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"When you have a dream, you've got to grab it and never let go"

➢ NCLAT Delhi Sets Aside The CIRP Of LA Residentia Developers, As Parties Enter Settlement

The National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, comprising of Justice Ashok Bhushan (Chairperson), Justice M. Satyanarayana Murthy (Judicial Member) and Mr. Naresh Salecha (Technical Member), while adjudicating an appeal filed in Amrapali LA-Residentia Flat Buyers Welfare Association (ALRFBWA) v LA Residentia Developers Pvt. Ltd. & Ors., has set aside the Corporate Insolvency Resolution Process ("CIRP") of LA Residentia Developers Pvt. Ltd. as parties have entered settlement. It was observed that the continuing business relation between the Parties show that the Corporate Debtor is not insolvent.

LA Residentia Developers Pvt. Ltd. ("Corporate Debtor") is a real estate developer with residential and commercial projects situated in Greater Noida, one of its prime projects being the Amrapali La Residentia. The Supreme Court in Writ Petition No. 940/2017 titled as Bikram Chatterjee and Ors. v Union of India and Ors., had directed Forensic Audit of the Amrapali Group, based on the premise that the amount invested by Flat Buyers were being siphoned off by the latter. The Forensic Auditor submitted a report that the Company "M/s. Stunning Constructions Pvt. Ltd." consortium member was part of Amrapali Group owning a share amounting to 19.75% equivalent to 632 apartments in the LA-Residentia Project. However, the Supreme Court refused to hand over the La-Residentia Project to National Buildings Construction Corporation Ltd. (NBCC) for completion and instead permitted the Corporate Debtor to continue with the construction.

In 2017, Singhal Pipes Pvt. Ltd. ("Operational Creditor") had supplied pipes, sockets, cement and allied products to the Corporate Debtor and the latter had failed to pay the outstanding bill amount of Rs. 28,07,764/- (inclusive of interest) despite several demand notices. The Operational Creditor in 2020 had filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") before the NCLT New Delhi ("Adjudicating Authority"), seeking initiation of CIRP against the Corporate Debtor.

In the meanwhile the Supreme Court vide an order dated 20.05.2022 passed in Bikram Chatterjee and Ors. v Union of India and Ors., had given directions for completion of the La-Residentia project to ensure that the home-buyers should get the flats.

Subsequently, the Adjudicating Authority vide an order dated 25.05.2022 had admitted the Petition and initiated CIRP, Mr. Naveen Kumar Jain was appointed as the Interim Resolution Professional ("IRP"). The La-Residentia Flat Buyers Welfare Association (ALRFBWA) ("Appellant") had filed an appeal before the NCLAT challenging the order dated 25.05.2022.

Further, in June 2022, the Suspended Board of Directors of the Corporate Debtor had filed an application before the Adjudicating Authority, seeking termination of CIRP under Section 12A of IBC as Parties had entered settlement. The Corporate Debtor and the Operational Creditor were in continuous business relation as Corporate Debtor had purchased and paid for materials worth Rs. 40 Lakhs during the period 01.11.2021 to 31.12.2021. It was further submitted that the IRP had not co-operated in filing of the application under Section 12A for withdrawal of the proceedings. The Adjudicating Authority had issued notice to the IRP in the matter on 17.06.2022.

On 07.07.2022, the appeal filed by the Appellant was allowed by the NCLAT and a direction was given to the IRP to file an affidavit, explaining his conduct in not filing the application for withdrawal of the Section 9 Petition under Section 12A, when the parties had already settled, communicated the settlement to the IRP and had also submitted Form-F. The Bench had also restrained IRP from taking any further steps in the CIRP of the Corporate Debtor.

On 25.07.2022, the Bench observed that "We are satisfied that the fact that between the period 01.11.2021 to 31.12.2021 payment of Rs. 40 Lakhs have been made by the Corporate Debtor to the Operational Creditor and Operational Creditor is continuing with the business relation, ought to have been taken into consideration by the Adjudicating Authority which fact clearly indicated that the Corporate Debtor is not insolvent."

The Bench observed that the Adjudicating Authority ought to have considered the directions given by the Supreme Court on 20.05.2022 for completion of Project, before proceeding to admit the Section 9 Application for an amount of Rs. 28,07,764/- which was an Operational Debt. Accordingly, the order dated 25.05.2022 was set aside by NCLAT.

