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SOLICITORS AND ADVOCATES

IBC- NCLAT FORTNIGHTLY SUMMARY

(February 1, 2025 – February 15, 2025)

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 February 1, 2025, to February 15, 2025. 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 and Miscellaneous.

A. PRE CIRP

1. In *Global Indian School Education Services Private Limited v. Mr. Abhay Narayan Manudhane (Comp. App. (AT) (Ins) No. 1617 of 2023)*, the NCLAT observed that a security interest established under a memorandum of understanding would not qualify as a "financial debt" under section 5(8) of the Code but rather constitutes "other debt" as it lacked the commercial effect of borrowing. The payment in question was made to secure monthly rental payments under an operational lease arrangement, rather than to fund construction activities and was fully refundable without interest after a period of 30 years. The NCLAT reasoned that to have the commercial effect of borrowing with time value of money, the interest payable by the Corporate Debtor must be regular and continuous from the date of disbursement or as contractually agreed upon. The interest provision, being contingent upon the breach or termination of the memorandum of understanding, would be characterized as penal interest or liquidated damages and therefore did not possess the characteristics of a financial transaction.

2. In *Chemical Suppliers India Private Limited v. GLS Films Industries Private Limited (Company Appeal (AT) (Insolvency) No. 157 of 2023)*, the NCLAT considered the question of whether an application under section 9 of the Code can be dismissed solely on account of pre-existing disputes which were non-existent at the time of the demand notice under section 8 of the Code. Answering in negative, it went on to observe that that neither disputes raised after the demand notice, nor civil suits filed after the filing of a section 9 application, can qualify as a 'pre-existing dispute'.

   While the objective of Code is not to penalize solvent companies or be a tool to coerce and intimidate the Corporate Debtor to capitulate to the unreasonable demands of the Operational Creditor, a section 9 application is valid when the debt is due, payable, undisputed, and above the threshold level with an established default. A police complaint based on grounds that no longer exist cannot be considered a pre-existing dispute, and a civil suit filed after a Section 9 application cannot be used to defeat such application.

3. In *Mr. Sudhir Bobba v. TVN Enterprises (Company Appeal (AT) (CH) (Ins) No.95/2024)*, the NCLAT observed that although the Corporate Debtor had acknowledged the debt that accumulated during the section 10A period, this acknowledgment could not be treated as a continuation of the earlier default since the Corporate Debtor had made significant repayments toward the prior dues. The NCLAT also clarified that while CIRP proceedings were barred, the debt itself was not extinguished, and the creditor retained the right to recover it through other legal means such as approaching commercial courts.

4. In *Ankur Kumar v. Sustainable Agro-Commercial Financial Limited (Company Appeal (AT) (Insolvency) No. 484 of 2023)*, the NCLAT held that when a Corporate Debtor is a guarantor and the corporate guarantee has never been invoked prior to the commencement of the CIRP, the right to payment has not accrued. The NCLAT observed that an uninvoked

corporate guarantee cannot be considered a 'matured claim'. Following the judgment in *IDBI Trusteeship Services Limited v. Mr. Abhinav Mukherji (Company Appeal (AT) (Insolvency) No.356 of 2022),* wherein the NCLAT had relied upon the Supreme Court's judgment in *Ghanshyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited (2021) 9 SCC 657*, the NCLAT held that once the moratorium is imposed under section 14 of the Code, a corporate guarantee cannot be invoked. The NCLAT went onto observe that when the guarantee has been invoked subsequent to initiation of the CIRP, no claim can be accepted in the CIRP on the basis of such invocation since the claim is not considered due and payable at the time of the commencement of CIRP.

In our view, the NCLAT's interpretation of treatment of invocation of corporate guarantees as admissible during the CIRP commencement date but not during the moratorium period, amounts to a critical oversight on the part of NCLAT, by failing to address the Supreme Court's decision in the case of *China Development Bank v. Doha Bank Q.P.S.C (2024 SCC OnLine SC 3829),* where it was categorically observed that whether the cause of action for invoking a guarantee has arisen or not is not relevant in defining a 'claim'. This judgment implies that an uninvoked guarantee would be admissible as a claim, whereas, as per NCLAT, an actually invoked guarantee during moratorium (where liability has crystallized) would not. This creates an untenable contradiction that requires urgent judicial clarification to establish consistent treatment of contingent liabilities arising from corporate guarantees throughout CIRP.

B. CIRP

1. In *Home Krafts Avenue v. Jayesh Sanghrajka (Company Appeal (AT)(Insolvency) No.756/2023),* the NCLAT held that section 77(3) of the Companies Act, 2013 casts an obligation only upon the Liquidator not upon the Resolution Professional to consider registered charges, indicating that the legislature never intended to apply this section to the CIRP. It reaffirmed that the right of a mortgagee under the Transfer of Property Act, 1882 cannot be nullified merely due to non-registration of a charge under this section. The NCLAT emphasized that registration under section 77 is not a *sine qua non* for classification as a secured creditor and its absence would be insufficient grounds to reject such creditor claims. The NCLAT further clarified that a secured interest can be created through any arrangement or agreement securing payment, including loan agreements, and non-registration under section 77 cannot justify rejection of secured creditor status.

2. In *Greenshift Initiatives Private Limited v. Rolta Bi and Big Data Analytics Private Limited (Company Appeal (AT) (Insolvency) No.1936 of 2024),* the NCLAT upheld the decision of the Adjudicating Authority that the assignee of a debt from a creditor who is a related party of the Corporate Debtor, and had acquired the debt via an assignment deed after the commencement of CIRP, cannot claim a seat in the Committee of Creditors ("**CoC**") when the assignment was made with the sole intent of circumventing the restrictions on related parties by affecting the vote share of other creditors, since it went against the object and purpose of the first proviso to section 21(2) of the Code.

