

INSOLVENCY

INSIGHT

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against each separate Personal Guarantor for the same debt.

The Hon'ble Delhi High Court has directed IBBI to frame a Code of Conduct for
the effective functioning of the CoC.

A Provisional Order of Attachment (POA) made under PMLA would not nullify the
protection granted under section 32A IBC



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The Hon'ble NCLT Mumbai Bench in the case of Bank of Baroda vs. Mr Amir Jamal Dodhia, CP (IB) NO. 1274/MB/2021 has held that there is no bar in IBC to proceed against each separate Personal Guarantor for the same debt. Moreover, the pendency of CIRP against the Principal Borrower does not debar the lender from proceeding against the Personal Guarantor.

This is a case where the Bank of Baroda (Financial Creditors) brought an application under Section 95 of the IBC to initiate insolvency proceedings against the Personal Guarantor. Further, the Corporate Debtor was subjected to CIRP under Section 7 of the IBC by an order dated 25.09.2019. The Personal Guarantor to negate any claim against them argued that the loan had already been settled by the Corporate Debtor, Calchem Industries (India) Limited, under a pending Resolution Plan.

The Hon'ble NCLT relying on the judgement of the Hon'ble Supreme Court in Dilip B. Jiwrajka vs. Union of India & Ors. in WP (civil) No. 1281 of 2021 held that the contentions raised by Personal Guarantor were devoid of merit as there is no bar in IBC to proceed against each separate Personal Guarantor for same debt. Additionally, they held that the pendency of Resolution Plan approval also cannot be grounds for dismissal of proceedings against the Personal Guarantor.

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The Hon'ble Delhi High Court in the case of Mr Kunwer Sachdev vs. IDBI Bank and Ors. W.P.(C) 10599/2021 has directed IBBI to frame a code of conduct/guidelines preferably, within three months from the date of the passing of this judgment, for the effective functioning of the CoC, without diluting the sanctity of the 'commercial wisdom' of the CoC and the legislative intent of the IBC.

This is a case where the petitioner, an ex-director of Su-Kam Power Systems Limited, raised concerns regarding the Company's entry into CIRP in 2018, with an IRP already in place. Highlighting the drastic reduction in the Company's value from Rs. 300 crores to a mere Rs. 10 crores, the petitioner criticized the CoC's decision, citing it as a blatant misuse of power. The petitioner stressed the necessity for mechanisms enabling the redressal of grievances against the CoC's conduct to ensure the proper implementation of the IBC. The petitioner advocated for collaboration among IBBI, the Reserve Bank of India, and the Indian Bank Association to establish guidelines for effective monitoring of the CoC.

The Court emphasized the fiduciary duties entrusted to the CoC and the wide-ranging nature of its functions. Recognizing the need for a code of conduct to facilitate the effective discharge of these duties, the Court underscored

that the law's primary function is to balance power with responsibility. In this context, the CoC, tasked with the fiduciary duty of rescuing the Corporate Debtor from the debt cycle, must ensure that its decisions align with the genuine objectives of the IBC. The Court clarified that the purpose of a code of conduct is not to question the CoC's decisions but to ensure that its commercial judgments are in harmony with the IBC's aims. However, the decision-making process must adhere to principles of fairness, reasonableness, and objectivity, regardless of the outcome.

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The Hon'ble NCLT Hyderabad in the case of Canara Bank vs. Deccan Chronicle Holdings Limited IA.No.738 OF 2023 has held that the POA under Section 5(1) of the Prevention of Money Laundering Act, 2002, in respect of the properties of the corporate debtor covered under the approved resolution plan, would not end the protection available to such properties under section 32A IBC which stipulates that there cannot be attachment or confiscation of assets of Corporate Debtor once RP is approved.

This is a case where the applicant emerged as the successful resolution applicant. The Respondent was admitted into CIRP on July 5, 2017. The CIRP concluded on February 15, 2019, with NCLT Hyderabad approving the resolution plan on June 3, 2019. However, a provisional order of attachment was issued by the Enforcement

Directorate on October 15, 2020, attaching immovable properties valued at Rs. 1,22,15,06,4. Relying on the judgement of the Hon'ble Supreme Court in Manish Kumar vs. Union of India (2021) SCC Online SC 30, the Hon'ble NCLT concluded that properties included in resolution plans, duly sanctioned under the IBC, are unequivocally protected under Section 32A of the IBC. Further, they held that such protection must also extend to provisional orders of attachment made under the provisions of the PMLA to prevent the legislative intent behind Section 32A from being subverted.



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