creditor supplied batteries to the corporate debtor and raised invoices. The corporate debtor defaulted in payment thus the operational creditor issued demand notice under section 8. While confirming dues by way of email, the corporate debtor did not raise any dispute regarding quality of goods supplied by the operational creditor, but, it did not take further steps to release the due amount.

Held that impugned order passed by Adjudicating Authority admitting section 9 application could not be interfered with. However, impugned order would not come in way of corporate debtor if corporate debtor intended to settle matter with operational creditor.

Case Review : Jay Ace Technologies Ltd. v. Micromax Energy Ltd. [2019] 108 taxmann.com 135 (NCLT - New Delhi) affirmed

SECTION 7 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY FINANCIAL CREDITOR

Deegee Cotsyn (P.) Ltd. v. Phoenix ARC (P.) Ltd. [2019] 108 taxmann.com 130 / 155 SCL 16 (NCL-AT)(MAG)

Moment NCLT is satisfied that a default has occurred, application of financial creditor to initiate CIRP must be admitted, unless incomplete.

When the corporate debtor failed to repay, the financial creditor filed application to initiate CIRP against the corporate debtor. The said application was admitted. The corporate debtor challenged admission of the application on ground that the financial creditor had already taken steps under SARFAESI Act. It was also alleged that the financial creditor was an assignee of loan and thus, not authorized to file said application. It was noted that a person could be assignee under SARFAESI Act, but on that ground application under section 7 could not be rejected. It was also noted that, action, if any, taken under SARFAESI Act would not proceed in view of order for moratorium passed. Further, NCLT was satisfied that a default had occurred, therefore, application of the financial creditor must be admitted (unless incomplete)

Held that appeal against impugned order passed by adjudicating authority was to be rejected.

Case Review : Phoenix ARC (P.) Ltd. v. Deegee Cotsyn (P.) Ltd. [2019] 108 taxmann.com 129 (NCLT - Mum.) affirmed

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

Sanjoy Ghosh v. Impex India Inc. [2019] 108 taxmann.com 134 / 155 SCL 27 (NCL-AT)

]Where corporate debtor claimed that loan taken by it from financial creditor was a friendly loan and not to be refunded, but, he failed to bring on record any evidence to substantiate his claim, impugned order of Adjudicating Authority admitting application to initiate CIRP against corporate debtor could not be interfered.

When the corporate debtor defaulted in repayment of loan, the financial creditor filed application to initiate CIRP against the corporate debtor. The corporate debtor raised a dispute that it was a friendly loan and same was not to be refunded. However, corporate debtor failed to bring on record any evidence to substantiate his claim

Held that since, corporate debtor had committed default in repayment of financial debt, which exceeded statutory limit of rupees one lakh, impugned judgment by Adjudicating Authority admitting application to initiate insolvency process could not be interfered with

Case Review : Impex India v. Seajaan Logistics (P.) Ltd. [2019] 108 taxmann.com 133 (NCLT - Kol.) affirmed

SECTION 14 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

Punit Garg v. Ericsson India (P.) Ltd. [2019] 108 taxmann.com 94 (NCL-AT)

Where in a CIRP appeal, an interim order was passed directing parties including third party not to sell, transfer or alienate any property of corporate debtor nor to invoke any guarantee or any other instrument without prior permission of Tribunal/Court, issuance of show cause notice for violating license agreement and letter addressed to bank to invoke guarantee given by corporate debtor by operational creditor was against direction of Impugned order.

The applicant, Department of Communication (DT) initiated CIRP against the corporate debtor. Subsequently, the applicant made prayer for withdraw of said application. The Tribunal, instead of withdrawal, passed interim order directing parties including third party not to sell, transfer or alienate any movable or immovable property of the corporate debtor nor to invoke any guarantee or mortgage or any other instrument without prior permission of the Court. However, DT issued show cause notice against the corporate debtor for violating licence agreement/NIA condition and asked bank to invoke guarantee given by the corporate debtor

Held that issuance of show cause notice to the corporate debtor and letter to bank by DT was against direction of Impugned order; thus, no steps could be taken pursuant to said letter and notice.

SECTION 238 - OVERRIDING EFFECT OF CODE

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

Varrsana Ispat Ltd. v. Deputy Director, Directorate of Enforcement - [2019] 108 taxmann.com 96 (NCL-AT)

A. Since PMLA, 2002 relates to different fields of penal action of proceeds of crime, it can be invoked simultaneously with I&B Code, having no overriding effect of one Act over other, including I&B Code.

