

LEGAL UPDATES

NCLAT: FINANCIAL INSTITUTIONS DURING CIRP CAN NOT BE FORCED BY RP TO ADOPT A NON-FUND-BASED FACILITY

In an appeal heard by the NCLAT bench composed of Justice M. Venugopal, Hon'ble V. P. Singh and Dr Alok Srivastava held that the construction of Sec.17(1)(d) of IBC that FI "shall act on the instructions of the IRP" should not be interpreted to force a FI to adopt Non-fund based facility ('NFB') by authorizing IRP/RP to compel a FI to do the same thereby disregard of such direction of RP would not amount to the infringement of Sec. 17(1)(d). RP contended that (i) The FI arbitrarily misused their powers and did not consider continuing the NFB facility, the Corporate debtor's account was debited by the Appellant in order to recover INR 33.34 Cr., (ii) The NFB facility provided by the Appellant was withdrawn and further recovered an amount of INR 33.34 Cr., (iii) Hence, the statutory mandate of Sec. 17(1)(d) of the Code was violated as the actions of the Appellant during CIRP were not in consonance to the directions given by the RP. The Appellate Tribunal observed that a wrong suggestion was made to CoC by the RP wherein it was recommended to either accept the amount against a Letter of Credit or as a Bank Guarantee to debit the amount from the Appellant's allotted share under the RP or consider the same as CIRP cost. NCLAT observed, "...it is clear that the Appellant never recovered any amount from the payment of ₹ 34 crores, as has been misrepresented by RP. Further, NCLAT considered that the amount received was for those suppliers of the Corporate Debtor who continued to supply the goods and services to the corporate debtor in order to maintain the corporate debtor as a going concern and would be considered against the Letter of Credit Bank Guarantee, and further observed that the CoC was unable to take an appropriate decision as the RP failed to advise the correct legal stance to the CoC concerning the interim finance. Thereby, the NCLAT bench partially allowed the appeal holding that the payment done to the suppliers of the corporate debtor is to be considered as a part of the CIRP cost and therefore, cannot be subtracted from the Appellant's final payments as per the approved RP.