



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA



IBC AU-COURANT

Latest updates On Insolvency & Bankruptcy

23rd January 2023

"Courage is like a muscle. We strengthen it by use".

➤ **Bidders set up close fight for SKS Power; financial creditors could make a full recovery**

Bids to take over the debt-laden 600- MW SKS Power Generation plant are in a tight range, setting the stage for a close contest between the bidders that include two of the country's biggest conglomerates - the Adani Group and Reliance Industries.

Initial resolution plans submitted by the seven bidders are in the range of ₹1,400 crore- ₹1,600 crore, indicating a maximum recovery at this stage itself at 85% for financial creditors for their ₹1,890-crore dues. These bids are on basis of net present value (NPV), which discounts future cash flows to factor in the time value of money.

"All bidders that had submitted bids early this month are very close, which means a recovery of over 75% is almost guaranteed.

To break the deadlock, banks will push the bidders to offer more particularly with more cash upfront, which is likely to take recovery closer to 100%," said a person familiar with the process.

To be sure, some bidders have offered a mix of cash upfront and deferred payments with non-convertible debentures (NCDs) issued by parent companies payable in five-eight years. Plans of individual bidders could not be ascertained. Individual bidders could not be immediately contacted.

"Financial creditors will ask for more than the initial bids in the second round of negotiations. Looking at strong demand for the plant it is likely that financial creditors could get a full recovery and can also bargain for full or part of the resolution costs," said the person cited above.

Rules say that any amount recovered above the dues of financial creditors has to go to operational creditors after adjusting for the costs. In this case, operational creditors have dues of more than ₹500 crore.

The corporate insolvency process for SKS was initiated in April 2022. The company owes ₹1,890 crore to two banks - Bank of Baroda and State Bank of India (SBI).

Its 600-MW Chhattisgarh-based plant had stopped production after Hong Kong-listed owner Agritrade Resources failed to keep it running due to financial difficulties of its own. Agritrade Resources had bought plant in 2019 in a one-time settlement with lenders led by SBI.

The plant has 25 years of fuel agreement with South Eastern Coalfields, a CoalIndia unit, with a railway line transporting coal to the plant, making it a rare one available for sale. "At this stage Reliance, Adani, Torrent Power and NTPC are top contenders.

But Jindal Power, which has a power plant of its own within 50 kms, and Sarda Energy & Minerals, which has some mines even closer, also cannot be ruled out. Even for Adani it's a great buy because it owns a power plant right next door.

The seventh contender Singapore-based Vantage Point Asset Management also has deep pockets.

With all the seven bidders in the game it's going to be a tight contest," said a second person aware of the process. Process advisor BoB Capital Markets and resolution professional Ashish Rathi did not reply to an email seeking comment.

The plant is currently being run by NTPC following a government directive aimed at overcoming power shortages. "The strong interest is because getting this plant with all approvals in place is much cheaper compared to building a new one. At ₹2,000 crore, it costs less than ₹3.5 crore per MW, when the cost of building a plant today is upward of ₹9 per MW," said the first person cited above. Creditors will likely start negotiations with individual bidders next week.

Source: The Economic Times

Read Full news at: <https://economictimes.indiatimes.com/industry/energy/power/bidders-set-up-close-fight-for-sks-power-financial-creditors-could-make-a-full-recovery/articleshow/97233379.cms>

➤ **NCLAT Chairperson Calls For IBC Amendment To Ensure Due Share For Operational Creditors; Stresses On Need To Train IRPs**

Former judge of the Supreme Court and current chairperson of the National Company Law Appellate Tribunal, Justice Ashok Bhushan, said the move to inaugurate an insolvency law regime was one of the two most important changes in Indian legislative

policy; the other being the introduction of the goods and services tax which replaced multiple indirect taxes levied by the centre as well as the states.

“The prime minister himself is very keen and he has been following all developments, said the NCLAT chairperson, “He also knows every aspect of the matter including shortfalls and modifications that need to be made.”

Justice Bhushan was invited as the chief guest at the book launch of the second edition of Eastern Book Company’s ‘Insolvency and Bankruptcy Code’ by A.K. Mittal. The guest of honour at the virtual book launch was Justice Rajiv Shakdher of the Delhi High Court. Also in attendance were other eminent personalities in the legal fraternity.

The Insolvency and Bankruptcy Board of India recently conducted a twoday colloquium with the finance minister in attendance, revealed Justice Bhushan. “All shortcomings in the legislation were discussed and recommendations have been some submitted to the government to bring the necessary changes,” the former judge said. One of the most important topics at the event was the dues of operational creditors.

The Insolvency and Bankruptcy Code distinguishes between various kinds of creditors on the basis of their roles while a company is still solvent, with financial and operational creditors being key entities. Under the extant scheme, financial creditors, as voting members of the creditor’s committee, are given higher priority than operational creditors, who are not members of the committee.