B. Where prior to admission of CIRP, certain properties of corporate debtor were attached under PMLA, same could not be released as section 14 has no overriding effect on PMLA.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

SECTION 18 - INTERIM RESOLUTION PROFESSIONAL - DUTIES OF

PTC India Financial Services Ltd. v. Venkateswarlu Kari - [2019] 108 taxmann.com 173 (NCL-AT)

A. Where financial creditor on occurrence of default by corporate debtor transferred pledged shares to itself by invoking 'Pledge Deed' and became shareholder, its claim for financial debt could not be considered.

B. Resolution Professional could collate or accept claim but it has no power to determine or reject claim of financial debt.

Loan borrowed by the corporate debtor from the applicant-financial creditor was secured under 'Pledge Deed' of shares owned by MHPL company. Since, the corporate debtor committed default, the applicant filed section 7 application against the corporate debtor. In the meantime, the corporate debtor filed an application under section 10 for initiating CIRP against itself. As the said application was admitted, the appellant was allowed to withdraw its application filed under section 7 with liberty to file its claim for 'financial debt'. However, the applicant had exercised its rights under Pledge Deed and had specifically reserved its right to transfer and sell pledged shares. Thereafter, the applicant filed its claim before the IRP on ground that pledged shares were still retained by the applicant as security for financial debt and 'debt' was set-off only when sale of shares takes place.

Held that since applicant had already become shareholder in terms of pledge deed, its claim for financial debt could not be taken into consideration.

SECTION 9 - CORPORATE INSOLVENCY RESOLUTION PROCESS - APPLICATION BY OPERATIONAL CREDITOR

Gupshup Technology India (P.)Ltd. v. Zopsmart Technology (P.) Ltd. - [2019] 108 taxmann.com 253 (NCL-AT)

Adjudicating Authority is only required to notice as to whether there is a default or not; if record is complete and debt is payable, it is duty of Adjudicating Authority to admit application.

The corporate debtor availed promotional Short Messaging Services (SMS) from the operational creditor. The corporate debtor had not raised any objection or demur in respect of services provided by the operational creditor. The operational creditor raised invoices which were duly accepted and acknowledged by the corporate debtor. However, the corporate debtor failed to pay, thus the operational creditor filed application under section 9 to initiate CIRP against the corporate debtor. The Adjudicating Authority rejected said application on ground that there was no written contract between parties. In *Innoventive Industries Ltd. v. ICICI Bank* [2017] 84 taxmann.com 320/143 SCL 625 (SC), it was held that the Adjudicating Authority is only required to notice as to whether there is a default or not, and, if record is complete and debt is payable, it was duty of the Adjudicating Authority to admit application. In the instant case neither the corporate debtor had pleaded nor the Adjudicating Authority held that there was no record of debt or default.

Held that merely on ground, that there was no agreement reached between parties, it was not open to the Adjudicating Authority to reject application under section 9 preferred by the operational creditor.

Case Review :Gupshup Technology India (P.) Ltd. v. Zopsmart Technology (P.)Ltd. [2019] 108 taxmann.com 252 (NCLT - Beng.) Set aside

SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

Koshy Varghese v. John Varghese - [2019] 108 taxmann.com 250 (NCL-AT)

Where appeal against order of Adjudicating Authority was filed after delay of 112 days, Appellate Tribunal had no jurisdiction to condone delay.

The Adjudicating Authority by impugned order admitted application under section 7 filed against the corporate debtor. Against the admission of said application, the appellant/promoter of the corporate debtor preferred an appeal on ground that he was ready to pay admitted dues to the financial creditor

Held that since said appeal against order of the Adjudicating Authority had been preferred after delay of 112 days, in light of proviso to section 61(2), the Appellate Tribunal had no jurisdiction to condone delay.

Case Review : John Varghese v. Value Designbuild (P.) Ltd. [2019] 108 taxmann.com 249 (NCLT - Bengaluru) affirmed

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

Savinder Singh v. Alloysmin Industries - [2019] 108 taxmann.com 244 (NCL-AT)

Where appellant filed application seeking withdrawal of petition filed under 'section 9, in view of fact that Committee of Creditors' had not been constituted and no claim had been received except that of 'operational creditor', in such a situation, having regard to settlement arrived at between parties, operational creditor was to be allowed to withdraw application filed under section 9.

