



# IBC AU-COURANT

*Latest updates On Insolvency & Bankruptcy*

**12<sup>th</sup> September 2022**

**"The best time to plant a tree was 20 years ago. The second-best time is now"**

## ➤ **Erstwhile Resolution Professional Has No Right To Be Heard Before Being Replaced Under Section 27: NCLAT Delhi**

The National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, comprising of Justice Ashok Bhushan (Chairperson), Justice M. Satyanarayana Murthy (Judicial Member) and Mr. Barun Mitra (Technical Member), while adjudicating an appeal filed in Sumat Kumar Gupta v Committee of Creditors of M/S Vallabh Textiles Company Ltd., has held that when the Committee of Creditors decides to replace the Resolution Professional under Section 27 of IBC and an application is filed before the Adjudicating Authority for approval, the erstwhile Resolution Professional would have no right to be heard before the Adjudicating Authority before being replaced. Section 27 of IBC by implication excludes principles of natural justice.

M/S Vallabh Textiles Company Ltd. ("Corporate Debtor") was admitted into Corporate Insolvency Resolution Process ("CIRP") and Mr. Sumat Kumar Gupta ("Appellant") was appointed as the Resolution Professional. In a Committee of Creditors (CoC) meeting dated 04.06.2022, CoC had decided with 100% vote to replace the Appellant with another Resolution Professional namely Mr. Rajiv Khurana. Accordingly, an application was filed before the Adjudicating Authority by the Financial Creditor of the Corporate Debtor for replacement of the Resolution Professional and the same was allowed vide an order dated 11.07.2022. The Appellant filed an appeal before NCLAT against the order dated 11.07.2022.

Section 27 of IBC "27. Replacement of Resolution Professionals by Committee of Creditors.-

- (1) Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.
- (2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent. of voting shares, resolve to replace the resolution professional appointed

under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.

- (3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.
- (4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.
- (5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section."

The Appellant argued that the Adjudicating Authority passed the order without issuing notice or giving any opportunity of being heard to the Appellant. The Appellant had a right to be heard before being replaced, as principles of natural justice are applicable to Section 27 of the Insolvency and Bankruptcy Code, 2016 ("IBC").

The CoC submitted that Section 27 of IBC does not contemplate any opportunity to be given to the Resolution Professional by the Adjudicating Authority before passing an order approving the CoC's resolution for replacement of the Resolution Professional. As per the scheme delineated by Section 27, replacement is complete when resolution is passed for replacement with 66% votes of the CoC and Adjudicating Authority is communicated the name of new Resolution Professional for approval.

The Bench observed that Section 27(1) clearly provides that when the CoC is of the opinion that a resolution professional appointed under Section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under the Section 27(2). A resolution has to be passed at the CoC meeting by 66% voting share to replace the Resolution Professional, subject to a written consent from the proposed resolution professional.

It was further observed that the decision taken by the CoC is a decision by vote of 66% and when the decision is by votes of a collective body, the decision is not easily assailable. Replacement is complete as per scheme of Section 27 when the resolution is passed with requisite 66% voting share.

"When we look into the scheme of Section 27 it by implication exclude the principles of natural justice, it is clear from the scheme of Section 27 that the scheme nowhere provides for any opportunity to the Appellant for hearing. Therefore, it cannot be said that the erstwhile Resolution Professional is entitled to be heard by the Adjudicating Authority before taking decision."

**Source: Live Law**

**Read Full news at:** <https://www.livelaw.in/news-updates/nclat-delhi-erstwhile-resolution-professional-section-27-of-ibc-committee-of-creditors-corporate-insolvency-resolution-process-cirp-208954>

## ➤ **NCLAT Delhi Sets Aside Order Of Liquidation; Grants Additional Opportunity For Inviting Resolution Plans**

The National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, comprising of Justice Ashok Bhushan (Chairperson) and Mr. Barun Mitra (Technical Member), while adjudicating an appeal filed in Nikhil Tandon v Sanjeev Bindal & Ors., has set aside an order for liquidation of Corporate Debtor and has given one more opportunity to the Committee of Creditors and Resolution Professional for finding out as to whether there can be any Resolution Plan to revive the Corporate Debtor.

Small Industries Development Bank of India ("SIDBI") had filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC"), seeking initiation of Corporate Insolvency Resolution Process ("CIRP") against Radhey Sham Tandon Manufacturing Pvt. Ltd ("Corporate Debtor") and the Corporate Debtor was admitted into CIRP on 10.10.2019. Mr. Sanjeev Bindal ("Respondent No.1") was appointed as Resolution Professional.

The 5th Committee of Creditors (CoC) meeting was held on 24.02.2020, wherein it was decided that since the operation of Corporate Debtor were not being carried on for more than one year, it should be liquidated. In the 6th CoC meeting, the Suspended Director of Corporate Debtor, Mr. Nikhil Tandon (Suspended Director/Appellant), submitted a resolution plan before the CoC claiming to be an MSME and hence eligible to submit a plan. The CoC did not consider the Plan for not being in accordance with Section 30 of the IBC.

In the 7th CoC meeting, the Resolution Plan was discussed and the Appellant requested information memorandum to submit the Resolution Plan as per law. In the 8th CoC Meeting, the Resolution Professional opined that the Appellant is not an MSME and has not filed an affidavit. Further, the total claim of Financial Creditor was much more than the resolution plan amount. The CoC decided that Appellant's Plan cannot be deliberated since no Resolution Plan was invited and the liquidation was already approved in the 5th CoC meeting.

