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SOLICITORS AND ADVOCATES

IBC- NCLAT FORNIGHTLY SUMMARY

(July 1, 2024 – July 15, 2024)

MUMBAI I DELHI I BENGALURU I KOLKATA

INTRODUCTION

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 July 1, 2024 – July 15, 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, Liquidation and Miscellaneous.

A. PRE CIRP

1. In *Vaibhav Aggarwal v. Mr. Sunil Sachdeva (Company Appeal (AT) (Insolvency) No. 307/2023),* the NCLAT while upholding the decision of the Adjudicating Authority to admit section 9 application for non-payment of license fees, not only reiterated its earlier stance that rental pertaining to immovable property would constitute operational debt, it seem to have also suggested that for meeting the threshold one would be permitted to take into account the interest payable in delay of payment of rent as well as GST. In the same case the NCLAT reiterated that non filing of reply to section 8 notice does not preclude a corporate debtor from establishing the existence of a pre-existing disputes in its pleadings. Factually however, it was observed that where a mediation application was filed by the operational creditor which was a non-starter on account of non-participation by the corporate debtor would not constitute pre-existence of dispute.

2. In *Jaiprakash Agarwal v. Alka Prakash Agarwal & Ors. (Company Appeal (AT) (Insolvency) No. 292 of 2023),* the NCLAT held that a written financial contract is not a precondition or an exclusive requirement for proving the existence of a debt and a debt given on the basis of an oral agreement may also constitute financial debt, if the same can be established from other relevant documents.

3. In *Rashtriya Polymers and Solvents v. Kanodia Technoplast Limited (Company Appeal (AT) (Ins) No. 1140 of 2023)* the NCLAT held that if the relevant threshold under Section 4 can be met without taking into consideration the invoices pertaining to the period covered under Section 10A, a section 9 application cannot be held invalid merely on the basis that the section 8 demand notice contained some invoices which fell within the period of Section 10A.

4. In *Rita Malhotra v. Orris Infrastructure Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 484 of 2024)*, the NCLAT held that an allottee to whom a commercial space or unit has been allotted or when an allottee is entitled to assured returns, he does not cease to be an 'allottee' for the purpose of attracting threshold limit prescribed under the second proviso to Section 7(1) of the Code.

5. In *Bajrang Steel Trading Company (India) Pvt. Ltd. v. Ramkrishna Engineering Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 1086 of 2023)*, the NCLAT held that a disputed claim pertaining to interest can only be adjudicated by a competent court and despite the interest forming part of the invoice, if levy of interest is disputed, such disputed amount cannot be considered for meeting the section 4 threshold.

6. In *State Bank of India v. Abhijeet Ferrotech Limited (Company Appeal (AT) (Insolvency) No. 690 of 2023)*, the NCLAT observed that the provision contained under section 10 of CPC *(stay of suit)* cannot be applied to bar a proceeding initiated under section 7 on the basis of a proceeding initiated before Debt Recovery Tribunal as both the proceedings cover entirely different fields. It was further observed that due to the overriding nature of the Code on account of section 238, any order passed under the Recovery of Debts Due

to the Banks and Financial Institutions Act, 1993 cannot operate as *issue estoppel* between parties in reference to a section 7 proceeding.

7. The NCLAT, in *Ashok Tiwari v. DBS Bank India Ltd. (DBIL) & Anr. (Company Appeal (AT) (Insolvency) No. 343 of 2024)*, held that initiation of CIRP process cannot be interdicted on the ground of insufficiency of assets of the corporate debtor to resolve the insolvency.

8. The NCLAT, in *Fortune Land Holdings LLP v. SPG Macrocosm Limited (Company Appeal (AT) (Insolvency) No. 621 of 2024)* held that while inadequacy of stamping of promissory note may be relevant, where debt and default are clearly established from other sources such as agreement, audit report, report of information utility, the issue of insufficient stamping does not outweigh the substantive evidence of debt and default.

