

Insolvency and Bankruptcy Hotline

April 04, 2024

IBC ALLOWS AUTOMATIC RELEASE OF ED ATTACHMENTS: BOMBAY HC REAFFIRMS

- Once the resolution plan has been approved by the National Company Law Tribunal ("NCLT"), a corporate debtor is automatically discharged from all liability arising from offences committed by it prior to the commencement of the Corporate Insolvency Resolution Process ("CIRP").
- Any action such as attachment, seizure, etc., against the property of the corporate debtor shall cease to be in effect post approval of the resolution plan.
- NCLT has the necessary authority to pass directions against any governmental agency including the ED, for release of attachment of properties of the corporate debtor.
- Due to the automatic extinguishment of liability, the corporate debtor / resolution professional is not required to take any separate action for quashing of any pending proceedings.

INTRODUCTION

Recently, the Bombay High court ("**Court**"), in the case of *Shiv Charan v. Adjudicating Authority*,¹ pronounced a judgement on the legal implications of Section 32A of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") on the attachment, seizure and confiscation of the property of the corporate debtor that has undergone CIRP or liquidation proceedings.

BACKGROUND OF SECTION 32A

Prior to the enactment of Section 32A, the National Company Law Appellate Tribunal ("**NCLAT**") had held that the attachment of property of a corporate debtor by the Enforcement Directorate ("**ED**") after the approval of a resolution plan, is not permissible under law.² However, the Delhi High Court permitted seizure of property of the corporate debtor by the ED even after the commencement of CIRP and during the operation of the moratorium.³ Our hotline discussing these judgements can be found [here](#). In light of the ambiguity in this respect, the legislature introduced Section 32A which indemnifies the corporate debtor from liability for offences committed prior to the commencement of CIRP.

Post the enactment of Section 32A, the Delhi High Court⁴ interpreted Section 32A to hold that the section becomes applicable from the date on which the Adjudicating Authority approves "*the sale of the corporate debtor as a going concern*". As a result, an order of attachment passed by the ED after such date would be *void*. Our hotline on the judgement of the Delhi High Court in this case can be found [here](#).

BRIEF FACTUAL AND PROCEDURAL BACKGROUND

In February 2019, pursuant to a complaint filed by the ED, assets of DSK Southern Projects Private Limited ("**Corporate Debtor**") were provisionally attached ("**Attached Assets**"). Thereafter, in August 2019, an order confirming the attachment of assets was passed by the adjudicatory authority under the Prevention of Money Laundering Act, 2002 ("**PMLA**").

In December 2021, the Corporate Debtor was admitted into CIRP. In February 2023, the NCLT passed an order approving the resolution plan ("**Approval Order**"). Under the Approval Order as well as by way of a subsequent order, the ED was specifically directed to release the Attached Assets. In response, the ED filed a Writ Petition challenging such a direction of the NCLT.

ISSUE AND JUDGEMENT

The Bombay High Court analyzed Section 32A as well as the powers of the NCLT under Section 60(5), to hold the following:

1. Section 32A is a *non-obstante* provision i.e., it overrides the effect of any provision contained in any statute which is in conflict with the applicability of the section.
2. By virtue of Section 32A a corporate debtor stands automatically discharged of all liability for any offence committed by it prior to the commencement of CIRP.
3. The extinguishment of liability becomes effective automatically, upon the approval of the resolution plan if all the conditions under Section 32A are fulfilled.

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4. Such statutory immunity is only granted to the corporate debtor and not to any other person who was in the management or control of the corporate debtor.
5. As a consequence of the extinguishment of liability, no action including attachment, seizure, confiscation and retention, can be taken against the property of the corporate debtor.⁵ The ambit of action against the property of the corporate debtor under Section 32A is wide and inclusive.
6. The NCLT under Section 60(5), is empowered to decide any question of law or fact arising from the CIRP including questions pertaining to the extinguishment of liability and release of attached assets under Section 32A.
7. Section 60(5) is also a *non-obstante* provision. Hence, the NCLT has exclusive jurisdiction to decide the abovementioned questions.

In light of the interpretation of Sections 32A and 60(5) as discussed above, the Bombay High Court concluded that: (a) the NCLT has the power to pass necessary directions against government agencies like the ED for release of attachment of properties, and (b) the resolution professional / successful resolution applicant need not take any action towards quashing of pending proceedings “*in view of the explicit and clear statutory immunity for the corporate debtor and its properties by the operation of law, as set out in Section 32A.*”

ANALYSIS

One of the objectives behind the introduction of the IBC was to implement an effective mechanism for recovery of dues by banks and financial institutions through the sale of the borrower entity i.e., the corporate debtor as a going concern. The success of the IBC depended on expeditious completion of the insolvency resolution process which included a clean handover of unencumbered assets of the corporate debtor, to the acquirer i.e., the successful resolution applicant.

If the assets of the corporate debtor are mired in litigation, resulting in the same being unavailable for utilization by the successful resolution applicant, the entire purpose of the IBC would stand frustrated. In *Ebix Singapore (P) Ltd. v. Educomp Solutions Ltd.(CoC)*,⁶ the Supreme Court held that a successful resolution applicant cannot modify its resolution plan once the resolution plan has been approved. Therefore, if a resolution applicant decides to purchase encumbered assets subject to the outcome of litigation which has to be pursued by the applicant itself, it will not be able to modify the purchase consideration in case of an unfavorable outcome. In such a scenario, a resolution applicant could refuse to factor in the value of such encumbered assets while proposing an acquisition cost for the corporate debtor. This could effectively reduce the rate of recovery for lenders i.e., the financial and operational creditors. Moreover, if the encumbered assets form a vital part of the business of the corporate debtor and are important for business continuity, resolution applicants would be dissuaded from participating in the bid process.

In spite of the aforementioned practical hurdles which are a natural consequence of selling encumbered assets via the IBC route, various governmental agencies like the ED, have been unrelenting in not complying with the legislative mandate of Section 32A of the IBC. Almost every CIRP involving attachment of assets of the corporate debtor by a governmental agency, has been stuck in prolonged litigation. However, with the pronouncement of the present judgement, there is much needed clarity on the impact of Section 32A. This will help in boosting investor confidence and encouraging stressed asset acquirers to participate in the acquisition of distressed assets through the IBC route.

— Shruti Dhonde, Arjun Gupta and Sahil Kanuga

You can direct your queries or comments to the authors.

¹ 2024 SCC OnLine Bom 701.

² *JSW Steel Ltd v. Mahender Kumar Khandelwal & Ors.*, 2020 SCC OnLine NCLAT 431.

³ *Deputy Director Directorate of Enforcement Delhi v. Axis Bank & others*, (2019) 259 DLT 500.

⁴ *Nitin Jain Liquidator PSL Limited v. Directorate of Enforcement*, (2022) 287 DLT 625.

⁵ 32-A. Liability for prior offences, etc.—(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under Section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation.—For the purposes of this sub-section, it is hereby clarified that,—

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

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