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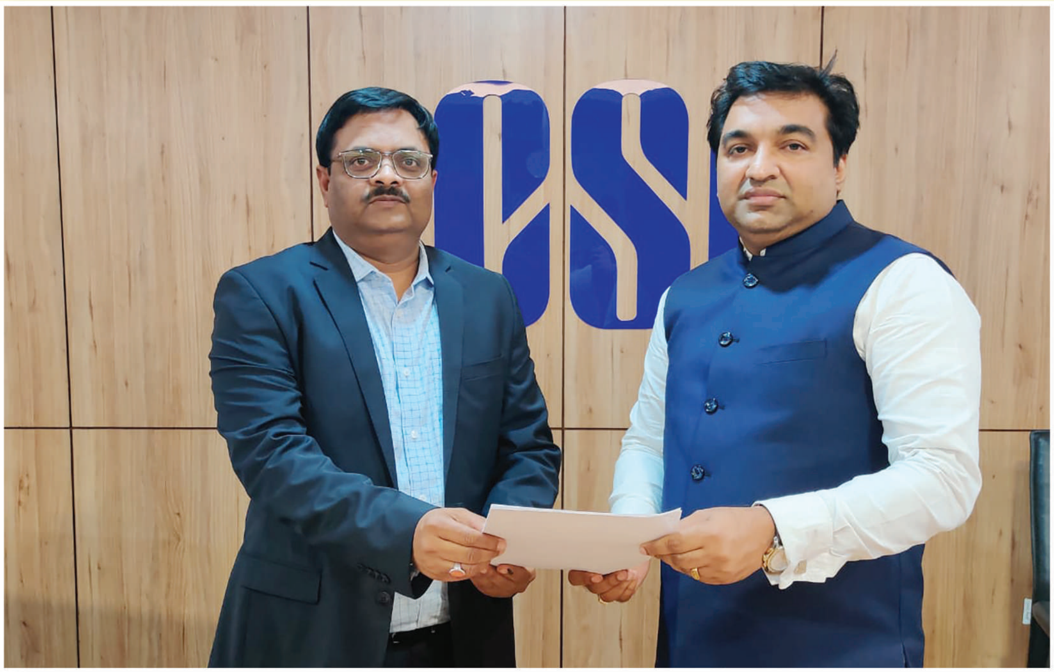
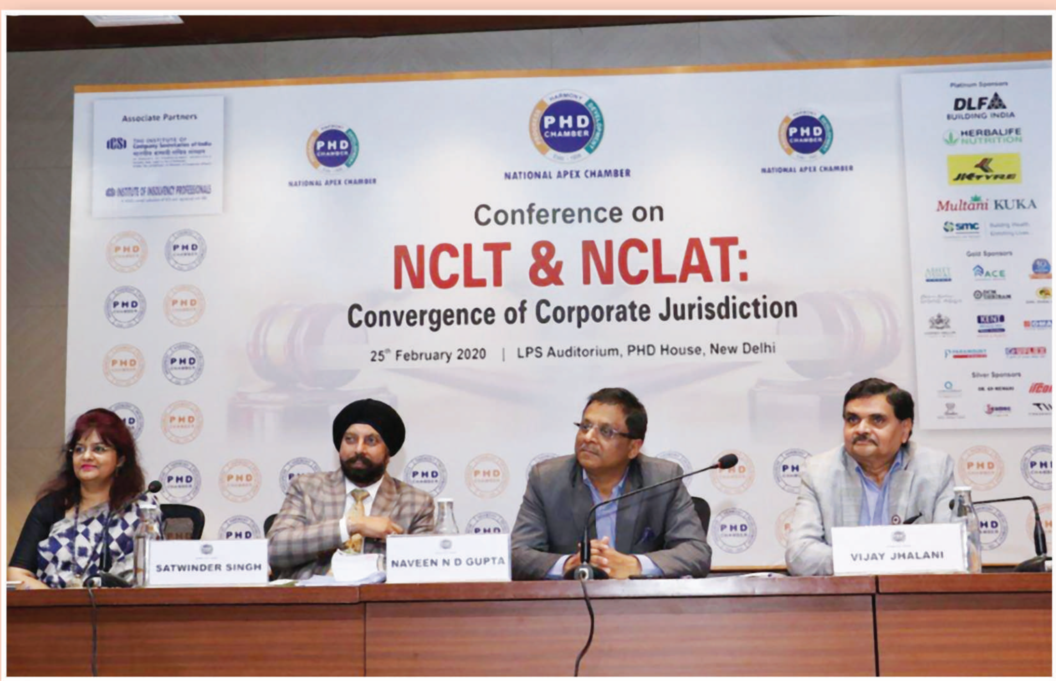


L-R: Mr. Piyush Kumar, *CEO, Taxmann;*
Dr. Binoy J Kattadiyil, *Managing Director, ICSI IIP*

Conference on NCLT & NCLAT: Convergence of Corporate Jurisdiction



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At a Glance

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Section 5(21), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational debt - Operational creditor was awarded civil work of construction of Hotel by corporate debtor - As per work order, retention money of 5 per cent would be retained from every running account bill which was to be released after completion of defects liability period of one year from date of award of completion certificate and issue of defect liability certificate, to be issued by corporate debtor to operational creditor - Operational creditor filed application under section 9 submitting that corporate debtor had not paid retention money after completion of defects liability period and even after issuance of demand notice - Appellant submitted that retention money did not fall within definition of operational debt - Whether since retention money was part of main bill raised towards services rendered by operational creditor to corporate debtor, it could not be treated as separate money - Held, yes - Whether further, since operational creditor had rendered services and there was no dispute with regard to said services, it could not be accepted that said claims would not fall under definition of operational debt Held, yes - (Para 17)

