INSOLVENCY PROFESSIONAL AGENCY
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Latest updates On Insolvency & Bankruptcy

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"Never let your fear decide your fate"

➢ Founders of sinking companies dragged to tribunals for ₹1tn

Shareholders and founders who extend personal guarantees to their companies, giving additional comfort to lenders, are increasingly ending up in bankruptcy tribunals, marking a significant development in India's bankruptcy resolution push. Official data from the Insolvency and Bankruptcy Board of India (IBBI) showed that personal guarantors representing over ₹1 trillion had been dragged to these tribunals since they were brought under the bankruptcy code in 2019. Close to 70% of the 1,235 cases of personal guarantors who faced creditor action ended up in tribunals in FY22, even as the economy recovered from the contraction seen in the previous fiscal year. Of the total ₹1.1 trillion worth of personal guarantees that reached tribunals, FY22 accounts for about ₹63,000 crore.

In the April-June period of FY23, 123 cases of personal guarantors ended up in tribunals, accounting for over ₹5,000 crores, data showed. Founders of businesses facing creditor action for the personal guarantees given by them is a significant development in the bankruptcy resolution regime. Personal guarantees give extra comfort to the lender while taking the risk of extending loans. They can also help persuade lenders that the promoter has skin in the enterprise, especially in the case of thinly capitalized companies.

Anoop Rawat, partner (insolvency and bankruptcy) at law firm Shardul Amarchand Mangaldas & Co., said that initially, when the Insolvency and Bankruptcy Code (IBC) came into effect, provisions relating to personal guarantors were not operational. "Subsequently, the provisions got notified, and the Supreme Court also brought clarity by upholding the liability of personal guarantors, irrespective of whether a resolution plan has been approved for the corporate debtor. Also, the trend now in many cases is to pursue personal guarantors parallelly while corporate insolvency resolution process is on."

As of June, over 5,600 corporations have ended up in the National Company Law Tribunal (NCLT) for bankruptcy resolution, of which two-fifths represent the manufacturing sector and a fifth account for the real estate sector. Construction, retail trade, hotels, electricity and transport account for the rest. Data also showed that of the cases admitted in tribunals so far for defaults of less than ₹1 crore, 80% were triggered by operational creditors like vendors.

To address such aggressive action by operational creditors and the use of IBC as a recovery tool, the government had raised the minimum payment default for invoking IBC to ₹1 crore in 2020. Till June end, over 500 cases of corporate distress have found resolution plans under the IBC regime, with creditors realizing about ₹2.35 trillion.

The total claim of creditors in these cases was about ₹7.6 trillion. The fair value of these enterprises when they entered the bankruptcy process was over ₹2 trillion. The Centre is currently working on a bill to amend the IBC to try and further improve the outcome of procedures in terms of the rescue of companies and recovery of the investments by lenders. The bill is expected to be tabled in the winter session of Parliament. Official data also showed that till the end of June, 786 petitions had been filed by administrators of insolvent businesses to reverse the dubious past transactions of these entities and recover lost funds.

The amount involved in these transactions, which include fraudulent or under-valued deals, is over ₹2.2 trillion.

Source: Live Mint
Read Full news at: *https://www.livemint.com/companies/news/founders-of-sinking-companies-dragged-to-tribunals-for-1-tn-11661359265440.html*

- **Tribunal Cannot Interfere With Decision Of COC To Replace Resolution Professional : NCLAT Chennai**

The National Company Law Appellate Tribunal ("NCLAT"), Chennai Bench, comprising of Justice M. Venugopal (Judicial Member) and Mr. Kanthi Narahari (Technical Member), while adjudicating an appeal in M/s IDBI Bank Limited v C.J. Davis, had set aside the Adjudicating Authority's order disallowing the Committee of Creditors ("CoC") to replace the Resolution Professional under Section 22(3)(b) of the Insolvency and Bankruptcy Code, 2016 ("IBC"). The Bench held that the commercial wisdom of CoC is paramount and can only be interfered by the Tribunal if the same is arbitrary, illegal, irrational and dehors the IBC and its Rules.

