

November 2024

Supreme Court of India orders for liquidation of Jet Airways (India) Limited and recommends reform in the Insolvency and Bankruptcy Code, 2016

On November 7, 2024, a 3 (three) judge bench of Hon'ble Supreme Court of India ("**Supreme Court**") delivered their judgment in the matter of *State Bank of India and Ors. vs. The Consortium of Mr. Murari Lal Jalan and Mr. Florian Fritsch and Anr.*¹, *inter alia*, ordering liquidation of Jet Airways (India) Limited ("**Jet Airways**"). Interestingly, Supreme Court also suggested various points for the Parliament to reform the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Brief facts

This judgment arose out of an appeal against the order passed by National Company Law Appellate Tribunal ("**NCLAT**") on March 12, 2024 ("**Impugned Order**"), which held that the Successful Resolution Application ("**SRA**") of Jet Airways had fulfilled all conditions precedent of the approved resolution plan ("**Plan**"). The Impugned Order, *inter alia*, allowed for adjustment of the Performance Bank Guarantee of INR 150,00,00,000 (Indian Rupees one hundred and fifty crore) ("**PBG**") towards the first tranche payment of INR 350,00,00,000 (Indian Rupees three hundred and fifty crore) that was due from SRA under the Plan.

Issues

1. Whether the PBG could be allowed to be adjusted against the first tranche payment under the Plan?
2. Whether the non-implementation of the Plan by SRA necessarily leads to liquidation?
3. Whether timely implementation of Plan is also one of the objectives of IBC?

Analysis and findings

Before analysing these issues, Supreme Court rejected the preliminary objection of non-existence of any 'question of law' under Section 62 of IBC. Even amidst the concurrent factual findings by National Company Law Tribunal ("**NCLT**"), Mumbai, and NCLAT, Supreme Court held that an intervention was justified, because the Impugned Order was in violation of its earlier order dated January 18, 2024, which held against the adjustment of PBG. Supreme Court was also of the view that NCLAT also drew wrong inferences from proved facts.

1. For **Issue (1)**, Supreme Court answered in negative, with the following analysis:

¹ Civil Appeal Nos. 5023-5024 of 2024

- a) Supreme Court analysed the provisions of the Plan which mandated payment of the first tranche of INR 350,00,00,000 (Indian Rupees three hundred and fifty crore) by SRA within 180 (one hundred and eighty) days of the 'effective date' (which was originally the 90th day from the fulfilment of the conditions precedent ("CPs")).² After multiple extensions by NCLT and NCLAT, the 'effective date' was frozen at May 20, 2022, when SRA claimed to have complied with the conditions precedent;
 - b) the Supreme Court observed that, at least, after the effective date of May 20, 2022, SRA should have fulfilled its obligations under the Plan, and their undue delay reflected *mala fide* intention on their part; and
 - c) Supreme Court also analysed that the provisions of the Plan, read with the 'Request for Resolution Plan', did not allow for any adjustment of PBG, since the PBG was to be invoked only in specific conditions prescribed therein. Such adjustment also fell afoul of Regulation 36B(4A) of the Insolvency and Bankruptcy Board of India ("IBBI") (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which mandated forfeiture of performance security in case the resolution applicant failed to implement the Plan. Supreme Court held that PBG had to be kept alive till the implementation of the plan and could not be set-off against any payment obligation. Thus, failure to infuse funds led to non-implementation of the Plan;
2. For **Issue (2)**, Supreme Court answered in positive with the following analysis:
- a) Supreme Court considered that the non-infusion of funds by SRA led to the default in payment of Corporate Insolvency Resolution Process ("CIRP") costs as well, which includes airport dues;
 - b) Supreme Court also analysed the schedule of Plan and concluded that the SRA should have paid the provident fund and gratuity dues in time;
 - c) Supreme Court analysed Section 33(3) of IBC to conclude that consequence of non-implementation of Plan must necessarily be liquidation and held that the creditors were entitled to invoke the PBG; and
 - d) Supreme Court lamented on how more than 5 (five) years passed since the admission of CIRP, and the implementation of the Plan still seemed to be a '*dim light at the far end of a long tunnel*';
3. For **Issue (3)**, Supreme Court answered in *positive* with the following analysis:
- a) Supreme Court analysed the preamble to IBC and the report of the Bankruptcy Law Reforms Committee, 2015, to note that 'time' and 'speed' were of essence for the working of IBC;
 - b) Supreme Court reasoned that minimising delay was crucial to ensure that the assets of corporate debtor do not get frittered away due to a time lag;
 - c) Supreme Court, hence, cautioned that the powers with NCLT and NCLAT to extend the timelines³ cannot be exercised mechanically without any application of mind, and must be done by adequately weighing the consequences of such extension; and
 - d) Supreme Court invoked its plenary powers under Article 142 of the Constitution of India ("**Constitution**") to order for liquidation of Jet Airways, in light of the *extraordinary circumstances* of inordinate delay in implementation of Plan and dues of corporate debtor getting multiplied. Supreme Court observed that liquidation remained the *viable* last resort for corporate debtor and the creditors