Section 238A of Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Limitation period - As per work order awarded by corporate debtor to operational creditor, retention money of 5 per cent would be retained from every running account bill which was to be released after completion of defects liability period - Defect liability period was completed on 1-4-2015 and thereafter, operational creditor had requested corporate debtor to release money - Operational creditor filed application under section 9 as corporate debtor failed to pay amounts due even after issuance of demand notice - Appellant submitted that application under section 9 filed on 27-4-2018 was barred by limitation - Whether since cause of action for release of retention money commenced on 21-7-2015 when mail was sent by corporate debtor stating that operational creditor had attended to all concerns and rectified same, instant application being filed within a period of three years was not barred by limitation - Held, yes (Para 17)

- **Anand Rao Korada Resolution Professional v. Varsha Fabrics (P.) Ltd.**
  (2019) 111 taxmann.com 474 (SC)

• P-26

Section 231, read with sections 238 and 14, of the Insolvency and Bankruptcy Code, 2016 - Bar of jurisdiction - A financial creditor filed petition under section 7 against corporate debtor which was admitted by NCLT and moratorium was declared - However, during pendency of moratorium, High Court by impugned order started auction proceedings of assets of corporate debtor - Whether High Court ought not to have proceeded with auction of property of corporate debtor, once proceedings under IBC had commenced, and an order declaring moratorium was passed by NCLT - Held, yes - Whether thus, impugned order passed by High Court was to be set aside - Held, yes (Para 9)

- **Anubhav Anilkumar Agarwal v. Bank of India**
  (2020) 116 taxmann.com 793 (NCLAT - NEW DELHI) **• P-29**

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 18 of the Limitation Act, 1963 - Corporate insolvency resolution process - Limitation period - Application filed under section 7 by financial creditor-bank was admitted and CIRP was initiated against corporate debtor - Appellant contended that date of default/NPA was 31-12-2014 whereas application was filed in year 2019, *i.e.* three years after occurrence of default; therefore, same was barred by limitation - Whether date of default stands forwarded, if borrower acknowledges debt and agrees to pay on a future date in terms of Section 18 of the Limitation Act - Held, yes - Whether since in instant case, corporate debtor by its letter dated 18-3-2016/ 20-3-2016 specifically stated that it will make an effort to save their bank account from getting NPA and citing good reputation and goodwill, corporate debtor agreed to pay amount and acknowledged dues, period of limitation stands shifted to date on which corporate debtor agreed to pay and thus, application under section 7 was not barred by limitation - Held, yes (Paras 10 to 13)

- **Anuj Jain v. Axis Bank Ltd.**
  (2020) 114 taxmann.com 656 (SC) **• P-31**

Section 43, read with sections 44, 49 and 66, of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Preferential transactions and relevant time - Whether for a transaction to fall within mischief sought to be remedied by sections 43 and 44, it ought to be a preferential one answering to requirements of sub-section (2) of section 43; and preference ought to have been given at a relevant time, as specified in sub-section (4) of section 43 - Held, yes - Whether if a transaction entered into by a corporate debtor is not falling in either of exceptions provided by sub-section (3) of section 43 and satisfies three-fold requirements of sub-sections (4) and (2), it would be deemed to be a preference during a relevant time, whether or not in fact it were so; and whether or not it were intended or anticipated to be so - Held, yes - Applicant lender bank extended various credit facilities in favour of JAL, which was holding company of corporate debtor JIL - In respect of such credit facilities, corporate debtor JIL created security in favour of applicant bank executing various mortgage deeds whereby several parcels of land of JIL were put under mortgage with lender of JAL - Such transactions took place around time when accounts of JIL were declared NPA - For creation of mortgage to secure debt of JAL - Corporate debtor did not take `No objections' of its own lenders - Finding these transactions preferential, undervalued and fraudulent, NCLT held that security interest created by JIL in favour of lender of JAL was to be released and discharged - However, said order of NCLT was set aside by impugned order of NCLAT - Whether impugned transactions had been of transfers for benefit of JAL, who a related party of corporate debtor JIL and its creditor and surety by virtue of antecedent operational debts as also other facilities extended by it; and impugned transactions have effect of putting JAL in a beneficial position than it would have been in event of distribution of assets being made in accordance with section 53 and, thus, corporate debtor JIL had given a preference in manner laid down in sub-section (2) of section 43 - Held, yes - Whether since impugned transactions had not been in ordinary course of business or financial affair of JIL, impugned transactions were not of excepted transfers in terms of sub-section (3) of section 43 - Held, yes - Whether thus, transactions in question are hit by section 43 and NCLT having rightly held so, had been justified in issuing necessary directions in terms of section 44 in relation to transactions concerning in question and NCLAT had not been right in interfering with well-considered and justified order passed by NCLT - Held, yes (Paras 18.2, 19.5, 22.5, 25.7, 25.8 and 27)

Section 5(7), read with section 5(8), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial creditor - Whether if a corporate debtor has given its property in mortgage to secure debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within definition of 'debt' under section 3(10), however, it would remain a debt alone and cannot partake character of a 'financial debt' within meaning of section 5(8) - Held, yes – Applicant bank extended various credit facilities in favour of JAL, which was holding company of corporate debtor JIL - In respect of such credit facilities, corporate debtor JIL created security in favour of applicant bank executing various mortgage deeds whereby several parcels of land of JIL were put under mortgage with lender of JAL - Held, yes - Whether debts in question were in form of third party security; said to have been given by corporate debtor JIL so as to secure loans/advances/facilities obtained by JAL from respondent-lenders; such a 'debt' is not and can not be a 'financial debt' within meaning of section 5(8) and, hence, respondent-lenders, mortgagees, are not 'financial creditors' of corporate debtor JIL - Held, yes - Whether thus, lender of JAL on strength of mortgages in question, may fall in category of secured creditors, but such mortgages being neither towards any loan, facility or advance to corporate debtor nor towards protecting any facility or security of corporate debtor, it can not be said that corporate debtor owes them any 'financial debt' within meaning of section 5(8) and, hence, such lenders of JAL do not fall in category of 'financial creditors' of corporate debtor JIL - Held, yes (Paras 47.2, 48 and 54)