IDBI Bank Ltd. ("Financial Creditor/Appellant") had filed a petition under Section 7 of the IBC, seeking initiation of Corporate Insolvency Resolution Process ("CIRP") against Tip Top Furniture Pvt. Ltd. ("Corporate Debtor") and had proposed to appoint Shri CA Mahalingam Suresh Kumar ("Mr. Suresh") as the Interim Resolution Professional. The Adjudicating Authority had initiated CIRP against the Corporate Debtor but had rejected the name of Mr. Suresh for IRP as his name was not found in the NCLT Kochi Bench's list of Insolvency Professionals circulated by the IBBI. Accordingly, Mr. C.J. Davis ("Respondent") was appointed as the IRP of the Corporate Debtor

The Committee of Creditors ("CoC") was constituted with only two creditors and the Appellant had majority voting rights of 98.03%. The first CoC meeting was held on 21.01.2022 and the Respondent had acted as Chairman. In the same meeting, the

Appellant proposed to appoint Mr. Suresh as Resolution Professional of the Corporate Debtor and the resolution was passed unanimously. One day prior to the

CoC meeting, Mr. Suresh Kumar had already given his written consent in Form-AA to act as a Resolution Professional. Consequently, the Appellant filed an application under Section 22(2) of the IBC before the Adjudicating Authority for appointing Mr. Suresh as the Resolution Professional, however, the Adjudicating Authority rejected the application vide an order dated 09.02.2022. The ground for rejection was that the incumbent IRP was eligible to be appointed as Resolution Professional since there were no adverse comments against him and there was no reason to replace him. Further, Mr. Suresh could not be appointed as the Resolution Professional as his name was not available in the panel issued by the IBBI for Kochi Bench.

Contentions Of The Appellant

The Appellant contended that as per Section 16(2) of IBC, it is mandatory for the Adjudicating Authority to appoint the proposed IRP as long as there is no disciplinary proceeding against him/her and there is a valid Authorization for Assignment (AFA). The Adjudicating Authority's rejection of the Resolution Professional appointed by the Appellant, who is a member of CoC with majority voting share, was in gross violation of the Appellant's rights under law. The Adjudicating Authority acted beyond its power as it has no equity jurisdiction to decide whether it can appoint or reject the Resolution Professional proposed to be appointed by the CoC.

Contentions Of The Respondent

The Respondent submitted that the Adjudicating Authority primarily found that Mr. Suresh was handling too many assignments and thus appointed the Respondent from the panel of IRP maintained by the IBBI. An Insolvency Professional (IP) must refrain from taking too many assignments, if he is unlikely to devote adequate time to each of the assignments under Clause 22 of the Code of conduct of the IP.

Decision Of The NCLAT

The NCLAT Bench observed that under Section 22(3) of the IBC, the CoC in its 1st Meeting by a majority vote not less than 66% of the voting share can either decide to continue the IRP as Resolution Professional or may replace the IRP by filing an Application before the Adjudicating Authority along with written consent from the proposed Resolution Professional in the specified form. The Bench opined that the Appellant had complied with the provision of law and the Adjudicating Authority ought to have considered the same without going into the other technicalities. "When the Applicant comply with the provisions of law and there is no scope to reject the prayer or relief as sought by the Applicant." Reliance was placed on the Supreme Court judgment in Vallal RCK v M/s Siva Industries and Holdings Limited & Ors., CA 1811-1812 of 2022 wherein it was held that if the decision of the CoC, exercising their commercial wisdom is in accordance with law then the same cannot be interfered with by the Tribunals.

"Further, the provisions of law empower the CoC contemplated under Section 22 of the I&B Code, 2016 either to continue the IRP as RP or replace the IRP. When the provisions are unambiguous and authorises the CoC to act in accordance with law the same cannot be interfered with by the Tribunals unless and until it is arbitrary, illegal and irrational and dehors the provisions of the Code and the Rules."

The Bench set aside the Adjudicating Authority's order and directed the latter to consider appointment of Shri CA Mahalingam Suresh Kumar as Resolution

Professional of the Corporate Debtor within a period of two weeks, in accordance with law and pass appropriate orders.