“The maximum casualty is of the operational creditor who are at the very bottom of the distribution chain. The financial creditors take the major share, while the operational creditors get nothing,” Justice Bhushan explained, while highlighting the need for an amendment to Section 53 of the code. “The legislature may take a call on this. We hope that this year, we will have some more amendments in the code addressing the pertinent issues.”

While speaking about the shortcomings of the insolvency architecture, the chairperson said that professionals were often ‘caught up’ in ‘small things’, causing them to lose sight of the larger objective of the code, which is to provide succour to distressed companies and maximise the overall wealth and welfare of the economy.

He said, “There should be a cadre of insolvency professionals so that they are accountable to a body. In fact, we have recommended that the government create a cadre and provide proper training and education. Competent professionals are likely to take insolvency resolution on the right track and prevent liquidation.”

In this connection, Justice Shakdher said that one of the problems faced by India was cross border insolvency. “The reason that this code was brought in and the government was very keen on pushing it was that on a global index on ease of business, India had a dismal position. But we are very far from achieving what was envisaged in 2016.”

The government was also sitting on the UNCITRAL recommendations, the judge said. He cautioned, “Do not expect people or multinationals to invest in the country in a big way unless they are sure that there is easy access if the country fails.”

Justice Shakti Singh further pointed out that personal insolvency was also an aspect that required greater legislative attention. Proposed Overhaul of Insolvency and Bankruptcy Code is an Important Change in Indian Legislative Policy: Former SC Judge and NCLAT Chairperson.

Source: Live Law

Read Full news at: <https://www.livelaw.in/top-stories/nclat-chairperson-calls-for-ibc-amendment-to-ensure-due-share-for-operational-creditors-stresses-on-need-to-train-irps-219654>

➤ **Operational Creditors Only Entitled To Minimum Of The Liquidation Value: NCLAT Delhi**

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 Dharindra Constructions Pvt. Ltd. & Anr. v Rajendra Kumar Jain, has held that Operational Creditors are only entitled for minimum of the liquidation value.

Background Facts

Kudos Chemie Ltd. & Ors. (“Corporate Debtor”) was admitted into Corporate Insolvency Resolution Process (“CIRP”). Dharindra Constructions Pvt. Ltd. (“Operational Creditor/Appellant”) is an operational creditor of the Corporate Debtor who was not allocated any amount in the resolution plan, since the liquidation value of the Appellant/Operational Creditor was NIL. On 17.03.2022 the Adjudicating Authority approved the Resolution Plan submitted by the Successful Resolution Applicant. The Adjudicating Authority observed that as per the Information Memorandum, the operational creditors were segregated into three categories. First being workmen and employees, who have been paid Rs. 20 Lakhs as against their verified claim of Rs. 18.88 crores. Second being Government dues, towards which NIL payment was made as against as verified claim of Rs.295.18 Crores. Third being operational creditors other than workmen & employees and government dues, to whom NIL payment has been made as against a verified claim of Rs.295.18 crores.

The Appellant/Operational Creditor filed an application before the NCLAT, challenging the order dated 17.03.2022 passed by the Adjudicating Authority. It was argued that since the approved resolution plan did not allocate any amount for the operational creditor, the same was violative of the Insolvency and Bankruptcy Code, 2016 (“IBC”).

A Resolution Plan requires statement that claims of all the stakeholders have been dealt with. However, there is no consideration in the plan about the claim of the Appellant/Operational Creditor.

The Resolution Professional submitted that the liquidation value of the Operational Creditor was NIL, hence no amount was allocated to it in the Resolution Plan. Further, the claims of all stakeholders were dealt with in the Resolution Plan.

NCLAT Verdict

The Bench observed that the Liquidation value of the Appellant/Operational Creditor was Nil. Even the Operational Creditors which are Government and whose verified claim is Rs. 295.18 Crores, were paid NIL. The requirement for the obligation for payment of amount to the Operational Creditor is under Section 30(2)(b) and the plan had not violated the said provision.

“We are of the view that as per the law as exist today, the Operational Creditors are only entitled for minimum of the liquidation value and there being no breach of any of the provisions of the Code, we are unable to interfere with the impugned order.” The Bench held that the Operational Creditors are only entitled for minimum of the liquidation value. Accordingly, the Appeal was dismissed.

Source: Live Law

Read Full news at: <https://www.livelaw.in/news-updates/operational-creditors-only-entitled-to-minimum-of-the-liquidation-value-nclat-delhi-219624>

➤ **The Centre’s proposals should strengthen insolvency code**

The introduction of the Insolvency and Bankruptcy Code (IBC) in 2016 was a ‘ watershed’ moment in India, its success aided by swift legislative interventions by the government to ensure that the code evolved to address legal and practical challenges in its implementation. The latest proposals by the ministry of corporate affairs advance the same philosophy, with sweeping changes being suggested.