- **G. Eswara Rao v. Stressed Assets Stabilisation Fund**
  (2020) 116 taxmann.com 794
  (NCLAT - NEW DELHI) • **P-62**

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Limitation period - Whether a decree passed by Debts Recovery Tribunal or any suit cannot shift forward date of default - Held, yes - Whether as filing of Balance Sheet/Annual Return being mandatory under section 92(4) of Companies Act, 2013, failing of which attracts penal action under section 92(5) & (6), Balance Sheet/Annual Return of 'corporate debtor' cannot be treated to be an acknowledgement under section 18 of Limitation Act, 1963 - Held, yes - Corporate debtor availed loan from financial creditor during period 1994 to 1996 - In year 2004, account of corporate debtor was declared as NPA and case was filed before Debt Recovery Tribunal (DRT) - DRT passed a decree in favour of financial creditor on 17-8-2018 - Thereafter, financial creditor filed an application under section 7 before NCLT against corporate debtor - Whether in absence of any acknowledgement under section 18 of Limitation Act, 1963, date of default/NPA was prior to 2004 and thus, application under section 7 filed after year 2018 was barred by limitation - Held, yes (Paras 15 & 28)

- **Maharashtra State Electricity Transmission Co. Ltd. (MSETCL) *v.* Sri City (P.) Ltd.**
  (2020) 116 taxmann.com 795
  (NCLAT - NEW DELHI) • **P-65**

Section 30, read with section 238, of the Insolvency and Bankruptcy Code, 2016 - Resolution plan - Submission of - Appellant had entered into a bulk power transmission agreement (BPTA) with corporate debtor for allocation of certain transmission capacity rights through transmission network of appellant for a period of 25 years - Subsequently, CIRP was initiated against corporate debtor - In resolution plan, long term BPTA between appellant and corporate debtor was terminated - Whether in view of provisions of section 238, termination of BPTA with appellant was proper - Held, yes (Para 5)

Knowledge Centre 7-12

- **Practical Questions** • **P-7**
  - Can the CIRP be initiated in respect of a government company ?

- In case where no fund is created by the CD in violation of Payment of Gratuity Act, 1972, can the liquidator be directed by the AA to make payment of gratuity to employees ?
- If in a case the CD writes a letter to its Creditor requesting to send his claim for verification and payment, will such a letter amount of acknowledgement for the purposes of extension of limitation period?
- Can a shareholder agitate his dispute against the other shareholder by way of intervening in the CIRP proceedings initiated u/s 7, IBC?
- Can the Directorate of Enforcement also discharge the function of deciding if a Resolution Applicant is ineligible being related party u/s 29A, IBC?
- Is a CIRP application maintainable in respect of a CD whose name has been struck-off from the register of Registrar of Companies?
- If, during the proceedings u/s 230, IBC, an objection is raised, can the NCLT exercise power to overrule such an objection if it entertains a view that such arrangement and scheme is beneficial for the CD?
- Can a plea be maintained against maintainability of a section 7 application asking the AA to consider if or not a resolution would be possible w.r.t. the CD or whether or not it would be possible to keep the CD as a going concern?
- Can an application filed u/s 10, IBC be rejected on the ground that the Corporate Debtor is earning sufficient income?
- Can a statement in the balance sheet of the CD (duly signed by the directors) be held to be an acknowledgement of the debt u/s 18, Limitation Act, 1963?

- HC out not to have proceeded with the auction of property of the CD, once the proceedings under IBC had commenced, and an order declaring moratorium was passed by the NCLT.
- The period of Limitation is to be counted from the date of default/NPA. However, the date of default stands forwarded, if the Borrower acknowledges the debt and agrees to pay on a future date in terms of section 18 of Limitation Act.
- Fault cannot be found in an approved Resolution Plan, where CoC in its wisdom accepted its plan which allows Resolution Applicant to take over with a clean stale and not be forced to continue with any long term arrangement of the CD.
- Decree passed by DRT only suggests that debt becomes due and payable. It does not shift forward the date of default as decree has to be executed within a specified period.
- The retention bill which is a part of the main bill, comes under the definition of operational debt.

From Chairman's Desk

P.K. MALHOTRA
ILS (Retd.) and Former Law Secretary (Ministry of Law & Justice, Govt. of India)

With the new day comes new strength and new thoughts

... Eleanor Roosevelt

The existence of a company as a business entity is based on the assumption that it is capable of discharging its liabilities and has the true potential to bring in economic welfare to the nation. While there can be several reasons for a business entity to suffer financial distress, the act of getting out of it is largely based on its own capacity and potential to resuscitate itself to life, and the chances of a company reviving itself is substantially determined by the fact as to at what stage its ailment is discovered and rescue actions are put in place.