C. POST CIRP

1. In *Pioneer Engineering Industries v. Anjali Capfin Private Limited (Company Appeal (AT) (Insolvency) No. 1382 of 2024)*, the NCLAT held that the Adjudicating Authority has no jurisdiction to modify or alter a resolution plan approved by the CoC, and its powers are limited to either approving or rejecting the resolution plan based on the criteria specified in

Section 30(2) of the Code. It cannot impose additional conditions or modify the distribution mechanisms laid out in a resolution plan, as this would amount to interfering with the commercial wisdom of the CoC, which is paramount in insolvency proceedings.

The NCLAT reaffirmed that the scope of judicial review regarding an order approving a resolution plan is very limited and can only be challenged on the specific grounds enumerated in Section 61(3) of the Code. A dissenting financial creditor does not have the requisite locus to challenge an approved resolution plan as duly approved by the members of the CoC, except when the distribution of proceeds is less than what they would be entitled to under Section 53(1) of the Code.

2. In *Damodar Valley Corporation v. Mackeil Ispat and Forging Limited (Company Appeal (AT) (Insolvency) No. 1663 of 2023)*, the NCLAT held that electricity suppliers cannot demand pre-CIRP from the Corporate Debtor after the approval of a resolution plan by the Adjudicating Authority. Once a resolution plan is approved, all claims that existed prior to the approval stand extinguished, and creditors are only entitled to receive what has been allocated to them under the Plan. Any amount obtained by demanding pre-CIRP dues after the approval of a resolution plan is illegal and must be refunded. The NCLAT confirmed that the Adjudicating Authority has jurisdiction under section 60(5)(c) of the Code to entertain applications related to the implementation of the resolution plan, including matters arising out of reliefs and concessions granted therein.

D. LIQUIDATION

1. In *Aniwesha Engineering Projects Limited v. Inderdeep Construction Company (Company Appeal (AT) (Insolvency) No 1698 of 2024)*, the NCLAT held that under the amended Regulation 32A(4) of the IBBI (Liquidation Process) Regulations, 2016, the requirement for completing the sale within 90 days was replaced with the requirement that the sale be conducted in the first attempt at auction. The Adjudicating Authority erred by applying the unamended provision and by making adverse observations against the liquidator when the sale had been properly conducted by the liquidator in compliance with the *amended* regulations. The successful bidder had paid the full amount, which was distributed to stakeholders. The NCLAT also observed that when a Corporate Debtor is sold as a going concern during liquidation proceedings, the purchaser acquires the business free from all past liabilities and claims, creating a "clean slate", and no other entity, including government departments, can claim any past unpaid or outstanding dues against the purchaser.

2. In *Power Mech Projects Limited v. Essar Power (Jharkhand) Limited (Company Appeal (AT) (Insolvency) No.106 of 2025)*, the NCLAT held the Swiss Challenge Mechanism of sale of assets is a valid and legally permissible method during liquidation proceedings under the Code, which was recognized for its transparency in the case of *R.K. Industries (Unit-II) LLP v. H.R. Commercials Private Limited (2024) 4 SCC 166*. It is consistent with the principles of natural justice and transparency, and falls within the statutory powers granted to the Liquidator under Regulation 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Furthermore, the NCLAT recognized that giving the right of first refusal to an anchor bidder who originates the proposal is acceptable practice. The NCLAT affirmed that the Code empowers the Liquidator to adopt any means likely to maximize the realizations from the sale of assets. However, such discretion is limited by the Code and applicable regulations, but when the Stakeholders' Consultation Committee endorses the liquidator's decision and the Adjudicating Authority grants approval, such decisions are deemed valid exercises of power, not arbitrary or unguided actions.

E. MISCELLANEOUS

1. In *Bank of Baroda v. Shree Rajasthan Syntex Limited (Company Appeal (AT) (Insolvency) No. 888 of 2023),* the NCLAT held that the 14-day period specified in section 11A(3) of the Code is mandatory rather than directory, which implies that an application under section 54C is filed more than 14 days after the filing of a Section 7 application, the Adjudicating Authority must first dispose of the section 7 application before proceeding with the section 54C application. It clarified that no time exclusion is provided in the statutory scheme for compliances under sections 54A and 54B when calculating this 14-day period.

   Additionally, the NCLAT emphasized that Adjudicating Authorities do not have the jurisdiction to investigate or revise Micro Small and Medium Enterprises ("**MSME**") registrations granted under the MSME Development Act, 2006 when examining applications. Despite finding procedural irregularities in the case at hand, the NCLAT determined that setting aside the Pre-Packaged Insolvency Resolution Process would serve no useful purpose since the Corporate Debtor (a validly registered MSME) had already been successfully resolved with payments made to all financial creditors.

2. The NCLAT, in *Mahdoom Bava Bahrudeen Noorul Ameen v. State Bank of India (Company Appeal (AT) (Insolvency) No. 1324 of 2024),* held that an application under section 95 of the Code must strictly comply with the requirements of Section 95(4), particularly the *"details and documents relating to debts owed by the debtor to the creditor or creditors"*. It was further held that a notice under section 13(2) of the SARFAESI Act cannot substitute a demand notice under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019. The NCLAT agreed with the Appellant's argument that these notices are distinct and serve different purposes, like a cheque bouncing notice under section 138 of the Negotiable Instruments Act, 1881 cannot substitute a winding-up notice under section 433 of the Companies Act, 2013. By observing that service of demand notice under rule 7(1) is mandatory before filing of application under section 95 and service of the same after filing of section 95 application is not in accordance with law, the NCLAT remanded the personal insolvency proceedings back to the Adjudicating Authority.

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