Source: Live Law
Read Full news at: *https://www.livelaw.in/news-updates/nclat-chennai-committee-of-creditors-coc-insolvency-and-bankruptcy-code-resolution-professional-nclt-kochi-207412*

➢ Does Limitation Period For Filing Appeal Applies To Period For Curing Defects?: NCLAT Refers Question To Larger Bench

The National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, comprising of Justice Ashok Bhushan (Chairperson), Justice N Satyanarayana Murthy (Judicial Member) and Mr. Barun Mitra (Technical Member), while adjudicating in an appeal filed in Mr. V R Ashok Rao v TDT Copper Limited, has observed that issue of delay in refilling of appeal is often coming before the NCLAT Bench for consideration. Accordingly, the NCLAT Bench has referred the following question to a larger Bench: 'whether limitation for filing an Appeal before NCLAT also governs the period for curing defect in the Appeal and does NCLAT have jurisdiction to condone the delay in refilling of appeal if it is beyond the limitation prescribed in Section 61 of the IBC or Section 421 of the Companies Act, 2013?'

The Appellant had filed an appeal before the NCLAT under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("IBC") against the Order dated 11.03.2022 passed by the NCLT New Delhi Bench. The Memo of Appeal was presented in the NCLAT office on 13.04.2022. After scrutiny of the Memo of the Appeal on 19.04.2022, defects were intimated to the Appellant. The Appellant refilled the Memo of the Appeal on 08.06.2022, there being delay of 43 days in refiling the Appeal. The Registrar of NCLAT vide its "Office Note" dated 12.07.2022 placed the matter before the NCLAT Bench under the heading 'For Admission (Fresh Cases) with defects'.

Contentions Of The Parties
The Appellant submitted that refiling delay of 43 days may be condoned and the Appeal be heard on merits. The limitation for filing an Appeal under Section 61 of the IBC is 30 days, the Appeal being filed on 13.04.2022, an Application for condonation of delay of two days in filing the Appeal was field along with the Appeal. Respondent No. 1 submitted that refiling delay does not deserve to be condoned as the refiling of the Appeal on 08.06.2022 shall be treated as fresh filing of the Appeal and the same is beyond 45 days from date of the Impugned Order. Neither delay in filing the Appeal can be condoned nor delay in refiling need to be condoned. Under Rule 26 of the NCLAT Rules, 2016, only 7 days' time is allowed to remove the defects and the defects having communicated to the Appellant on 19.04.2022, the said defects could have been removed only till 26.04.2022. Whereas

after removal of the defect Appeal was refiled on 08.06.2022, hence registration of the Appeal should be refused.

Issue

Whether the refiling delay of 43 days in refiling the Appeal can be condoned and further the Appeal is to be treated as a fresh Appeal on 08.06.2022 on the date when it was represented. In event, it is accepted, the Appeal which was firstly presented on 13th April, 2022 and represented on 08th June, 2022 is a fresh Appeal filed on 08th June, 2022. 08th June, 2022 being beyond 45 days, whether this Tribunal shall have no jurisdiction to condone the delay in filing the Appeal.

The Bench placed reliance on the following judgments:

• Northern Railway Vs. Pioneer Publicity Corporation Pvt. Ltd., (2017) 11 SCC 234, wherein the Supreme Court held that refiling of the Application after curing the defects in Application does not amount to fresh filing of the Application for counting limitation.

• P. Ram Bhoopal & Ors. Vs. Pragnya Riverbridge Developers Limited & Ors., Civil Appeal No. 19486 of 2017, wherein the Supreme Court held that the initial date of lodgment of the appeal is the date on which the appeal should be considered as filed, even though an appeal number may be given to the appeal subsequently

• Mr. Jitendra Virmani v MRO-TEK Realty Ltd. & Ors., Company Appeal (AT) No. 138 of 2017 and Arul Muthu Kumaara Samy v Register of Companies, Company Appeal (AT) No. 122 of 2020, wherein the NCLAT held that when defect is not cured within seven days and Appeal is filed thereafter it should be treated as fresh Appeal. The Bench opined that the view taken by NCLAT in Mr. Jitendra Virmani v MRO-TEK Realty Ltd. & Ors., and Arul Muthu Kumaara Samy v Register of Companies, does not lay down the correct law in view of the judgments of the Supreme Court in Northern Railway v Pioneer Publicity Corporation Pvt. Ltd and P Ram Bhoopal v Ors. Vs. Pragnya Riverbridge Developers Limited & Ors. The Bench further observed that the issue of delay in refiling is often coming before NCLAT for consideration and the Judgments of NCLAT in its aforementioned two cases need to be reconsidered for an authoritative pronouncement on the issue.