- (i) The ministry of corporate affairs proposes to make the admission of a case “ near automatic” by relying on records of Information Utilities to determine “default” , making it mandatory for the National Company Law Tribunal (NCLT) to admit a petition where that has been established. While this will reduce delays, safeguards should be incorporated for recording of a default by Information Utilities.
- (ii) Pre-packs introduced during the covid pandemic’s peak for micro, small and medium enterprises were not used. The pre-pack framework will now be expanded to include additional categories of companies whilst reducing the

- approval threshold for initiation from the current 66% to 51% of unrelated nancial creditors. The fast-track process for prescribed companies is being fine-tuned, so that the NCLT will be involved only for nal approval of a resolution plan (or a free-standing moratorium if needed). The fast-track process has checks and balances outside the NCLT to make it robust and swift. This will take resolution options under the IBC closer to established pre-pack regimes globally.
- (iii) Companies with diverse classes of assets have historically faced difficulties in attracting resolution applicants. The Committee of Creditors (CoC) can now invite asset-specific resolution plans to move ahead in stages. Mechanisms have been proposed for cases involving inter-dependent assets required for business continuity, such as pooling of assets of companies, and guarantors and a long-awaited group insolvency procedure. The “ clean slate” principle, a basic requirement for resolution applicants, is proposed to be reinforced by prohibiting government or statutory authorities from initiating legal proceedings for claims related to the period before the corporate insolvency resolution process (CIRP). The continuation of subsistent arrangements or licences issued by government authorities after the approval of a resolution plan will achieve the dual purpose of keeping the company a going concern and improving bidder confidence to maximize the value of its economic assets.
 - (iv) Mandating the use of a Swiss challenge mechanism or inter-se bidding will offer certainty to bidders and help ensure that stakeholders realize the best possible value from the process. However, the CoC may need some discretion to specify the contours of the challenge processes as they see fit.
 - (v) The disruptive effect of the Indian Supreme Court’s ruling in Rainbow Papers is sought to be neutralized by a proposal that all debts owed to government authorities will be treated at par with unsecured creditors, irrespective of statutory provisions creating a first charge, except in cases where a security interest has been created in favour of the government pursuant to a “transaction” between it and the borrower.
 - (vi) Recovery for operational creditors will improve once they are brought at par with unsecured nancial creditors.
 - (vii) Offering some homebuyers relief, if insolvency is initiated against the promoter of a real-estate project, then CIRP provisions will apply only to such projects which have defaulted, at the discretion of the NCLT. This will enable segregation of viable and distressed projects and contain the problem. Allottees can be handed over completed projects with the CoC’s consent.
 - (viii) The government’s distribution proposal calls for more debate. It proposes that creditors receive proceeds up to the liquidation value of the company based on the existing waterfall mechanism used for liquidation under Section 53 of the IBC. All of the surplus will then be distributed among all creditors based on a ratio of their unsatisfied claims. While well-intentioned, this proposal deviates from credit fundamentals and a well-accepted order of priority of security interests. It has been considered for complex group structures and layered borrowings where

multiple companies operated as a single economic unit. Applying it to standalone firms may deter the availability of credit. One solution could be to give the CoC or government discretion over applying the proposed distribution device in cases involving public interest. In all other cases, the payout scheme should be as per the existing Section 53, which clearly gives secured creditors priority, as established principles of credit demand.

On the whole, the proposals bear testimony to the government's awareness of IBC problems that warrant course correction. The proposals preserve the creditor-in-possession model as the IBC's fulcrum, but make the framework more robust and negate the impact of judicial rulings in Vidarbha Industries and Rainbow Papers which shook the substratum of the IBC. Considering that significant discretion is proposed to be granted to the NCLT, the government will now have to focus on strengthening its infrastructure and help it discharge its functions effectively.

Source: Mint

Read Full news at: <https://www.livemint.com/opinion/columns/the-centre-s-proposals-should-strengthen-our-insolvency-code-11674406335559.html>

➤ **'Difficult To Comprehend Reasoning, Logic Or Rationale In This Order': Bombay High Stays IBBI Order Suspending Valuer's Registration**

The Bombay High Court has granted a stay on an order passed by the Insolvency and Bankruptcy Board of India (IBBI) against a Registered Valuer, saying that it was "difficult to comprehend the reasoning, logic or rationale" in the order.

A division bench of Justices G S Patel and S G Dige on January 12 stayed the operation of the IBBI order suspending Vishwanatha Prabhu's registration as a 'registered valuer'. "The impugned order seems to us to have completely overlooked the inherent absurdity that it creates.