An application filed under section 9 against the corporate debtor was admitted and a Resolution Professional was appointed. Subsequently, both the parties arrived at settlement regarding payment of the operational debt. Thus, the instant application was filed seeking withdrawal of application filed under section 9

Held that since Committee of Creditors' had not been constituted and, no claim had been received except that of the 'operational creditor', in such a situation, having regard to settlement arrived at between parties, the operational creditor was to be allowed to withdraw application filed under section 9

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

Shweta Vishwanath Shirke v. Committee of Creditors - [2019] 109 taxmann.com 30 (NCL-AT)

Where application filed for withdrawal of CIRP under section 12A by promoter was approved by Committee of Creditors by more than 90 per cent voting share, same could not be rejected on ground that 'Promoter' not eligible to file 'resolution plan' under section 29A cannot file application under section 12A.

The appellant-bank had filed an application under section 7 and corporate insolvency resolution process against the corporate debtor i.e. Sterling had been initiated. An application under section 12A was filed at instance of 'Promoter' approved with more than 90 per cent voting share of the 'Committee of Creditors', but it was rejected by the NCLT, on ground that 'Promoter' not eligible to file 'resolution plan' under section 29A cannot file application under section 12A

Held that since application under section 12A was approved by 'Committee of Creditors' by more than 90 per cent of voting share, it was not open to the NCLT to reject same and that too on a ground of ineligibility under section 29A.

Further held that impugned order was to be set aside and appellant was allowed to withdraw application filed under section 7

SECTION 25 - RESOLUTION PROFESSIONAL - DUTIES OF

Roma Enterprises v. Martin S.K. Golla - [2019] 108 taxmann.com 192 (NCL-AT)

Where creditor raises claim before RP, RP has no jurisdiction to decide such claim but he can only collate claims; creditor could raise such an issue and claim only after moratorium was over.

Upon initiation of CIRP against the corporate debtor, appellant-creditor filed its claim with the RP that four cranes of the corporate debtor were hypothecated in its name. The RP rejected said claim. The Adjudicating Authority did not entertain application of the creditor against decision of the RP

Held that RP had no jurisdiction to decide claim of one or other party; and he could only collate claims

Further held that the appellant-creditor could raise such an issue and claim at an appropriate stage, i.e., after moratorium was over and, thus, instant appeal was to be dismissed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

Hemanth Meka Rao v. Asset Reconstruction Co. (India) Ltd. - [2019] 108 taxmann.com 210 (NCL-AT)

After initiation of liquidation proceedings against corporate debtor, no order of settlement can be passed by Appellate Tribunal, even though corporate debtor agreed to pay all dues.

The appellant, a shareholder of the corporate debtor filed instant appeal against order passed by the Adjudicating Authority under section 33(2) directing for liquidation in absence of any approved plan. The appellant submitted that a sum of Rs. 14 crores was due and out of which a settlement for Rs. 10.38 crores had been made. The appellant thus pointed out that the corporate debtor could be saved by passing appropriate order under section 230 of the Companies Act 2013.

Held that no order of settlement can be passed by the Appellate Tribunal, even though appellant agreed to pay all dues.

Further held that liquidator was to be directed to proceed in terms of decision in case of Y. Shivram Prasad v. S. Dhanapal, [Company Appeal (AT) (Insolvency) No. 224 of 2018].

Case Review :L&T Finance Ltd. v. Meka Dredging Co. (P.) Ltd. [2019] 108 taxmann.com 209 (NCLT - Chennai) affirmed

SECTION 7 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY FINANCIAL CREDITOR

Nakul Bharana v. ICICI Bank Ltd. - [2019] 108 taxmann.com 290 (NCL-AT)

Where financial creditor satisfies all requirements of section 7, Adjudicating Authority has no discretion to reject application or defer it unless corporate debtor intend to settle claim.

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

Ankit Agrawal v. Nico Extrusions Ltd. - [2019] 108 taxmann.com 245 (NCL-AT)

Where there was no existence of dispute and there being a debt and default, Adjudicating Authority rightly admitted application under section 9 against corporate debtor.

The corporate debtor purchased certain goods from the operational creditor. In response to the demand notice, the corporate debtor raised a dispute that goods supplied by the operational creditor were of poor quality and it had telephonically informed the operational creditor about the same. However, in support of such statement no document had been placed on record by the corporate debtor.

Held that there being no existence of dispute and there being a debt and default, Adjudicating Authority rightly admitted application under section 9 against corporate debtor.

Case Review :Nico Extrusion Ltd. v. Nicomet Industries Ltd. [2019] 102 taxmann.com 346 (NCLT - Mum.) affirmed