Recommendations by Supreme Court

Considering the present litigation to be an *eye-opener* on the working of IBC, Supreme Court gave the following suggestions to improve the working of IBC:

² Supreme Court also analysed the 5 (five) conditions precedents mentioned in the Plan, namely: (a) validation of air operator certificate, (b) approval of business plan, (c) slot allotment approval, (d) international traffic rights clearance; and (e) demerger of Airjet Ground Services Ltd.

³ Rule 15 of the NCLT Rules, 2016; Rule 15 of NCLAT Rules, 2016.

1. the committee of creditors (“**CoC**”) exercises its commercial wisdom to approve or reject a Plan after providing a rationale for the benefit of the adjudicating authorities;
2. the Central Government and IBBI have an oversight committee to independently ensure enforcement of the Guidelines for CoC dated August 6, 2024, issued by IBBI;
3. the SRA’s role must not be merely transactional, rather of pivotal responsibility towards the distressed entity. Hence, SRA must make sustained efforts for corporate revival even when faced with operational impediments;
4. the creditors must not impede the implementation of Plan through unnecessary demands, and hence, provide active support to SRA to revive the corporate debtor;
5. the NCLT while approving a Plan should record the next steps to be taken, so that parties are *ad idem* and vigilant about the next round of their obligations; and
6. IBC may provide for a monitoring committee to ensure smooth handover of corporate debtor to SRA once the plan is approved, and the said committee can be constituted by the CoC.

Significantly, before closing the matter, Supreme Court also highlighted deficiencies in IBC and functioning of NCLTs and NCLAT, calling for immediate attention:

1. SRAs repeatedly approached NCLT or NCLAT for relaxation in strict compliance with the Plan and the adjudicating authorities also acceded to such requests. The Supreme Court held that such intervention must be kept at a minimum at best, and NCLT and NCLAT must not aid the SRA in circumventing the mandate of law by acceding to their request for relaxation;
2. there was a serious lack of timely admission and disposal of applications by NCLT and NCLAT, no practice of sitting for full working hours, lack of capacity to manage growing number of cases, no effective system for urgent listings and the registry has ‘wide power to list or not to list a particular matter’. Supreme Court observed that NCLTs and NCLAT must seriously rethink their approach towards admission and disposal of matters and must take their role seriously, with judicial propriety. It even warned that any contravention of Supreme Court’s order will not be tolerated; and
3. there was an issue of vacancy of members in such tribunals and that appointment of new members must be prioritised.

Conclusion

Stressing upon timely and speedy resolution of a corporate debtor, Supreme Court went ahead to exercise its plenary power under Article 142 of the Constitution to order liquidation of Jet Airways. The Supreme Court set aside the Impugned Order of NCLAT, as perverse and unsustainable in law and directed that the infused funds of INR 200,00,00,000 (Indian Rupees two hundred crore) by SRA be forfeited. It also allowed the creditors to encash the PBG of INR 150,00,00,000 (Indian Rupees one hundred and fifty crore).

This judgment is significant as it not only emphasised time and speed to be the essence of IBC, but also presented the poignant deficiencies in the functioning of NCLT and NCLAT and made recommendations to reform IBC. It is particularly important for the fact that it directed the liquidation of Jet Airways due to defaults of the SRA by observing that a delay in taking control of a company leads to liquidation as the only viable answer.

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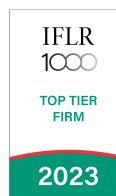


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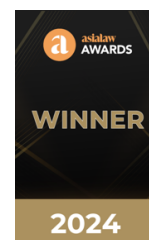


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