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IBC- NCLAT FORNIGHTLY SUMMARY

(May 16, 2024 – May 31, 2024)

MUMBAI I DELHI I BENGALURU I KOLKATA

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The following is a snapshot of the important orders passed by the National Company Law Appellate Tribunal ("**NCLAT"**), under the Insolvency and Bankruptcy Code, 2016 ("**Code**"), during the period between May 16, 2024 to May 31, 2024. For ease of reference, the orders have been categorized and dealt with in the following categories *i.e.,* Pre-admission stage, Corporate Insolvency Resolution Process ("**CIRP**") stage, Post CIRP stage, Liquidation stage and Miscellaneous.

A. PRE-CIRP

1. In *Harinder Bashista v. Sanjib Kumar and Ors. (Company Appeal (AT) (Insolvency) No. 197 of 2023),* the NCLAT had an opportunity to examine various issues pertaining to calculation of the threshold of allotees specified under the proviso to Section 7 of the Code. In this regard, the NCLAT considered the question of whether a unit holder would be treated as a single allottee irrespective of number of units that such allotee may hold and observed that for the purpose of meeting the threshold, only the number of units would be required to be considered.

   As to whether an allotee who has been handed over the possession can be excluded from the calculation of the threshold, the NCLAT observed that mere possession without obtaining occupancy certificate does not alter the status of the allottee. It was further observed that mere waiver of delay interest, charge, penalty or execution of sub lease does not deprive the unit holder, the right to maintain a Section 7 application where the occupancy certificate has not been issued in relation to such unit.

2. In *Mr. Jayesh Dani v. SREI Equipment Finance Limited and Ors. (Company Appeal (AT) (Insolvency) No. 161 of 2024),* the NCLAT noted that the acceptance of partial payments by the financial creditor under an OTS could not invalidate the insolvency proceedings initiated on account of breach of the other terms and conditions of the OTS.

3. In *Sanjay Kumar v. Gannon Dunkerley & Company Limited and Ors. (Company Appeal (AT) (Insolvency) No. 1210 of 2023),* the NCLAT noted that, failure to reply to a Section 8 demand notice does not preclude the corporate debtor from taking the defence of pre-existing dispute. The NCLAT further noted that the underlying rationale with regard to a petition of pre-existing dispute is clearly that as long as there are trivial issues of facts which require consideration and adjudication, the same shall be recorded as a pre-existing dispute to reject the petition filed under Section 9 of the Code and held that, while examining the existence of such pre-existence of dispute, the Adjudicating Authority is not authorized to reject such dispute by adjudicating its merit.

4. Can a creditor initiate CIRP proceedings for recovery of the security deposited by such creditor, elucidated two separate views from the NCLAT, albeit basis two different factual circumstances.

   In the first one, the NCLAT, in the case of *Carestream Health India Private Limited v. Seaview Mercantile LLP (Company Appeal (AT) (Insolvency) No. 579 of 2023)*, noted that a security deposit made under a letter of intent to ensure execution of a leave and license agreement does not qualify as operational debt within Section 5(21) of the Code, as such deposit is linked to a conditional contractual arrangement and unrelated to any immediate service being rendered.

   On the other hand, in the case of *Chintan Jhunjhunwala v. Avani Towers Private*

Limited and Anr. (Company Appeal (AT) (Insolvency) No. 769 of 2024) the NCLAT treated an interest-bearing security deposit to amount to a financial debt under the Code after considering the commercial nature of the agreement, acknowledgment of the liability to pay interest by the corporate debtor in their financial statement and the real nature of the transaction.

5. In *Desh Bhushan Jain v. Abhay Kumar (Company Appeal (AT) (Ins) No.124 of 2024 and I.A. No.402 of 2024)*, the NCLAT upheld the right of a financial creditor to maintain a Section 7 application basis breach of a settlement agreement, which was entered into in connection with an earlier petition filed by the financial creditor. While doing so, the NCLAT observed that denial of such petition would amount to the corporate debtor getting a premium out of breach of the settlement arrangement.

6. In *IIFL Home Finance Limited v. Shiv Nandan Sharma Resolution Professional Saha Infratech Private Limited (Comp. App. (AT) (Ins) No. 856 of 2024 & I.A. No. 2958, 3089 of 2024*, the NCLAT upheld the decision of the Adjudicating Authority to not classify the banks/ financial institutions which have advanced loans to home buyers as 'secured creditors'.