B. CIRP STAGE

1. In, *Crown Business Park Tower A Buyers Association, v. Atul Kansal & Ors. (Company Appeal (AT) (Insolvency) No. 431 of 2023)*, the NCLAT observed that by virtue of Regulation 36A (4) of the CIRP Regulations (which deals with invitation of Expression of Interest), the CoC is empowered to specify different eligibility *criteria* for prospective resolution applicant (PRA) and upheld the decision of the CoC to specify a lower quantum of performance bank guarantee or the association of allottees submitting the plan as PRA. While upholding the aforesaid commercial decision of the CoC, the NCLAT found rationale basis for such decision from the fact that the association of allottees had already given their monies to the Corporate Debtor.

C. POST CIRP

1. In *PKH Ventures Limited. v Monitoring Agency of Amar Remedies & Ors. (Company Appeal (AT) (Insolvency) No. 877 of 2024)*, the NCLAT observed that where the successful resolution applicant was not in a position to arrange for the funds relevant for the implementation of the plan, it could not take the defence of the status of the corporate debtor not being active in the MCA. It was further observed that when the Adjudicating Authority had refused grant of the waivers and reliefs sought by the SRA under the resolution plan, and no challenge was filed against such order, the SRA would not be permitted to rely on such refusal to grant of waiver, as excuse for non-implementation of the plan.

2. In *Everlike Real Estate & Developers Pvt. Ltd. v. Mr. Mohit Goyal, CA & Ors. (Comp. App. (AT) (Ins) No. 978 of 2024)*, the NCLAT held that while the status of an homebuyer as a speculative investor is relevant at the stage of admission of CIRP under Section 7, once admitted all the homebuyers and allottees, irrespective of genuine or speculative, are treated as financial creditors. It was also observed that neither the court nor RERA differentiates between allottees on the basis of whether they are purchasing for own consumption or for commercial purpose.

   As to whether a plan can categorize homebuyers into different categories and provide differential treatment, was answered in affirmative with NCLAT upholding such categorization if backed by some logic and rationale.

3. In *Shri Madhukar Shetty v. Bank of Baroda (Company Appeal (AT) (Insolvency) No. 739-740 of 2024)*, the NCLAT held that, on the basis of a valuation report obtained prior to admission of CIRP, the Adjudicating Authority cannot question the valuation of assets conducted by the IBBI registered valuers in compliance with the CIRP Regulations.

4. The NCLAT, in *Deepak Sakharam Kulkarni & Anr v. Manoj Kumar Agarwal, Resolution Professional of D.S. Kulkarni Developers Ltd. & Ors (Company Appeal (AT) (Insolvency) No. 63 of 2024)*, held that as assets of a third party which may be in possession of the corporate debtor, cannot be dealt under a resolution plan. It however went on to distinguish a situation where the assets were in the name of the promoter but were purchased using the corporate debtor's funds by observing that such assets can be made part of a plan.

   As to whether the provisions of the Code can be used for the purpose of extinguishing contractual agreement or negating third party rights, the NCLAT observed in negative. In the context of a lease, it specifically went on to observe that a plan cannot extinguish rights of a lessee in contravention of the provisions of the agreement.

   Finally, this case may be used as a precedent to argue that deletion of non-conforming part of resolution plan would not amount to modification which power the Adjudicating Authority or NCLAT lacks.

D. LIQUIDATION

1. In *Mr. Padmanabhan v. Priya S. Anand (Liquidator of RRP Housing Private Limited) and Ors. (Company Appeal (AT) (CH) (Ins) No.167 / 2024)*, the NCLAT noted that an ex - director or shareholder lacked the locus to question the concluded auction process especially when such appellant had failed to raise his grievances at the time of publication of bid invitation.

2. In *Anuj Bajpai v. Employee Provident Fund Organisation (Comp. App. (AT) (Ins) No. 1141 of 2023 & I.A. No. 3979 of 2023)*, the NCLAT held that not only the dues pertaining to provident fund contribution, even damages and interest payable on such unpaid contribution are to be treated outside liquidation estate assets under the Code and the provisions of section 53(1) of the Code cannot be made applicable to such dues.