It proceeds on the basis that the mere pendency of a criminal proceeding robs a person such as the Petitioner of his "fit and proper person" status because it supposedly affects his 'integrity, reputation and character'," the bench observed. It added that "we are asked to believe that ... the integrity, reputation and character of the petitioner will suddenly get restored to some position anterior in time" if in future no charges are framed against him, or he is discharged, or the case is quashed or he is acquitted.

"In other words, it is being suggested that on account of mere accusations and allegations the Petitioner is already so guilty that his professional integrity, reputation, and character are tarnished. He has, in other words, already been found guilty — and not just before trial, but before charges are even framed," the bench noted and granted

interim relief in favour of the petitioner, who was represented by Advocate Bhavesh Parmar. The petitioner was enrolled as a Registered Valuer with the IBBI in May 2019 after due process, but the registration was suspended on February 28, 2022 by a Whole Time Member of the IBBI “till he is exonerated of the charges.”

The reason for this suspension was Prabhu’s arrest in the Punjab and Maharashtra Cooperative Bank-Housing and Development Infrastructure Ltd loan fraud case. Prabhu’s firm Yardi Prabhu Consultants had PMC bank as one of its clients – he was neither on the board of PMC bank nor HDIL.

The bank had a panel with Yardi Prabhu Consultants as one amongst several valuers. It was because of this association that the Economic Offences Wing of Mumbai Police called Prabhu for investigation and eventually arrested him on March 12, 2020. He was released on bail only on June 20, 2022.

The IBBI issued a show cause notice to him in May 2021, while he was in custody, asking him why his registration should not be cancelled. The basis of the show cause notice was the charge-sheet filed by the EOW for Prabhu’s alleged role in the case linked to PMC bank, under sections 201, 406, 420, 465, 467, 468, 471 and 477A read with section 120B of the Indian Penal Code and Sections 46(1) and 47A of the Banking Regulation Act.

Prabhu contested the notice despite which the IBBI passed an order suspending his registration. The IBBI Whole Time Member, in its order, noted that the question that the authority needed to answer was whether the pendency of criminal proceedings impacts the integrity and reputation of the registered valuer and whether the same had an effect on his eligibility for continuing as an RV.

After noting down all the major sections in the charge-sheet filed by the EOW, the authority observed, “It is pertinent to note that the foundation of valuation services in a market economy lies on mutual trust between the valuer and the stakeholders.

Based on the professional opinion of a valuer, for the purposes of Corporate Insolvency Resolution Process, CoC takes prudent commercial decisions. Therefore, it becomes crucial to engender as well as maintain the reputation and integrity of the valuation profession and the trust of the stakeholders, so that the decision makers in the market have adequate comport to take any crucial economic decision without any fear or doubt.”

It then passed an order suspending Prabhu’s registration observing, “Pendency of the criminal proceeding against Mr. Prabhu for the offences as stated above, adversely affected his integrity and reputation and makes him a person who is not ‘fit and proper’ to be eligible as a RV.

Hence, the Authority finds that this is in violation of Rule 3(1)(k) of the Companies (Registered Valuers and Valuation) Rules, 2017.” The HC division bench, however, outright disagreed with the reasoning calling it against the presumption of “innocent

until proven guilty." "On the face of it, it is difficult to comprehend the reasoning, logic or rationale in this order, especially in paragraph 4.7. Anyone may set the criminal process in motion against anyone.

There may be an FIR. There may even be a charge-sheet. But, except in certain specific statutes, the presumption in criminal jurisdiction in this country is still that a person is innocent until he is proved guilty," the bench noted.

The court said even charges have not been framed against Prabhu and It is entirely possible that the court in question, when it takes up the chargesheet, may not in fact frame charges against the him at all.

"Even that is not known. The Petitioner may apply for or may obtain a discharge or a quashing order at some appropriate stage. Even that is unknown. We believe that in fact a quashing application is in the process of being filed. There is in addition the possibility of the Petitioner's acquittal.

The impugned order proceeds on the basis that a simple allegation or accusation is enough to impeach the 'integrity, reputation and character' of a person, and that on a mere accusation a person is rendered unfit and improper," the bench observed. Staying the IBBI order during the pendency of the petition, the court directed that affidavit-in-reply on merits be filed and served on or before February 24, 2023. "A Rejoinder is permitted by 10th March 2023.

The Petition is to be listed peremptorily for final disposal at 2.30 pm on 16th March 2023," it added.

Source: Live Law

Read Full news at: <https://www.livelaw.in/news-updates/mere-accusation-is-not-enough-to-impact-character-of-a-person-bombay-hc-stays-ibbi-order-against-registered-valuer-219663>

