



INDIALAW



INDIALAW

IL NEWS

Shiju P Veetil, Senior Partner, Indialaw llp quoted in the economic times today

AUTHOR IndiaLaw LLP

PUBLISHED 22 August 2022

DISCRETION given to NCLT to admit cases even when default is proven can cause long-lasting harm to the process, they say

SC Order on IBC Jolts Bankers, Lawyers

Joel.Rebello@timesgroup.com

Mumbai: An apex court order giving the National Company Law Tribunal (NCLT) discretion over admission of insolvency cases even when default is proven has shaken bankers and lawyers.

They said the ruling could deflate an already delayed process under the Insolvency and Bankruptcy Code (IBC) and will most likely be used by unscrupulous promoters to argue against the admission of cases, potentially denting the potency of the dedicated recovery mechanism.

Shiju P Veetil, senior partner, India Law LLP, said the court order has the potential to cause long-lasting harm to the IBC as cases may not be admitted, taking the system back to days before the code came into being.

"Earlier, creditors were required to prove the inability of debtors to admit a winding up petition. IBC changed this criterion as creditors were only required to prove the existence of debt and default in payment to admit an insolvency case," Veetil said. "Unfortunately, the Supreme Court judgement takes jurisprudence back to

the earlier regime, and now the creditor is required to prove the inability of the debtor to pay the debt, including the feasibility of initiating the process. This will make IBC more contentious and less effective."

Last month, in a case involving thermal power company Vidarbha Industries Power (VIPL), the apex court ruled that proven default cannot be the reason for initiation of insolvency proceedings. In contrast to the long-held view that a corporate in default has to mandatorily be admitted under Section 7 of the IBC.

VIPL, a part of the Anil Dhirubhai Ambani Group (ADAG), had appealed against the National Company Law Appellate Tribunal (NCLAT) order that upheld an NCLT judgement allowing insolvency proceedings against it by Axis Bank on the basis of default.

The company argued that its inability to pay was due to an ongoing dispute for which it is already fighting in the apex court.

VIPL was permitted by the Maharashtra Electricity Regulatory Commission (MERC) to supply power to Reliance Industries (RIIL) but certain disputes arose on operational costs

Major Implications

SC order says no automatic admission even if debt and default is proven

This may give another reason for debtors to stall their recovery process, say legal experts

Bankers and lawyers say the order goes against the time-bound nature of IBC

They fear this could derail an already delayed law which is not living up to its promise

and capping of tariff between VIPL and MERC. While adjudicating those disputes, the Appellate Tribunal for Electricity (APTEL) awarded VIPL ₹1,730 crore, an award challenged by the MERC in the Supreme Court. VIPL argued it could not pay back banks because of this pending appeal and thus was not insolvent.

In their order, justices Indira Banerjee and J.R. Maheshwari said admission of a case does not have a fixed timeline. "Legislature has, in its wisdom, made a distinction between the

date of filing an application under Section 7 of the IBC and, the date of admission of such application for the purpose of computation of timelines. CIRP (corporate insolvency resolution process) commences on the date of admission of the application for initiation of CIRP and not the date of filing thereof. There is no fixed time limit within which an application under Section 7 of the IBC has to be admitted," the judges said.

Bankers said allowing courts to dwell on the merits of admitting a ca-

se will give defaulting promoters an escape route.

"If we go on analysing the reasons for default, it is going to be a mess. As it is, the law has been compromised due to various delays. This now gives defaulting promoters one more tool to avoid paying up. We can be sure that many promoters will use this order to stop recovery from them," said a senior public sector banker.

Since the order is from the top court, bankers and lawyers said there are limited avenues to challenge it. Potential recourse is either a change in legislation or a likely hearing by a five-judge bench in case of a future such hearing.

Rajesh Narain Gupta, managing partner at SNG & Partners, said the judgement defeats the time-bound admittance goal of the IBC.

"This is not a good order from the IBC perspective. It is open to misuse as some unscrupulous borrowers will use it to prevent their cases from being admitted," Gupta said.

Bankers said they are weighing options to challenge this order and have also sounded off the Insolvency and Bankruptcy Board of India (IBBI) to consider some changes in the law.