   What is interesting to note in the instant case is the claim of the appellant was to be treated as a secured creditor and it does not appear from the decision as to whether any claim had been made by the lender to be treated as a 'financial creditor'. However, the NCLAT relied on the decision of *Axis Bank Limited v. Value Infracon India Private Limited & Ors. (IA No. 1502 of 2020 and I.A. No. 1503 of 2020 in CA (AT) (Ins) No. 582 of 2020*) where the appellant lender had sought admission of its claim as a secured *financial* creditor and be included in the CoC which was eventually rejected. It appears that the NCLAT might have missed the trick by applying the aforesaid precedent to the instant case to reject the claim of the lender to be treated merely as a secured creditor as opposed to a financial one.

7. In *Shubham Corporation Private Limited v. Kotoju Vasudeva Rao (Company Appeal (AT) (CH) (Insolvency) No. 163 of 2023)*, the NCLAT had an occasion to consider the nature of a convertible debenture, wherein it observed that whether a convertible debenture would be regarded as "debt" or "equity" would be based on the test of liability for repayment. For instance, if the terms of convertible debentures provide for repayment of borrower's principal amount at any time, it can be treated as a debt instrument but if it does not contemplate repayment of the principal amount at any time, that is, if it compulsorily leads to conversion into equity shares, it is nothing but an equity instrument.

   In the instant case, as the instrument was a compulsory convertible debenture, not carrying any obligation towards repayment of original debt, the NCLAT held the same to be an equity instrument.

B. CIRP STAGE

1. In *Peanence Commercial Private Limited and Anr. v. Mamta Binani (Company Appeal (AT) (Insolvency) No. 905 of 2024)*, the NCLAT had an occasion to consider the issue of whether an assignee (a non-related party of the corporate debtor), basis assignment of claims which had been duly admitted, from the assignor (related party of the corporate debtor) could gain participation rights in the CoC.

   Answering the reference in negative, the NCLAT observed that where execution of agreement to assignment was conditional upon assignee getting a seat in the CoC,

such transaction would not qualify as a *bona fide* transaction.

2. In *Nippon Life India AIF Management Ltd. & Ors. v. Ashapura Options Pvt. Ltd. (Company Appeal (AT) (Ins) No. 711 of 2023)* along with *Chetan Bhanushali v. Ashapura Options Pvt. Ltd. & Anr (Company Appeal (AT) (Ins) No. 478 of 2023)*, the NCLAT held that a settlement agreement entered during the stay on formation of the CoC was valid and cannot be challenged by other financial creditors whose petitions were rendered infructuous due to the admission of CIRP basis the now settled debt. It was further observed that such financial creditors, however, would have the option of reviving the petitions which were disposed of as infructuous basis the earlier admission.

3. In *Devarajan Raman v. Principal Commissioner Income Tax and Ors. (Company Appeal (AT) (Insolvency) No. 977 of 2023)* the NCLAT held that completion of the period of CIRP does not imply that the moratorium ceases to exist unless a resolution plan is approved, or a liquidation order is passed.

   It was further observed that, as set off is allowed under Regulation 29 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016 only after the passing of a liquidation order, until such order has been passed, any set off or adjustment during the intervening period when the permissible CIRP timeline period has expired and no resolution plan or liquidation order is passed, would be a violation of the moratorium provisions under Section 14 of the Code.

4. In *Commissioner of State Tax Department v. Ramchandra Dallaram Chaudhary (Comp. App. (AT) (Ins) No. 34 of 2024 & I.A. No. 105, 106, 990 of 2024)*, the NCLAT made certain conflicting observation regarding validity of assessment order which was passed during moratorium. While on one hand, it noted that the tax authority could determine the tax, interest, fine or any penalty during moratorium period, but could not enforce recovery of such tax, interest, fine or penalty, on the other hand, it observed that any assessment order passed during moratorium violates the moratorium. The confusion stems from the fact that if undertaking assessment during moratorium results in breach of Section 14 of the Code, the observation that tax authority could still determine the tax payable during the moratorium period becomes otiose.

   In the same case, the NCLAT also held that any assessment order passed post commencement of liquidation, without obtaining prior approval of Adjudicating Authority in terms of Section 33, sub-section (5) of the Code, is violative of the provision of the Code.

C. POST CIRP STAGE

1. The NCLAT, in *Peter Beck and Partner Vermoegensverwaltung GMBH v. Sharon Bio Medicine Limited (Company Appeal (AT) (Insolvency) No. 371 of 2024)*, noted that, even in relation to the CIRP proceedings which had commenced before January 24, 2019, being the date when Regulation 36B(4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations, 2016**") (Performance security in relation to submission of plans) came into effect, forfeiture of performance guarantee is allowed where such event of default occurred post the relevant regulation coming into effect.