   While in the aforesaid case, the damages and interest were also treated at par with the unpaid provident fund contributions, interestingly, during the same period NCLAT had in the case of *Roofit Industries Ltd. v. Employee Provident Fund Organisation Company Appeal (AT) (Insolvency) No. 1227 of 2024,* did not interfere with the decision of the Adjudicating Authority directing the dues on account of damages and interest to be categorized as operational debts and be dealt with under section 53 of the Code.

   In the same case, it was also observed that even if the provident fund claims relating to two years prior to the CIRP commencement date, would not form part of the liquidation estate.

3. In *Avil Menezes, Liquidator of Sunil Hitech and Engineers Limited v. Principal Chief Commissioner of Income Tax, Mumbai (Company Appeal (AT) (Insolvency) No. 258 of 2024)*, the NCLAT examined the difference between the moratorium provision under Section 14 (*during CIRP*) and Section 33(5) (*during liquidation*) and went on to observe that while both the provisions bar institution of fresh suit or legal proceedings, unlike Section 14, Section 33(5) does not bar continuation of pending suits.

   In the context of status of income tax department as a creditor as well as its right to claim set-off against income tax refunds owed to the Corporate Debtor, the NCLAT observed that there is no basis to treat income tax department as a secured operational creditor, nor can the income tax department *suo motu* initiate recovery of dues or execute their claim unilaterally by adjusting the income tax return amount with pre-CIRP dues.

E. MISCELLENEOUS

1. In *State Bank of India v. India Power Corporation (Company Appeal (AT) (CH) (INS) No. 53 of 2024)*, the NCLAT observed that for the purpose of filing an appeal, the free copy sent to the parties under Rule 50 of NCLT Rules, 2016 cannot substitute the requirement of attaching a certified copy of the order.

2. In *D. Srinivasa Rao v. Stressed Assets Stabilisation Fund (Company Appeal (AT) (CH) (Ins) No. 80/ 2024)*, the Chennai Bench of the NCLAT deliberated upon the distinction of power of review and power of recall, and noted they operated in two different fields having two different facets, with different procedural situations.

   The Bench noted that Rule 11 of the NCLT Rules could not be permitted to introduce new facts by filing a recall application and agitate the issue *de novo.* It was further observed that grounds which were already available to be argued at the stage where the principle hearings were being decided cannot be pressed to sustain a recall application.

3. In *Sangita Arora v. IFCI Ltd. [Comp. App. (AT) (Insolvency) 1102/2024]*, the NCLAT referred to the case of *Krishan Kumar Basia v. State Bank of India (Company Appeal (AT) (Insolvency) No.721 of 2022)* to observe that the interim moratorium under section 96 commences on the date on which the application is filed and not the date when the application is registered and numbered by the Registry.

   In the course of the aforesaid decision, NCLAT also refused to follow the decision in case of *Jeny Thankachan vs. Union of India & Ors. [WP(C) No.31502 of 2023]*, wherein the Kerala High Court had observed that moratorium would commence not on the date of the filing of the application, but only when the application was complete in all respects and was defect free. For arriving at such conclusion, the NCLAT observed that such decision of the Kerala High Court was *de hors* the statutory scheme as delineated in NCLT Rules, which contained a specific definition of the expression *filed* under Subrule (2) of Rule 14 of NCLT Rules, 2016 which serves as the trigger point for initiation of moratorium.

4. In *Ms. Mausumi Bhattacharjee v. Jumbo Chemicals and Allied Industries Private Limited and Anr. (Comp. App. (AT) (Ins) No. 886 of 2024 & I.A. No. 3196 of 2024)*, the NCLAT held that a settlement deed executed by a corporate debtor, whose name was struck off on the date of such execution, would continue to have binding effect upon the name of the corporate debtor upon being restored.

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