With the above context, let me briefly make an analogy between the insolvency law regime that existed pre-IBC and the one introduced under the IBC. It is important because some doubts have been raised regarding effectiveness of IBC as a legal mechanism to resolve the problem of non-performing assets for the banks and financial institutions, and at the same time finding solution to the situation of financial distress faced by the corporates. As per the recent data available, till December 2019 there have been 3312 CIRPs initiated under IBC which have culminated into liquidation in 780 cases and in 190 cases the resolution plans got approved. Thus, while the CIRP proceedings wherein liquidation orders have been passed constitute 57.74% of the total CIRPs, the cases wherein resolution plans got approved by the CoC (and the AA) constitute only 14.06% of the total CIRPs. Taking this data alone without an understanding of the details thereof is likely to make one believe that, perhaps, the legal regime that existed pre-IBC brought was better than the present one. The truth, however, is completely otherwise. This is why I believe that one should not only see the statistics (as they appear on their face), but also try to analyse their details in order to discover the whole truth. It is important to note that in 72.48% of the CIRPs initiated that culminated into passing of liquidation orders (561 out of 774 of which data is available) were the cases which were earlier before BIFR and/or were defunct. Thus, it is clear that in most of such cases the economic value of the CD was eroded before they entered into CIRP. As I said earlier, for a CD to revived the potential to move on the track has to be there. Moreover, IBC is based on the philosophy that the sooner a financial distress (in a corporate entity) is detected, the easier it becomes to revive it. In the coming days, months and years a very small fraction of CIRPs would result into CD's liquidation. Eversince introduction of IBC there has been a major behavioural change observed in the way debtors run their business, and the threat of IBC process that a company may change hands has brought in the sense of being upright in running the business. Thousands of debtors are now settling the defaults at an early stage of lifecycle of a distressed asset. The creditors are no more chasing the debtors to settle, rather, it is the creditors who on the occurrence of a default of payment are insisting to settle their dues in order to avoid the consequences of IBC process. As very aptly stated by Dr. M.S. Sahoo, Chairperson, IBBI, that the *"best use of the Insolvency and Bankruptcy Code would be in not using it at all"*.

Another fallacy that I wish to correct here is that the recoveries made under IBC through resolution plans is not satisfactory. Now, the fact that in cases wherein there is a huge organization value stored in the CD, the best recovery that can be made is through reviving only and not by liquidating the CD, is beyond any pale of any doubt. For instance, in cases (190 CDs till December, 2019) wherein resolution plans have been passed (under IBC), while the creditor's dues were in the range of Rs. 3.8 lakh crores, the realizable value of CD's assets (available at the time of initiation of IBC process) was only 0.77 lakh crore. Now, if, in such circumstances, the creditors are able to recover to the extent of 1.6 lakh crores, it worries me as to how does one come to the conclusion that the recoveries are not significant. In percentage terms, there is 207% recovery made keeping in mind the realizable value *i.e.* liquidation value of the assets at the time of CD entering into the IBC process. The other very important fact to be noted is that by the time these companies were pushed into the IBC process, there was already a huge value erosion of its assets, and thus the Financial Creditors had to take a hair-cut of 57% of the total claims.

A concern regarding PUFE transactions is catching the attention of not only the Regulator (the IBBI) but also that of the judicial courts. Recently, the Apex Court, vide its judgment dt. 26th February, 2020 passed in the matter of *Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited etc* (2020) 114 taxmann.com 656, has set aside Hon'ble NCLAT's judgment on the issue of avoidance of certain transactions u/ss. 43, 45 and 66, IBC. Interpreting and analysing the language of ss. 43 and 44, Hon'ble Supreme Court, while observing that the provisions need to be strictly construed, held that for a transaction to fall within the mischief sought to be remedied by the said sections, it ought to be a preferential one answering to the requirements of sub-section (2) of s. 43, and that the preference ought to have been given at the relevant time. Further, in cases of transfer of property (or interest thereof) of the CD, the test which has to be followed in ordinary circumstances has also been laid down. The judgment has also thrown light on the issue of Look back period in terms of s. 43(4), IBC.

As you might be aware that under the *Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018*, an IP can be appointed as an Administrator, and that IBBI and SEBI have mutually agreed to use a panel of IPs for appointment as *Administrators* for effective implementation of the Regulations, there is an opportunity for the IPs to take up the task of an Administrator in the future.

President's Message

Correction does much, but encouragement does more

... Helen Keller

CS ASHISH GARG
President
Institute of Company
Secretaries of India

Dear Professional Members,

People who possess the strength of *positivity* are the only ones who are capable of giving solutions to the problems and they are the ones who are capable of looking at the silver lining even in a gloomy situation. We often come across persons who always have a smile on their face, and when they are in a group, their actions are motivated to lift the spirit of everyone who is in the group. They prefer to look at the *bright side* of things, rather than being bogged down with any challenging situation. I started with this thought to not only encourage you to discover and see as to how beautifully life is shaping-up itself, but also to make you see the immense possibilities that exist when you adopt the attitude of positive thinking.

While I do want you to look at the present real picture of the World Economy which is believed to be undergoing a difficult phase, as contributed by reasons such as fall in consumer demand, there is enough reason to retain your positive outlook as there was a sharp pickup seen in India's business activity at the start of the new year 2020 itself. This signaled towards a momentum returning to Asia's third-largest economy. Signs that the economy has put the worst behind it also gave the policy makers some respite. While the RBI eased its policy, the Government has also widened its budget deficit goals to spur the economic growth, which is believed to be the weakest in more than a decade this year. Be that as it may, there are some reliable statistics available which prove it that we have a reason to smile and think positive and progressive. Let me share some of them with you. In terms of the business activity, *Markit India Services PMI index* climbed to 55.5 in the month of January which is the highest ever in seven years (in December, 2019, it was 53.3). That, together with an improvement in manufacturing purchasing managers' survey, has helped push the composite index higher to 56.3. The improvement in growth was accompanied by stronger inflationary pressures, according to the PMI surveys, with input costs rising by the most since February 2013 and output price inflation surging to a near two-year high. As regards the statistics on exports from India, though the picture is not very encouraging, and there is a decline which majorly on account of drop in shipments of gems and jewellery along with engineering goods, we should remain both realist and optimist. As per the IMF data released last year (IMF's October World Economic Outlook), India has risen to become world's fifth largest economy in the World. It has leapfrogged France and UK.