   Further, looking into the facts of the matter, the NCLAT refused to proceed under Section 74 (3) of the Code (Punishment for contravention of moratorium or resolution plan) against the Successful Resolution Applicant ("**SRA**"), noting that the penalty

under the provision cannot be imposed upon an SRA unless it is established that the failure to establish a plan was willful.

2. In *Assistant Commissioner of Income Tax v. Resolution Professional of Diamond Power Infrastructure Limited & Ors. (*Company Appeal *(AT) (Insolvency) No. 977 of 2022),* after observing that mere reference of pendency of assessments without crystallized amount would not qualify as a valid claim, the NCLAT held that even where the Adjudicating Authority had granted assessment proceedings to be conducted during the moratorium period by the Income Tax authority to ascertain determinate claims against the corporate debtor, claims filed post approval of the resolution plan by the CoC cannot be considered, even though such assessment proceedings were conducted within the timelines prescribed under the Income Tax Act, 1961.

   It was also observed that the Income Tax Department would not qualify as a secured creditor for the purpose of Section 53 of the Code.

3. In *Superintendent of Stamps & Inspector General of Registration, Stamps & Registration Bhavan, v. Avil Menezes Resolution Professional of AMW Autocomponent Limited (Comp. App. (AT) (Ins) No. 1591 of 2023 & I.A. No. 5750 of 2023),* although the NCLAT observed that filing of claims in a wrong form cannot be a ground to reject the claims, it refused to entertain belated filing of a claim which was received post approval of the resolution plan by the CoC.

4. In *Beacon Trusteeship Limited v. Jayesh Sanghrajka (Company Appeal (AT) (Insolvency) No. 1494 – 1495 of 2022)*, after observing that valuation of immovable property cannot be ascertained with mathematical precision due to inherent uncertainties, the NCLAT held that no challenge could be made against a valuation, which was conducted in accordance with CIRP Regulations, 2016 and prepared after considering all the relevant factors.

   The NCLAT further held that a resolution plan providing 93% haircut to financial creditors, while giving the homebuyers their flats without escalation of any price cannot be said to violate Section 30(2) (b) (ii) as they fall in two different categories.

   It was further observed that dissenting financial creditors are not entitled to claim payment as per the security interest held by such creditors.

5. In *Protima Arora v. Maya Gupta & Ors. (Company Appeal (AT) (Insolvency) No. 72 of 2024)*, one of the questions before a 3-judge bench of the NCLAT was, where the corporate debtor was in existence when the CIRP application was filed, but whose name was subsequently struck off prior to the date of admission, whether CIRP against such an entity was maintainable. Upholding the maintainability of such petition, the NCLAT took note of the fact that the admission order was never challenged on the ground that the company was struck off and also the fact that the company was in very much in existence, when the application was initially filed. The NCLAT also took note of sub-section (7) of Section 248 of the Companies Act, 2013 ("**2013 Act**"), which allows continuation of proceedings against a company whose name has been struck-off, for recovery of liability. The NCLAT also reasoned that, if the liabilities of the company are simply washed out, due to action of company for non-compliance of the 2013 Act, the easiest thing for a company would be to get struck-off to wash off all its liabilities.

   It is interesting to note that, another 3-judge bench of NCLAT, in the case of *Fedex Express Transportation and Supply Chain Services (India) Private Limited vs. Zipker*

Online Services (Comp. App. (AT) (Ins) No. 1498 of 2023) (Covered in our round up for the period May 1, 2024 to May 15, 2024), had held that no CIRP lies against a company whose name was struck off as on the date of pronouncement of admission order. Provision under sub-section (7) of Section 248 of the 2013 Act, was also noted by the NCLAT, and it was observed that as CIRP proceeding is not a recovery proceeding, the aforesaid sub-section could not justify maintainability against a struck off company.

Considering both the decision have been passed by benches of equal strength and the *Fedex Express* decision was not considered by bench in *Protima Arora* case, it would be interesting to see if someone argues the decision to be *per incuriam* for its failure to consider the decision of a earlier decision of co-ordinate bench of equal strength.

6. In *Yamuna Expressway Industrial Development Authority v. Monitoring Committee of Jaypee Infratech Limited (Company Appeal (AT) (Insolvency) No.493 of 2023)*, the NCLAT upheld the status of Yamuna Expressway Industrial Development Authority ("**YEIDA**") as a secured creditor on the basis of the provisions under Sections 13 and 13A of the Uttar Pradesh Industrial Area Development Act, 1976, and went on to observe that although the claim of YEIDA would amount to operational debt due to the nature of such claim being secured debt, YEIDA would have to be treated at par with other secured creditors, and not merely as an operational creditor for the purpose of waterfall mechanism under Section 53 of the Code.