The Bench observed that on one hand the IRP had filed an application for withdrawal on 15.06.2022 and on the other hand it had proceeded to constitute the CoC on 18.06.2022. "His action speaks for his intent that his intent was that even if Operational Creditor and the Corporate Debtor have settled he may proceed with the CIRP." The Bench opined that the IRP has to act in accordance with the statutory scheme.

Source: Live Law
Read Full news at: *https://www.livelaw.in/news-updates/nclat-delhi-amrapali-la-residentia-flat-buyers-welfare-association-corporate-insolvency-resolution-process-insolvency-and-bankruptcy-code-204873*

➢ Reverse Corporate Insolvency Resolution Process In Case Of Real Estate Companies

Taking a cue from the Supreme Court in the matter of Swiss Ribbons Private Limited and Anr. vs. Union of India and Ors. [1] , a new concept by the name of 'Reverse

Corporate Insolvency Resolution Process' was propounded by the National Company Law Appellate Tribunal ("NCLAT") for insolvency resolution of real estate companies in Flat Buyers Association Winter Hills – 77, Gurgaon Vs. Umang Realtech Pvt. Ltd through IRP & Ors.

The Supreme Court had remarked that hindering innovative experiments of economic nature will have serious consequences on the nation. The aforesaid views of the Supreme Court motivated the NCLAT to experiment with the corporate insolvency resolution process given in the Insolvency & Bankruptcy Code, 2016 ("Code"), In light of the above, the NCLAT tested as to whether during the corporate insolvency resolution process, the resolution of the corporate debtor could reach finality without approval of a third-party resolution plan thereby deviating from the corporate insolvency resolution process given in the Code.

Under the corporate insolvency resolution process prescribed under the Code, the interim resolution professional / resolution professional, as the case may be, invites resolution plans from prospective resolution applicants who are not ineligible under Section 29A of the Code for undertaking resolution of the corporate debtor. The whole intent of incorporating Section 29A of the Code was to debar those persons who with their misconduct had contributed to defaults of the corporate debtor or who may misuse this insolvency resolution process due to lack of prohibition or restrictions and regain control of the corporate debtor, i.e., promoters of the corporate debtor.

However, through the reverse corporate insolvency resolution process, the promoters can overcome the bar given in Section 29A of the Code and give a proposal for completing and delivering the projects of the corporate debtor. The reverse corporate insolvency resolution process is undertaken after taking approval of the creditors, and pursuant thereto, the promoters are allowed to infuse funds as an investor thereby ensuring completion of the estranged projects of the corporate debtor and provides the promoters an opportunity to regain the corporate debtor on satisfying all of the claims of the creditors of the corporate debtor.

The reason given by the NCLAT for propounding the reverse corporate insolvency resolution process in case of real estate companies was that real estate companies usually have more than one project; hence, default in delivery of units of a particular project should not affect other projects of the corporate debtor. The aforesaid idea was premised on the fact that separate plan(s) are approved by different authorities, the land in which the project is being developed and its owner may also be different and even the allottees (financial creditors), financial institutions (financial creditors), and operational creditors are different for each project. Hence, the NCLAT was of the view that there is no need to maximise all of the assets of the corporate debtor, and therefore, only the asset of the corporate debtor of that particular project in default is to be maximized in the interest of the creditors of the said project, i.e., allottees, financial institutions and operational creditors of that particular project.

In the light of aforesaid, the NCLAT was of the view that it is very difficult to follow the normal corporate insolvency resolution process which is given in the Code, and hence, a reverse corporate insolvency resolution process should be followed in the case of real estate companies in the interest of the allottees thereby ensuring

survival of real estate companies, completion of projects and providing employment to large number of unorganized workmen.

In the said matter, one of the promoter of the corporate debtor, i.e., Umang Realtech Primate Limited, agreed to remain outside of the corporate insolvency resolution process and act in the capacity of a lender (financial creditor) and infuse funds so that the estranged allottees of the project would get possession of their flats during the insolvency resolution process of the corporate debtor without any third-party intervention.

The promoter was directed to cooperate with the interim resolution professional and infuse funds as a lender (financial creditor) and not in the capacity of a promoter to ensure that the project was completed within the time frame given by the promoter, and in case the promoter failed to comply with the undertaking and failed to invest as a financial creditor or did not cooperate with the interim resolution professional of the corporate debtor, the NCLAT had directed that the National Company Law Tribunal ("NCLT") would complete the corporate insolvency resolution process of the corporate debtor in the manner given in the Code.