The Indian Economy is presently driving on two very powerful engines, *i.e.*, public investment and Foreign Direct Investment (FDI). For past some years we have seen a spate of FDI flow into the country. However, domestic as well as global consumption remains to be a worrying factor for the economy. Once the consumption starts picking up, we will then see the ideal capacities in the private sector get utilised. That is also go a long way in addressing the NPA issues as far as banks are concerned. The nation needs to support banks so that they in turn can support the industry who can make the nation realise its growth targets.

One of the first thing, that a nation like India, which is determined to realise its true growth potential, needs is, a strong insolvency and bankruptcy law regime which ensures that the resources of the nation are put to their best possible use. The industry, world over, undergoes phases of economic upside and downturn. In case of cyclical industries, there are business cycles which operate resulting in higher revenues during the periods of economic prosperity and expansion and lower revenues in cases of economic downturn and contraction. That apart there are also industries which are more prone to suffer financial downturn due to factors like global competition, technological advancements, etc. In all such cases there is bound to be situations of default being committed by corporates in servicing Bank loans, and therefore, an ideal insolvency law regime needs to draw a mechanism whereby the lenders get an opportunity to discover the viability of the corporate through the market mechanism. Under the IBC, the very fact that a time bound mechanism has been introduced wherein efforts are made to contain loss in the value of assets of Corporate Debtor reassures us that we have parted from the previous insolvency law regime, wherein, while looking to give all comfort to the defaulting promoters, the interests of the lending institutions was somewhere discounted in deciding as to what lies in the interest of the Economy.

As the President of ICSI and being a part of the Board of Directors of ICSI IIP, it is my responsibility and a privilege to encourage that the Institute keeps serving its Professional Members with the best of its services!

Wishing you all the very best in all your future endeavours!

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Managing Director's Message

Dr. BINOY J. KATTADIYIL
Managing Director
ICSI Institute of Insolvency Professionals

All you need is the plan, the road map, and the courage to press on to your destination

... Earl Nightingale

With a little more than 3 years into operation, and the entire ecosystem around the insolvency and bankruptcy code comprising of the IBBI (the Chief Regulatory Body), the Adjudicating Authorities (and the Appellate Authority thereof), the IPs (and their frontline regulators, the three Insolvency Professional Agencies), Registered valuers (and their frontline regulators, the eleven Registered Valuer Organisations) already in place, the fruits of efforts put into setting up this system are now becoming more and more evident. Chapter 4 of the Economic Survey 2019-20 states in the context of achievements of IBC, as, *'the resolution under IBC has been much higher as compared to previous resolution channels. Amount recovered as percentage of amount involved was 49.6 per cent in 2017-18 and 42.5 per cent in 2018-19. The proceedings under IBC take on average about 340 days, including time spent on litigation, in contrast with the previous regime where processes took about 4.3 years.'*

The legal process is being initiated both by the debtors and the creditors, and in some cases the size of the non-performing asset accounts is extremely large. The consequence of putting this legal machinery (provided under the IBC) into motion is that it puts the fate of the company into the hands of its creditors (the CoC), who, with the help (and guidance) of the Resolution Professionals, are able to first assess the financial condition of the corporate debtor, and then make a judgment as to their further course of action *vis-à-vis* the CD. As per the latest statistics available (as on 31st December 2019), ever since the IBC has come into force, 3312 CIRPs have been initiated (involving 3254 CDs) of which 246 got closed on either appeal or review (or otherwise settled), 135 have been withdrawn, while 780 ended in liquidation and 190 ended with approval of resolution plan. As regards the initiation of CIRP, in 49.21 per cent cases the process has been initiated by the OCs, while those initiated by FCs constitute 43.44 per cent of CIRPs with remaining few cases initiated by the CDs themselves.

Prima facie when we look at the above statistics, we wonder if we are missing the ultimate objective of IBC. But, most often, statistics need to be taken with a pinch of salt and understood in its proper perspective so as to get the real picture. While it is a fact that about 57.74% of the CIRPs initiated (and later closed) ended in liquidation (and only 14.06% culminated into a resolution plan), it is equally important to note that a substantial number of such cases (*i.e.*, 72.48% of the total CIRPs which ended in liquidation, *i.e.*, 561 out of 774), were the cases which were either earlier pending with BIFR and or were defunct companies, and thus, the economic value of such CDs was eroded even before the initiation of CIRP. Therefore, while it is important to understand the things in their proper perspective, standalone, they can be given any colour as the presenter may want to give.

As regards statistics on the sector-wise distribution of cases, 41.2 per cent of the cases admitted by the NCLT pertain to the manufacturing sector, followed by 19 per cent in the Real Estate, Renting and Business Activities sectors. Our biggest strength in the whole process is the commitment shown by the stakeholders *viz.*, the Government, the Regulators, the Adjudicating Authority, and most importantly, the professional members, who proactive actions decide the success of an CIRP.