Subsequently, the Resolution Professional filed an application for liquidation of the Corporate Debtor before the Adjudicating Authority and the latter approved liquidation vide an order dated 26.08.2021. The Appellant filed an Appeal before the NCLAT, challenging the order of liquidation.

### Issue

Whether the decision of the CoC taken in the 5th CoC meeting to liquidate the Corporate Debtor was a sustainable decision?

### Decision Of The NCLAT

It was observed that in the 5th CoC meeting it was already decided to liquidate the Corporate Debtor. In the 6th CoC the CoC approved the Appellant's request for submitting Resolution Plan. It indicates that the CoC had reconsidered its earlier

decision and proceeded to consider the plan submitted by the Appellant which was a MSME, but ultimately plan was refused to be considered only on the ground that no Resolution Plan was invited.

When in the CoC meeting Appellant was permitted to file a Resolution Plan, it cannot be said that Appellant was not invited to submit a Resolution Plan. Further, CoC ought to have given opportunity to others to submit Resolution Plan by directing for issuance of Form G which was never done. Non-acceptance of Corporate Debtor as a Registered MSME is a material irregularity which has been committed in the CIRP.

The Bench opined that CoC's decision to liquidate the Corporate Debtor also cannot be held to be sacrosanct. When CoC permitted the Appellant to file Resolution Plan, the decision to liquidate the Corporate Debtor was not proceeded with any further.

"In the facts of the present case, decision to liquidate the Corporate Debtor was taken in the 5th CoC meeting held on 24.02.2020 by that time neither any Valuers were appointed nor there was any liquidation value. The Resolution Professional has not even prepared Information Memorandum. As noted above, the entire object and purpose of the I&B Code is to revive the Corporate Debtor and put it back on the track. The CoC had not taken any effort to issue any Form G to find out as to whether there can be resolution of the Corporate Debtor by any Resolution Applicant. Without even making one effort, CoC jumped on conclusion to liquidate. It is true that under the statute CoC is empowered to take a decision to liquidate the Corporate Debtor. Material irregularity has been committed in the process as already noticed above."

The Bench held that there were sufficient grounds within the meaning of Section 61(4) of IBC to assail the order directing for liquidation. It was observed that the Adjudicating Authority had only relied on the resolution of the CoC in 5th meeting and had directed for liquidation, without taking into consideration minutes of subsequent 6th, 7th and 8th meetings of CoC, the steps taken by CoC to invite plan from the Appellant, discussion of the plan and ultimately decision thereon.

The Bench set aside the order of liquidation dated 26.08.2021 and directed that further steps need to be taken in the CIRP. The following directions were passed:

- I. An extension of period of 90 days granted to the Resolution Professional and the CoC to take steps to prepare Information Memorandum and issuance of Form G and consideration of Resolution Plan, if any, and take appropriate decision regarding resolution in the CIRP process.
- II. The Appellant may also in pursuance of issuance of Form G submit its Resolution Plan which also need to be considered by the CoC alongwith other plans, if any

**Source: Live Law**

**Read Full news at:** <https://www.livelaw.in/news-updates/nclat-delhi-section-7-of-the-insolvency-and-bankruptcy-code-corporate-insolvency-resolution-process-committee-of-creditors-208957>

## ➤ **SEBI order no bar on initiation of CIRP: NCLT orders insolvency process against Pancard Clubs**

The National Company Law Tribunal (NCLT) at Mumbai on Friday admitted a petition initiating the Corporate Insolvency Resolution Process (CIRP) against Pancard Clubs Limited. **[Nitin Suresh Satghare v. Pancard Clubs Limited]**. The order was passed by a Bench of judicial member **PN Deshmukh** and technical member **Shyam Babu Gautam** on a joint petition filed by 100 shareholders. The Tribunal admitted Rajesh Sureshchandra Sheth as the Interim Resolution Professional (IRP).

The petition was filed before the NCLT on the ground that Pancard defaulted in repayment of monies to the tune of ₹1,55,12,880 invested by shareholders. The financial debt arose in respect of investments made by the petitioners in a collective investment scheme (CIS) operated by the company under the guise of a time share business. The Securities Exchange Board of India (SEBI) by way of order dated February 29, 2016 directed the company to refund monies amounting to ₹7,035 crore of the investors within 3 months of passing the order and wind up the CIS.

This order was upheld by the Securities Appellate Tribunal (SAT). Advocate Nausher Kohli for the shareholders stated that the above mentioned orders made it clear that the investments made by over 50 lakh investors were accepted by the company under the guise of a time share scheme for purchase of room nights in various properties and resorts owned by the company.

SEBI opposed the plea, arguing that the initiating of CIRP would be detrimental to recovery proceedings already initiated by the regulator for violations of the SEBI Act. NCLT, however, did not consider this submission as it deemed that an order of SEBI did not bar initiation of CIRP against the company. It also concluded from the documents annexed to the petition that the company failed to honour the contract, hence the repayable amount is in default.

*"It is seen that the Financial Creditors have disbursed the money against time value of money which in the instant case means that the Petitioners were to receive a value higher than the invested amount, which has all the characteristics of Financial Debt. Further, the Petitioners have placed on record bank statements and financial contracts to prove the same,"* the Tribunal held. The Bench found that the default by the company is in excess of the minimum amount stipulated under the Insolvency and Bankruptcy Code (IBC). *"The debt and default stands established and there is no reason to deny the admission of the petition"* the order concluded.

**Source: Bar and Bench**

**Read Full news at:** <https://www.moneycontrol.com/news/business/startup/lido-learning-files-for-bankruptcy-6-months-after-asking-over-1200-staffers-to-quit-9147811.html>

