



SC stays insolvency proceedings against Jaypee Infratech before NCLT

Facts of the Case:

IDBI Bank had moved National Company Law Tribunal (NCLT) for insolvency proceedings against Jaypee Infratech for default of a loan of about Rs 526 crore.

IDBI Bank is a Financial Creditor through the loans amounting to Rs 526 crores issued to the corporate debtor (Jaypee Infratech)

The application to the adjudicating authority under the Insolvency and Bankruptcy Code, 2016 filed by IDBI Bank under section 7(1) as a Financial creditor was approved by National Company law Tribunal under 7(5)(a) of the code.

Under section 13 (1) (a) of the code, the NCLT has the authority to declare a Moratorium for the purposes referred to in section 14.

The purposes for which the Moratorium under section 14(1) applies includes:

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor

Jaypee Group which is yet to deliver flats to around 32,000 homebuyers.

Homebuyers come under the category of “Operational creditors” under Section 5(20) of the code since the moneys paid by home buyers to Jaypee Infratech come under the definition of “Operational Debt” under section 5(21) of the code.

The contention of the Homebuyers who initiated the PIL in the SC, was that the NCLT order has put the homebuyers in a disadvantaged position as the order required them to fill up certain forms which will stop them from moving consumer courts. The lawyer also said the homebuyers are worried about their investments in the company's projects due to the Moratorium proceedings ordered by the NCLT during the pendency of the Insolvency Resolution process.



Checking with the legal provisions of the code:

Under the code, the operational creditors also can initiate the Insolvency Resolution Process under section 9(2) of the Code. The Interim Resolution professional also may be proposed by the Operational creditors under section 16(3)(b) of the code.

One of the duties of the Interim Resolution Professional is to constitute a Committee of Creditors under section 18© of the code.

Under section 21 (2) The committee of creditors shall comprise all financial creditors of the corporate debtor.

Under section 22(2) the Committee of Creditors at its first meeting will resolve to appoint a Resolution Professional (who may be either the Interim Resolution Professional or a new person)

Under section 24(6), at the meeting of Committee of creditors, each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

This would mean that though the operational creditors

1. may initiate Insolvency resolution process
2. may propose the Interim Resolution personnel, and
3. receive invitations to the meetings of the Committee of Creditors (provided his debt is 10% of the total debt) ,

they will not be part of the Committee of creditors and hence will not be able to

1. appoint the Resolution Professional and
2. not approve the Insolvency Resolution Plan

Under section 32, The remedy available to any one aggrieved by the order of the NCLT approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of section 61. This appeal will be to the National Company law Appellate Tribunal

Under section 61 (3) an appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—

iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts;



Any further appeal against the order of the Appellate Authority shall be preferred to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order under section 62(1).

Under section 64 (2) No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code.

Questions that arise:

1. The adjudicating authority is only the NCLT ;
 - a. Appellate authority against its order is NCLAT ;
 - b. Appeal against the above can be preferred in SC if it involves a question of law
2. Now the Insolvency proceedings have commenced against Jaypee Infratech based on the initiation by IDBI Bank a Financial creditor. The proceedings are under progress
3. Home buyers currently are Operational creditors and hence could not be part of Committee of creditors and hence cannot take any decisions either to appoint a resolution professional or to approve a resolution plan
4. The NCLT order has not come as the Insolvency Resolution Plan seems not having been submitted

In that case, under the code,

SC intervention is not envisaged unless it is a question of law

Whether the rights of operational creditors to be included in the Committee of creditors by declaring their dues as Financial debt (as pleaded in the PIL) is a question of law or not is a matter to be decided.

Without the order either from the adjudicating authority or the appellate authority, jumping 2 steps and going to SC at this stage is not contemplated in the code.

This is because, we still do not know whether the Resolution Plan which is still not presented to the Resolution professional and so not approved by the committee of creditors , does not provide adequately for the operational creditors.

Under the circumstances, the SC should not have ordered a stay of the IRP proceedings which indirectly restores the earlier Board of Directors of the company into decision making role and stays the powers of Resolution Professional/Committee of Creditors etc.

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Background – IBC – select provisions

PART II

INSOLVENCY RESOLUTION AND LIQUIDATION FOR CORPORATE PERSONS

CHAPTER I PRELIMINARY

5. In this Part, unless the context otherwise requires,—

(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;



(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority

CHAPTER II CORPORATE INSOLVENCY RESOLUTION PROCESS

6(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

7 (5) Where the Adjudicating Authority is satisfied that—

- (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application;
- (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate— (a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

Time-limit for completion of insolvency resolution process.

12. (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

Moratorium.

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the



Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period

16. (1) The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.

(2) Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under section 7 or section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

17. (1) From the date of appointment of the interim resolution professional,—

(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;

(b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional; Public announcement of corporate insolvency resolution process. Appointment and tenure of interim resolution professional. Management of affairs of corporate debtor by interim resolution professional.

(c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;

(d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

Management of operations of corporate debtor as going concern.

20. (1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

Committee of creditors.

21. (1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.



(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Appointment of resolution professional.

22. (1) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

(2) The committee of creditors, may, in the first meeting, by a majority vote of not less than seventy-five per cent. of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Resolution professional to conduct corporate insolvency resolution process.

23. (1) Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period.

Meeting of committee of creditors.

24. (1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.

(2) All meetings of the committee of creditors shall be conducted by the resolution professional.

(3) The resolution professional shall give notice of each meeting of the committee of creditors to—

(a) members of Committee of creditors;

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings: Provided that the absence of any such direct or, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

Duties of resolution professional

25. (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.



Submission of resolution plan.

30 (3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent. of voting share of the financial creditors.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered: Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

Approval of resolution plan.

31. (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, guarantors and other stakeholders involved in the resolution plan.

Appeal.

32. Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of section 61

CHAPTER III

LIQUIDATION PROCESS

33. (1) Where the Adjudicating Authority, —

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and



(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor: Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority. Appeal. Initiation of liquidation. 22 THE GAZETTE OF INDIA EXTRAORDINARY [PART II—

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

Appeals and Appellate Authority.

61. (1) notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal: Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.



(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period; Adjudicating Authority for corporate persons.

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.

(4) An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order

62. (1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.

63. No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil court not to have jurisdiction

64. (1) Where an application is not disposed of or an order is not passed within the period specified in this Code, the National Company Law Tribunal or the National Company Law Appellate Tribunal, as the case may be, shall record the reasons for not doing so within the period so specified; and the President of the National Company Law Tribunal or the Chairperson of the National Company Law Appellate Tribunal, as the case may be, may, after taking into account the reasons so recorded, extend the period specified in the Act but not exceeding ten days.

(2) No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code.