The IBC is a relatively new legislation and is still evolving. As and when problems arise in the smooth functioning of the Code necessary steps have been taken by the Government, the IBBI and the Adjudicating Authorities to resolve them by *inter alia* bringing amendments to the Code, Regulations, interpreting provisions of the Code to ensure that the legislation is worked to pursue its objectives and not otherwise. Since its implementation in the year 2016, there have been four amendments made to the Code wherein the aim was to streamline the entire processes and to ensure proper operationalizing and implementation of the IBC. Under the first amendment itself, the most debated provision that is section 29A was introduced into the Code. The intent behind introducing such a provision was *inter alia* to plug the loopholes in the CIRP by not allowing something to be done which is not in line with the spirit of the Code itself. The provision introduced a bar and made certain persons disqualified from bidding for a CD. The ultimate object was to prevent the defaulters from regaining control of their companies at a cheaper price. Thereafter, vide IBC (second amendment) Act, section 12A was inserted which provided the creditors with an option to withdraw the insolvency proceedings initiated by them in respect of a CD, but before issuance of expression of interest under regulation 36 A (reg. 30A, CIRP Regulations). The amendment, in order to give a voice to home buyers in the entire CIRP process, also provided the status of a financial creditor to home buyers. This was done for the reason that the Home Buyers also provide funds (by making advance payments) for the projects undertaken by the reals estate developer companies. The indication was also to the real estate developers to prevent any defaulting on the commitments made by them both to the banks as well as to the home buyers. The IBC (third amendment) Act was brought in to ensure both timely admission and timely completion of the entire CIRP process. The amendment provided for a period of 14 days to the Adjudicating Authority to decide on admission or rejection of a CIRP application. Further, with an aim to instil discipline amongst the stakeholders and to avoid any inordinate delay in the CIRP, a mandatory time frame of 330 days was provided for completion of the CIRP. The consequences of not following the timeline was that the CD *ipso facto* goes into liquidation. Under the third amendment, the Government reaffirmed its commitment to act as a facilitator to the CIRP proceedings and it made the resolution plan binding on the Central Government, State Governments and local authorities to whom a debt in respect of payment of dues is owed.

The President of India, on the advise of Council of Ministers and acting in exercise of its powers under Article 123, Constitution of India, promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, wherein, apart from other changes, a new provision section 32A has been inserted which is intended to provide immunity to the CD and its assets, from the consequences of any offence committed prior to the commencement of the CIRP. In other words, the provision seeks to ring-fence CD and its property from offences committed by the previous management or the promoters. While the amendment seeks to release CD from any liability for the offence, it continues to hold the concerned persons responsible for the offences and they can be prosecuted without any violation of the provision. The rationale for insertion such a provision is clear, and at a time when there have been growing concerns over investigative agencies initiating actions against companies after the completion of the resolution process, the amendment offers much needed clarity and relief to the resolution applicants and prospective buyers. The amendment ordinance also draws a fine balance between rights of home buyers to invoke IBC provisions and that of real estate developers. The amendment provides that there should be at least 100 individuals or 10 per cent of the class of creditors (such as homebuyers) who must have come together to initiate CIRP in respect of the real estate developer.

If once looks at the aforementioned amendments and try to understand the direction in which we are moving, it leaves one with a satisfaction that while a lot of progress in the direction of achieving the objectives of the Code has already been made, but, at the same time, the future is going to be full of achievements as well as challenges!

We look forward to receive your continuous support in all our activities which are motivated to not only strengthen this new insolvency and bankruptcy regime, but is equally focussed on safeguarding the interests of the stakeholders.

•••

IBC, the ever-evolving law

SANJEEV AHUJA
LLB., CA., CMA,
Mediator, Arbitrator and a Resolution Professional

The intent initially was to simply run through a critical evaluation of Insolvency & Bankruptcy Code. 2016, IBC (henceforth referred to as the 'Code') so that we can have a peep into this ever-evolving Code and pick up some learnings we have had during our journey of last more than three years. The intent of the exercise being to bring to light the necessary tweaks that might be required going forward to continue making this Code effective and efficient for all stakeholders. As this exercise was half-way through, came the two important announcements (in the midst of the current pandemic); one being raising the bar of the default from INR 1 lakh to INR 1 crore and another, of a potential suspension of the Code (if situation so demands, on April 30, 2020). This changes the focus to not just the learnings from the past but also to what and how, should there be an IBC 2.0.

Now, let's go through the journey of evolution of one of the most game changing piece of legislation in current times, the IB Code. 2016. A journey through the eyes of various stakeholders (who were meant to be benefited, who were actually affected and who eventually got trapped, and let me tell you, the candidates in all these categories may not be same), a journey where we can combine the perspectives of all these stakeholders (not necessarily in any order) and a journey where we may discover some pitfalls and their possible solutions (atleast in some cases), so that IBC 2.0, if and when it comes, might have something to add to its current avatar. In this process, we might also get to know the cost of learning (which is not the cost of the process alone but also the 'collateral damages' we had on the way)

This legislation which was brought out in end of 2016 really shook the status quo very early on and the real shakeup /impact was seen when the 'Big 12' were pushed in to be treated through this mechanism, proving to be the real test of the 'intent' of the Government, at a stage, when we have been hearing about the cleaning of the stressed balance sheets of the banks for some time. These cases were a significant portion of the NPA's plaguing the banking sector (approx. 25%) and the success or the failure of their resolutions (or the challenges faced in them) would have decided the level of success and efficacy of the Code itself.

MV: The jury is still out with regards to the success of the Code on this parameter alone as not even 50% of these cases got resolved, the way ideally, we all wanted them to be, reasons being varied.

The Code quickly attempted to change the game which was being played differently over last few years. The regime changed from the 'debtors in possession' to 'creditors in control' (throwing up new challenges for the new 'makeshift' owners called 'COC', the Committee of Creditors) with the USP being the strict and finite timelines. (we would see how these could not be adhered to due to various factors). This was thought of a welcome change from the times and era of SICA and BIFR where the desired results were not received in years and some drastic measures had to be taken and IBC was the perceived to be the panacea. We saw the aggression when this new law was subjected to series of amendments and tweaks (through ordinance at times) just too often, as the 'proactive' legislator and an ever 'vigilant' regulator (IBBI) wanted to ensure the success of this legislation for various factors cited above in addition to the positive impact everyone wanted to have on the EODB (Ease of Doing Business) rankings of the World Bank.