Section 29A of the Code bars a person from submitting a resolution plan for taking over the corporate debtor if they fall within any of the ineligibility provided under Section 29A of the Code. The intent of incorporating Section 29A of the Code had been to bar people from taking control of the corporate debtor who with their misconduct had contributed to defaults of the corporate debtor or were otherwise undesirable, and could misuse this situation due to lack of prohibition or restrictions on participating in the resolution or liquidation process of the corporate debtor, i.e., promoters of the corporate debtor. The legislature was of the view that allowing such persons to regain the reins of the corporate debtor would undermine the process laid down in the Code as unscrupulous person would be rewarded at the expense of creditors.

However, taking into consideration the peculiar case of real estate companies in which only specific projects are under default, the NCLAT allowed the promoter to act as a financial creditor to ensure completion of the distressed project so that the said project would be timely delivered while keeping the scare of proceeding against the corporate debtor through the normal corporate insolvency resolution process in case of non-infusion of funds. Hence, ensuring speedy resolution of the destressed projects and thereby ensuring speedy delivery of the units to the estranged allottees.

The concept of reverse corporate insolvency resolution process was again utilised by the NCLAT in the case of Rajesh Goyal Vs. Babita Gupta & Ors. [3] Even in the said case, the promoter had agreed to make an investment as a financial creditor to keep the corporate debtor, i.e., Rajesh Projects (India) Private Limited, as a going concern so that the project in default could be completed.

As the allottees, being the main beneficiaries of the units, had already reached settlement with the promoter and the promoter as an outside financial creditor had agreed to invest, not from the account of the corporate debtor but from other sources, to keep the corporate debtor as a going concern, the NCLAT exercised its inherent powers conferred under Rule 11 of the NCLAT Rules, 2016 and utilised the

reverse insolvency resolution process to allow the promoter to complete and deliver the units to the estranged allottees.

Subsequently, even the Supreme Court in the case of Anand Murti Vs. Soni Infratech Private Limited and Anr. [4] observed that it would be in the interest of the home-buyers if the promoter was permitted to complete the housing project taking into consideration the project completion proposal presented by the promoter of the corporate debtor. The Supreme Court also observed that there is a high possibility that if the corporate insolvency resolution process was permitted, then the cost that the home-buyers would have had to pay under a third-party resolution would have be much higher as the offer made by the resolution applicants would include the price of escalation, etc.

In light of the above, the undersigned is of the view that the intention for propounding the reverse corporate insolvency resolution process is clearly to safeguard and further the interests of the allottees of the projects in default by ensuring timely and efficient resolution of destressed projects. However, through the said process, the people who with their misconduct had contributed to defaults of the corporate debtor, i.e., promoters of the corporate debtor, are also getting a means to take back the corporate debtor even though there is a bar under Section 29A of the Code. Hence, adequate checks are required to be maintained so that misuse of the process is not carried out by miscreants by securing haircuts in the garb of insolvency resolution.

Source: Live Law
Read Full news at: *https://www.livelaw.in/lawschool/articles/reverse-corporate-insolvency-resolution-real-estate-nclat-swiss-ribbons-private-limited-insolvency-bankruptcy-code-2016-204885*

➢ NCLT Disallows JSW To Withdraw From Status Of Successful Resolution Applicant Of Ind-Barath Energy

The National Company Law Tribunal, Hyderabad Bench, comprising of Bhaskara Pantula Mohan (Judicial Member) and Dr. Binod Kumar Sinha (Technical Member), while adjudicating an application filed in Bank of Baroda v Ind-Barath Energy (Utkal) Ltd., has held that under Section 31(1) of the Insolvency and Bankruptcy Code, 2016 ("IBC"), Adjudicating Authority is not empowered to terminate or remand back a resolution plan to the Committee of Creditors for re-consideration, an assessment can only be made to see whether the plan incorporates provisions for its smooth implementation or not. Further, the resolution plan submitted by JSW Energy Ltd. has been approved for Ind-Barath Energy (Utkal) Ltd.

Bank of Baroda had filed an application under Section 7 of the IBC, seeking initiation of Corporate Insolvency Resolution Process ("CIRP") against Ind-Barath Energy (Utkal) Ltd. ("Corporate Debtor"). The NCLT, Hyderabad Bench ("Adjudicating Authority") vide an order dated 29.08.2018 had admitted the application and CIRP was initiated. Mr. Udayraj Patwardhan was appointed as the Interim Resolution Professional and subsequently as the Resolution Professional.