The Bench held that the following questions need to be considered by a Larger Bench: Whether the law laid down by this Tribunal in "Mr. Jitendra Virmani Vs. MRO-TEK Realty Ltd. & Ors" and three Member Bench Judgement in "Arul Muthu Kumaara Samy Vs. Registrar of Companies" that when the defect in Appeal is cured and the Appeal is refiled before the Appellate Tribunal beyond seven days, the date of representation of the Appeal shall be treated as a fresh Appeal, lays down correct law?

Whether the limitation prescribed for filing an Appeal before this Appellate Tribunal under Section 61 of Insolvency and Bankruptcy Code, 2016 or Section 421 of the Companies Act, 2013 shall also govern the period under which a defect in the Appeal is to be cured and this Appellate Tribunal shall have no jurisdiction to condone the delay in refiling/representation if it is beyond the limitation prescribed in Section 61 of the IBC or Section 421 of the Companies Act, 2013.

Source: Live Law

Read Full news at: *https://www.livelaw.in/news-updates/nclat-section-61-of-the-insolvency-and-bankruptcy-code-limitation-period-companies-act-207411*

➢ On A Request Made By CoC, NCLT Is Empowered To Remand Back Resolution Plan To CoC For Re-Consideration: NCLT Ahmedabad

The National Company Law Tribunal ("NCLT"), Mumbai Bench, comprising of Dr. Deepti Mukesh (Judicial Member) and Shri Ajai Das Mehrotra (Technical Member), while adjudicating an application filed in Asset Reconstruction Company (India) Limited v GPT Steel Industries Ltd., has held that Adjudicating Authority has right to send back the resolution plan for reconsideration to the CoC, on a request made by the CoC in its commercial wisdom.

Background Facts

Asset Reconstruction Company (India) Ltd. ("Financial Creditor/Applicant") had filed a petition under Section 7 of the Insolvency and Bankruptcy Act, 2016, seeking initiation of Corporate Insolvency Resolution Process ("CIRP") against Steel Industries Ltd. ("Corporate Debtor"). The Adjudicating Authority admitted the petition and CIRP was initiated 02.05.2019. Nivaya Resources Private Limited ("Successful Resolution Applicant/SRA") had submitted a resolution plan for the Corporate Debtor which was approved by the Committee of Creditors ("CoC") with 82.41 % votes. Consequently, the Resolution Professional had filed an application before the Adjudicating Authority for approval of the After approval of the Plan by CoC, it came into light that the parent company of the SRA, i.e., Gulf Petrochem FCZ, was declared bankrupt and there is a freezing injunction on the Promoters. The credit rating of the SRA was in default as on 04.06.2021 and it had also defaulted as a Successful Resolution Applicant in CIRP of M/s. Allied Strips Ltd. and M/s. Tirupati Infraprojects Pvt. Ltd. The CoC passed a resolution with 96.95% votes to seek permission of Adjudicating Authority for reconsideration of the resolution plan submitted by SRA for better prospects of resolution. Accordingly, an application was filed before the Adjudicating Authority.

Contentions Of The Applicant

The Applicant submitted that permission be given to reconsider the resolution plan and call for new resolution plans from fresh proposed applicants if required, as the SRA had given false undertaking in the Plan and had misrepresented. Re-consideration of the Plan would aid in achieving timely and successful resolution of the Corporate Debtor; maximizing the value of the Corporate Debtor; and ensuring that Resolution Plan gets fully implemented.

Issue

Whether a resolution plan which is already approved by the CoC, and which is pending before the Adjudicating Authority for approval can be withdrawn for reconsideration by the CoC on the discovery of new facts and events relating to the resolution applicant and whether the Adjudicating Authority is empowered to send back the resolution plan, on such request, to the CoC?

Decision of the NCLT

The NCLT Bench observed that it was well within its rights to send back the resolution plan for reconsideration to the CoC, on request made by the CoC in its commercial wisdom. Reliance was placed on NCLAT judgment in Bank of Maharashtra v Videocon

Industries Ltd. & Ors., CA (AT) (Ins) No. 503 of 2021, wherein it was held that Adjudicating Authority is competent to send back a resolution plan to the CoC for reconsideration. The application was allowed and the Resolution Plan was remanded back to CoC for re-consideration.

Source: Live Law

Read Full news at: *https://www.livelaw.in/news-updates/nclt-ahmedabad-resolution-plan-corporate-insolvency-resolution-process-committee-of-creditors-coc-successful-resolution-applicant-207404*