*MV: I always wanted these 'rankings' as the positive '**effect**' of the actions we take and the results we achieve rather than being the '**cause**' for these actions.*

So back to the topic, where the objective of the Code was stated to be treating the ballooning of the NPA's. Hence cleaning of the balance sheets of the banks and hence resolution of the stressed assets. All this through a mechanism where an attempt would be made to resolve the 'insolvency' for 6/9 months by finding a resolution applicant (the white knight who would be willing to put his money to take over and save a CD) and in case of a failed resolution the liquidation would ensure the release of the value of the assets so that the unlocked resources/assets are put to use by the new party. The resolution applicant unfortunately could hardly get a 'clean start' with assurance/immunity to the new management (the latest amendment, 32A eventually addressing the issue). For long we struggled with orders from Adjudicating Authority (AA) not giving the waivers as sought by the potential/ new applicants, whose concern was simply to not be hassled by the previous non-compliances of the ex-management and related contingencies of the respective business entities. Inspite of the best efforts of the Insolvency Professionals in charge, it was not possible to go back in history and correct the wrong doings or fill the gaps. The objective surely was that these initiatives of resurrecting the failing businesses were supported from day one without any baggage of past.

MV: Am not sure, whether this was understood by all the stakeholders and practised, especially various central and state authorities who were seen struggling to reprioritize their actions and objectives. The questions they grappled with and for long; that all this while they have been the equivalent of 'crown debts' and this time too it could not have been any different and their claims should be put at a higher pedestal and not be expected to let go of their attachments inspite of the fact that they have been put into 5th category under waterfall in case of liquidation. Various orders and amendments later could we see the necessary change in the mindset.

The larger question which has baffled a lot of stakeholders is the continued confusion between 'resolution' and 'recovery'. How many stakeholders affected by the CIRP were truly concerned with the resolution of the CD and how many were only targeting the recovery? And this was the initial indication irrespective of whether the stakeholders were part of the COC or outside. Some banks also wondered for a while and were concerned about recovery (and that too at the earliest) rather than a resolution (which to them was another restructuring and a new name for the ever greening which some of them had suffered earlier). The actions in some cases hinted on this aspect.

MV: We all wanted resolution preceding recovery but somewhere the connect with on ground reality seemed missing. For example, in a case of a MSME as an operational creditor, its challenge was to seek a quick recovery to avoid their own liquidity crisis / insolvency and not worry about the insolvency resolution of the CD. Most of the times other unsecured financial creditors who were part of COC had their objectives and priorities very different than the banks who apparently had a larger goal/objective in mind (or did they?).

Imagine an employee or workmen initiating the CIRP under Section 9 for the non-payment of their salary/wages and expected to be really concerned about the resolution of the insolvency of the CD and not concerned to receive their unpaid dues. Imagine, a home buyer's (who was out of COC to start with, not being a FC) position who was initially under lot of strain and stress due to confusion on his take away from the intend resolutions, was made a FC and became part of COC but continued to be in a similar situation of confusion, this time marred by the technicalities and procedures that followed (be it their representation in COC through an AR, requirement of various treatments to various projects which were at various stages of completion in a particular CD, clash of interests from refunds to delayed possessions and finally the whole voting mechanism with few inconsistent orders on the 'present and voting' and majority rules). Here it seemed as if the objective of the government, being the cleaning up of NPA's of the banks led to a drafting of the code only from the perspective of the banking industry and no one else. The eventual piecemeal tweaks also did not result in the real solution and atleast for the real estate industry. May be perspectives of some stakeholders did not get the due importance and consideration as was required and that is exactly where the Code seemed to have gone slightly off balance.

MV: A carve out for real estate industry for sure is required, else RERA be strengthened further with some provisions borrowed from IBC. This may be like what has been done to treat the stressed cases in financial sector where RBI has taken over the process and the rules laid down in IBC are followed to a larger extent with the requires tweaks

What we have also seen for the first time is the compartmentalization of various stakeholders of an economy into being called CD (the asset in distress to be led by an independent professional), the FC's {(including the banks, NBFC's, individuals lenders (eventually also the ones who got assured returns) and finally home buyers), whether secured or unsecured but part of the COC}, the OC's (which included goods and services providers, employees, workmen and statutory bodies), even if secured, but to stay out of COC. The relevance of secured and unsecured creditor was not given any weightage during CIRP which though, appears to be in consonance with the larger objective of resolution but was unlike the other jurisdictions where classification of creditors was primarily based on secured and unsecured.

MV: Jury is still out whether this approach was more suitable in the Indian context but surely not giving an opportunity to 'values' and only 'categories' seemed harsh. Even the representation of OC's in case of their debt more than 10% of total debt has not been very clear, whether it means a single such debt or total of the OC debt. Immediate clarifications here, once and for all would have reduced the confusion and provided more clarity to warring parties thereby reducing the unnecessary burden on judiciary for all kinds of interpretations and clarifications where using a simple language and drawing straight lines would have made all the difference).

The unfinished definition of 'other debt' which was used in few orders keep lot of affected stakeholders confused till date.

MV: There cannot be a debt in the balance sheet of the CD which cannot or should not be categorized as operational debt or financial debt. 'Other debt' and 'other creditors' have been a confusing term used often at forums. High time clarifications came and not burdened the courts for interpretations of each kind of debt. In a way, all the debts have a 'time value of money' as money stuck in system always has an opportunity cost but to be fair to two identified categories, there could not have been any third category or a third kind of debt. Stakeholders have had their share of confusion in respect of security deposits which have not been identified as either operational debt or financial debt, where ideally this should be categorised as financial debt. (as has to be paid back or adjusted, has a time value, at times also is earmarked for return post the event/ timeline and finally is always shown as a liability (payable) in the books of the CD, hence reasonably clear in terms of its identity).