In the same case, the NCLAT had observed that liability of the corporate debtor to pay for the debt attached to a land parcel does not get extinguished or reduced on the basis that such land parcel had been sub-leased to a third party.

The NCLAT further held that in terms of the Code and Regulation 37 and 38 of CIRP Regulations, 2016, no consent of creditors is required as so far as the amount to be paid under the plan against the claim of creditor. It was further observed that no consent of counterparty to a contract would be required to be obtained in case no clause of existing agreement is being tinkered with.

D. LIQUIDATION STAGE

1. In *Shri Karshni Alloys Private Limited v. Ramakrishnan Sadasivan, Liquidator of Surana Industries Limited (Company Appeal (AT) (CH) (Ins) No.438/2022),* the Chennai Bench of NCLAT took note of Rule 15 of the National Company Law Tribunal Rules, 2016 ("**NCLT Rules, 2016**") which allows the Adjudicating Authority to extend timelines prescribed under the statutes subject to imposition of conditions and observed that as part of such extension the Adjudicating Authority has power to *suo moto* impose forfeiture obligations, even though such forfeiture did not form part of the prayer seeking extension.

In the instant case the NCLAT also observed that principles contained under Sections 73 and 74 of the Indian Contract Act, 1872, dealing with the award of damages, is inapplicable to a forfeiture on account of failure by the auction purchaser to pay the bid amount. It was further observed that eventual realization of a higher amount was not a ground to challenge the amount forfeited on the basis of undue enrichment.

2. In *Slimline Realty Private Limited v. Mr. Jigar Bhatt (Liquidator of RMOL Engineering and Offshore Ltd) (Company Appeal (AT) (Insolvency) No. 690 of 2024),* after observing that lack of mention of consequences could not be a ground to treat a

provision as discretionary, the NCLAT noted that the provisions contained under Section 33(5) of the Code is mandatory, and that the Liquidator is required to obtain the prior approval of the Adjudicating Authority before instituting a suit or other legal proceeding on behalf of the corporate debtor. However, the NCLAT rejected the submission that a party, against whom the approval for instituting a suit or legal proceeding is being sought, is required to be given prior notice or opportunity before grant of such approval.

As to the implication of initiating any legal proceeding without obtaining such prior approval, the NCLAT observed that while such proceedings would be *unauthorized and incompetent*, the proceedings can be regularized by obtaining *post-facto* approval and rejected the challenge to grant of such *post-facto* approval of Adjudicating Authority by observing that the order passed contained adequate reasons for grant of such *post-facto* approval.

It may not be out of place to mention that the distinction between a statutory provision requiring mere approval and a provision requiring *prior approval* (as contained under proviso to Section 33(5) of the Code), has been explained in catena of decisions (including that of Supreme Court), where it has been held that absence of word 'prior' indicates that *ex-post facto* approval or ratification was permissible and valid, *however, if the provision contemplates previous approval or prior approval, ex-post facto approval or ratification would not validate or cure the defect on account of want/absence/ lack of prior approval*. In our view, by allowing the *post-facto* approval for initiation of proceeding, the NCLAT failed to appreciate the aforesaid difference.

3. In *Avil Menezes v. Tata Consulting Engineers Limited (Company Appeal (AT) (Insolvency) No. 264 of 2024)*, the NCLAT examined the role of a liquidator and observed that as liquidator's responsibility extends beyond mere collecting claims and includes verification and determination, a liquidator is required to independently assess the merits of the claim and cannot sidestep undertaking verification of claims by relying on irrelevant communication.

4. MISCELLANEOUS

1. In *Chandra Srinivasulu v. Richardson & Cruddas (1972) Limited (Company Appeal (AT) (Insolvency) No. 853 of 2024)*, the NCLAT observed that acknowledgment by an unauthorized officer cannot be treated as acknowledgement for increasing the limitation period under Section 18 of the Limitation Act, 1963.

2. In *Ashok Tiwari v. DBS Bank India Limited & Anr. (Company Appeal (AT) (Insolvency) No. 195 of 2024)*, the NCLAT, observing that Rule 49 of the NCLT Rules, 2016 gives ample jurisdiction to the Adjudicating Authority to proceed *ex parte,* held that such an *ex parte* order to not be ordinarily recalled unless notice was not duly served, or the corporate debtor was prevented by sufficient cause from appearing either by itself or by an authorized representative.

It was further observed that where the debt and default was not being questioned, the Adjudicating Authority's refusal to recall *ex parte* admission is not to be interfered with.

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