Does Bhushan Steel ruling undermine IBC goal of maximising value through resolution?

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The legal tangle involving JSW Steel's takeover of Bhushan Power and Steel (BPSL) seems to be more complicated and headed for a long-drawn battle following the scrapping of the deal by the Supreme Court last week.

Even if JSW Steel and the Committee of Creditors manage to convince the top court about the financial structure used for the BPSL takeover, the top court has ruled that the National Company Law Appellate Tribunal has no jurisdiction to adjudicate on the Prevention of Money Laundering Act (PMLA) and allow takeover of assets attached by investigating agencies such as the Economic Offences Wing (EOW) and the Enforcement Directorate (ED).

Sonam Chandwani, Managing Partner, KS Legal said the SC ruling affirms that the NCLAT cannot overrule the ED or EOW asset attachments, and it severely complicates the JSW Steel case by enforcing the EOW's hold on the BPSL plant, a critical operational asset.

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This decision, while legally sound under PMLA's primacy, undermines the IBC's goal of maximising value through resolution, as it risks forcing the liquidation of a viable going concern, slashing creditor recoveries and threatening jobs, she said.

'GUT PUNCH' TO STAFF

Furthermore, the liquidation of BPSL is a gut punch to thousands of employees who now face the grim prospect of joblessness because of corporate and legal missteps they had no hand in.

JSW Steel's likelihood of going in for a review petition feels like a long shot given the court's tone was unforgiving, slamming everyone from JSW to the Resolution Professional for flouting rules, Chandwani said.

'CLEAN SLATE THEORY'

Piyush Agrawal, Partner, AQUILAW, said that though the SC judgment restricts the powers of NCLT/NCLAT to interfere with the decisions of the government and statutory authorities in the realm of public law such as the PMLA, it is silent insofar as the applicability of 'clean slate theory'.

If attachments by the ED or EOW remain valid even after a resolution plan is approved, it makes corporate debtor assets unattractive and creates uncertainty for resolution applicants thereby reducing the effectiveness and value of the insolvency process, he said.

Moreover, he added that liquidation of assets attached by investigating authorities will make it commercially unattractive.

Daizy Chawla, Senior Partner, S&A Law Offices, believes Section 32A will still safeguard the interests of bidders as it provides immunity to the assets of corporate debtor against actions for offences done prior to CIRP or sale of liquidation assets.

Shiju PV, Senior Partner, IndiaLaw LLP, said the judgment reaffirms that neither NCLT nor NCLAT possess powers of judicial review over decisions of statutory authorities, and therefore cannot declare the ED or EOW attachments illegal or void. Any such determination lies solely within the jurisdiction of the appropriate forums prescribed under public law, including constitutional courts and designated special courts, he said.