M/s JSW Energy Ltd. ("Successful Resolution Applicant"/ "SRA") had submitted a Resolution Plan for the Corporate Debtor which was approved by the Committee of Creditors ("CoC") with 82.70% votes on 09.10.2019. The Resolution Professional had filed an I.A. No. 882/2019 seeking approval of Resolution Plan by the Adjudicating Authority.

During the pendency of I.A. No. 882/2019, the SRA had filed an application bearing I.A. No. 24/2021, seeking permission to withdraw its own Resolution Plan which was pending approval and dismissal of I.A. No. 882/2019. The SRA had sought withdrawal by invoking the "Material Alteration Clause (MAC)" of its Resolution Plan over the premise that the asset value of Corporate Debtor had significantly eroded due to the Resolution Professional's negligence. The Adjudicating Authority had dismissed the I.A. No. 24/2021 while relying on the Supreme Court judgment in Ebix Singapore Pvt. Ltd. v CoC of Educomp Solutions Ltd. & Anr., Civil Appeal No. 3324 of 2020, wherein it was held that the Adjudicating Authority does not have power to permit withdrawal of the Resolution Plan.

Thereafter, the SRA filed objections to its own Resolution Plan in I.A. No. 882/2019, stating that the same cannot be implemented owing to the eroded value of Corporate Debtor's assets due to delay in approval of Resolution Plan and failure of the Resolution Professional to preserve the value of assets.

The Resolution Professional contended that the SRA had sought same relief in I.A. No. 24/2021 and the objections filed in I.A. No. 882/2019 and was merely finding a way to wriggle out of its own Resolution Plan by blaming the Resolution Professional for negligence. The SRA cannot object to the approval of its own Resolution Plan again and again on same facts.

The SRA had submitted that under the proviso to Section 31(1) of the IBC, the Adjudicating Authority can terminate a resolution plan which is incapable of being implemented. Issues Whether the Adjudicating Authority can look into the issues of deterioration of assets after approval of Resolution Plan by unassailable majority of CoC Members again to decide as to whether the CoC approved resolution plan is capable of effective implementation or not?

"31. Approval of resolution plan – (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:

PROVIDED that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this subsection, satisfy that the resolution plan has provisions for its effective implementation.

The Bench observed that Section 31(1) of the IBC was incorporated to ensure that the Resolution Plan itself contains provisions for its effective implementation. The Adjudicating Authority has to look into the various provisions of the Resolution Plan to satisfy itself that once Resolution Plan is approved by it, there are sufficient checks and balances demarcation of responsibilities and corresponding provisions in respect of the responsibilities required to be discharged with regard to statutory compliances that are to be made during the implementation of the Plan. The satisfaction of Adjudicating Authority only concerns the fact that the Resolution Plan includes provisions for its smooth implementation and there are no gaps to hinder the same.

Reliance was placed on Supreme Court judgment in Maharashtra Seamless Ltd. Padmanabhan Venkatesh & Ors., Civil Appeal No. 4242/2019, wherein it was held that "The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the Resolution Plan has provisions for its implementation."

The Bench observed that the proviso to Section 31(1) cannot be construed so as to allow the Adjudicating Authority once again to get into the questions of deterioration or revaluation of assets etc. which must be left to the commercial wisdom of the CoC. The Adjudicating Authority would not have any jurisdiction to either terminate the Resolution Plan or even send it to CoC for reconsideration.

Accordingly, the Bench held that the Adjudicating Authority cannot look into the issues of deterioration of assets after approval of the Resolution Plan by unassailable majority of CoC.

The Bench observed that the SRA through its objections was attempting to achieve the same object as in I.A. No. 24/2021 i.e. withdrawal from CIRP at present stage. While placing reliance on the Supreme Court judgment in Ebix Singapore Pvt. Ltd. v CoC of Educomp Solutions Ltd. & Anr., Civil Appeal No. 3324 of 2020, the Bench observed that the residual powers available to the Adjudicating Authority u/s 60(5) of the IBC cannot be used to create procedural remedies entailing substantive outcome on the insolvency process.

The Bench held that the Resolution Plan submitted by the SRA was in accordance with law and accordingly the Resolution Plan of JSW Energy Ltd. was approved for Ind-Barath Energy (Utkal) Ltd.

Source: Live Law
Read Full news at: *https://www.livelaw.in/news-updates/national-company-law-tribunal-insolvency-and-bankruptcy-code-successful-resolution-applicant-committee-of-creditors-jsw-energy-ltd-204861*