

Insolvency Law: Delhi High Court Curtails Powers Of NCLTs

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Once the insolvency process is over, applications for objectionable transactions cannot be entertained by National Company Law Tribunals unless a provision is made in the resolution plan, the Delhi High Court has ruled. Further, such applications must be decided by the NCLT before a resolution plan is approved, the high court has said.

In saying so, the Delhi High Court set aside an avoidance application filed by the erstwhile resolution professional of Bhushan Steel Ltd., which was acquired by [Tata Steel Ltd.](#) in June this year. Experts disagreed with the high court order saying if resolution plans have to await the conclusion of avoidance applications, it'll frustrate the timelines laid down under the Insolvency and Bankruptcy Code.

Transactions that give unfair preference to one creditor over others can be unwound under the IBC. For instance, those involving transfer of interest in a property for the benefit of a guarantor, creditor or surety of the corporate debtor.

Such transactions can be set aside by insolvency tribunals if they have been executed during the preceding two years in case of a related party and one year for any other person—before the commencement of insolvency resolution process.

The Delhi High Court has now laid down a time limit within which such orders must be passed by NCLTs. Any order for objectionable transactions will have to be passed prior to the approval of the resolution plan, a single judge bench of Justice Pratibha Singh has held.

Avoidance Applications Cannot Survive IBC, Says Delhi High Court

In March 2018, the Bhushan Steel's resolution professional filed an avoidance application involving excess payments to suppliers and vendors of the company, including Venus Recruiters Pvt. Ltd. The tribunal impleaded various parties to the application in October 2018—five months after Tata Steel [completed](#) the acquisition.

Venus Recruiters Pvt. Ltd. contested this saying the resolution professional has no role to play after the closure of the insolvency process, and that the NCLT's jurisdiction to pass such an order cannot extend after the approval of resolution plan.

This was countered by Tata Steel, the resolution professional as well as the standing counsel for the Union of India. They argued that the resolution professional's power to file an avoidance application is independent of the insolvency process.

The Delhi High Court disagreed, and said that avoidance applications are meant to give some benefit to the creditors of and not the "corporate debtor in its new avatar" post-approval of the resolution plan.

It held:

- Jurisdiction of the NCLT is limited to insolvency resolution and liquidation. As such, no proceedings remain before the NCLT after the new management takes over post the resolution.
- Assessment of objectionable transactions cannot be an unending process.
- Avoidance transactions are meant to benefit creditors of the corporate debtor. However, as CoC ceases to exist after the insolvency process, no benefit would arise to them.
- RP cannot wear the hat of the 'former RP' and pursue an avoidance application in respect of preferential transactions.

Experts Disagree With The Court's Findings

Insolvency experts agreed with the court's findings on powers of the resolution professional but disagreed with the part that curtails NCLTs' jurisdiction.

Preferential, undervalued and extortionate transactions are essentially void in law and the order for their avoidance can be passed only by a judicial body with a vested jurisdiction, Misha, partner at Shardul Amarchand Mangaldas & Co., said. As this cannot be decided by the new management, one cannot say that jurisdiction of NCLT is only limited to the CIRP period, she added.

“The main point is that there was some wrong doing in connection with affairs of a corporate debtor through such transactions which must be undone or avoided.”

Misha, Partner, Shardul Amarchand Mangaldas & Co.

The intent of the IBC is clear that once avoidance applications are filed, they have to be treated as independent provisions and can continue even after the resolution plan has been approved, Sumant Batra, managing partner at Kesar Dass B. & Associates, said.

“Avoidance applications can be complex and it can take a long time to detect and decipher them, and even to be ultimately decided by the NCLT. Even if applications are decided before the resolution plan is approved, the aggrieved parties can file an appeal. All this may take a lot of time and will put on hold the approval of the plan itself.”

Sumant Batra, Managing Partner, Kesar Dass B. & Associates

A compromise to this conundrum might lie in a solution that was alluded to in the Insolvency Law Committee's report from February 2020, Aparna Ravi, partner at Samvad Partners Advocates, pointed out.

The ILC's report had suggested that avoidance applications can continue to be prosecuted post CIRP if the resolution plan provided for it.

If this were to work, Ravi explained, the resolution professional should have identified and filed avoidance applications before a resolution plan is approved and the committee of creditors would need to take a conscious decision to continue them post-approval of the plan.

“The resolution plan would then have to include details such as who the committee of creditors authorises to pursue these applications, who will bear the litigation costs and how any ultimate recoveries would be distributed among the creditors.”

Aparna Ravi, Partner, Samvad Partners Advocates

Such a compromise might allow for timely resolution while also ensuring that creditors have the ability to pursue any avoidance actions that they consider worth pursuing, she said.