Let us look at the challenge of collateral damage we have seen in terms of the various stakeholders as listed above. Are the MSME's satisfied as CD's where the promoter being the face of the business in most cases had a tough time being led by the Insolvency Professionals. These businesses in Indian context run on relationships and less on systems. This led to scarcity of potential Resolution Applicants who could see less value in operations an the promoters. This was aggravated by introduction of 29A which had to undergo a series of amendments and tweaks to have a carve out for MSME's. Did it really work? Then MSME's got trapped as operational creditors. The bigger CIRP had a ripple effect and the crisis went down the chain. Forcing the regular supplies from these vendors to keep the bigger CD as a going concern backfired where earlier paralysed payments coupled with continued deliveries during moratorium further dented the liquidity of many MSME's. This led to a recent debate that no body should force the MSME to continue the supply during moratorium and let the market forces /commercial arrangements decide the actions. The jury is still out on this. The plight of the home buyers and employees/workmen has already been described above. (*Q: Does it mean the objectives of/for the eventually trapped stakeholders (primarily OC's and maybe in hindsight the home buyers) were not well aligned with the larger objectives of the code?).* The challenges faced by some statutory authorities (GST, Income Tax and PF/ESI) is another topic by itself. All this while the attachments, the priorities to their payments/dues, the aggressive stand taken by them and concern for their 'recovery' was the order of the day which suddenly had to undergo a change when many orders clearly clarified their position of that being an operational creditors, of being unsecured and finally down in the 5th category in the waterfall in case of liquidation. Delinking past and present and being pro-active in filing of the claims were some lessons learnt.

The advent of the code led to a birth of 4 pillars (wheels) with different shapes and sizes but were expected to be aligned from day one to smoothly drive this vehicle called the Code. NCLT's came as a new avatar of Company Law Board's (CLB) with added burden of IBC cases in addition to the erstwhile company law matters. Soon the IBC took over and we all felt the pressure on the available infrastructure at these forums. Information Utility, a noble initiative to have a central repository of digital records of debt/default across the country (herculean task always, and still) continues to evolve in a country where the struggle to bring people online and go digital in itself is going to be a project. Insolvency & Bankruptcy Board of India (IBBI) as the dedicated regulator and Insolvency Professionals (as a new profession) were the other two wheels. IP as a profession has quickly evolved and tested many traits of the professionals who took this plunge in something rightly touted as '**profession of professionals'** as we all were professionals before stepping in. The main feature being the need to be parachuted in a moving vehicle, become its driver and keep driving, ensuring safety and well-being of all its passengers for next 180/270 days while learning the driving of the vehicle itself. We have seen it very closely that inspite of the license to drive, each vehicle required a different focus, had a different mechanics and the learnings only came on the ground irrespective of your team or preparation. What we have seen in the process is, that all the pillars have taken their own roads in maturing with the Code and have tried to align their pace and direction trying to come together for a common cause. Somewhere this continues to be a work in progress.

MV: What affected the profession and professionals were few basic issues which never seemed to have found a stable / permanent answer. This included the definition of reasonable ness of fees and its uncertainty, the role/scope/identity of the professional; right from officer of the court to the trustee of the CD to the chairperson of the COC to the team leader/ team member but finally ONLY responsible and accountable to the entire world for all acts of omission and commission. Even the onus of proving all the acts those were done in good faith was put on the same individual called an I. This individual has suffered an identity crisis for long. Timely, consistent and focussed representation of their grievances has been an issue for a while, though we have seen lot of attempts in this regard by both IPA and IBBI. Has that been adequate? Jury is still out. Is this also the time to have the due clarity on the role and scope of IPE (Insolvency Professional Entity).

Judiciary did its best while trying to balance the sanctity of the contracts and the concept of equity and fairness to all the affected stakeholders. Still there have been times when the 'principles of natural justice' have been taken to the next level while the 'principles of contract' had to take a beating, so much so that attempt to revive the CD once ordered for liquidation by applying Sec. 230 of CA was just difficult to comprehend for most practitioners. To the credit of the benches were the instances where they were heard directing/urging the parties to adopt mediation and conciliation techniques to settle their disputes and avoid a no-go situation where post CIRP initiation, the drill had to be completed, at times resulting in bigger stress and strain.

MV: I maintain that the application of mediation and conciliation techniques would be more and more applicable, both prior as well as during the CIRP and if handled well, a lot of disputes would have an amicable solution; requirement being good mediators and the right mindset of the parties with the right intent. This for sure would also reduce the burden of cases on the judicial platform and help contribute to a less litigative environment.

Then there had been delays on admission, on orders, on appeal disposals at times due to infrastructure challenges and at times due to some attempts to frustrate /derail the system. Not all could have been pre-empted but some of it for sure could have been visualized.

MV: Rules are drafted for a generic scenario and exceptions are handled on a case to case basis. But when exceptions are order of the day then it is time for rules to be re-written. Are we already seeing the need for the same?

Some challenges we have faced included us trying to understand this code more legally than commercially? Did we lose the commercial direction while applying legal principles? Could we not apply the concept of 'Justice delayed is Justice denied' in cases under the Code?

Here come some additional questions which have been asked by various stakeholders and not sure if we have direct answers.

- Did some players use the platform of IBC for recovery?
- Did the bilateral settlements amount to recovery?
- Was this process not a 'proceedings in rem' to start with and not having an option of withdrawal?
- Was it not at all possible for AA to adhere to timelines on admission when only a debt (above a certain threshold) and default had to be established and not the reasons of those defaults?
- Was it not necessary to let go the basic/ routine procedures of the courts, when the only essence were the timelines and the commercial implications?
- Did we not see the bigger CIRP leading to smaller CIRP's?
- Did we really put OC's in a vulnerable position when they could initiate the process CIRP but not participate in the process, would not have a say in the Resolution Plan and hence know about their own stakes and finally were left down in waterfall at 6th category in case of liquidation? Was it not an attempt to save one business at the cost of other(s)?
- Were we confident of creating the frontline professionals supposed to manage the running CD (big or small) just basis their qualifications and profession and not the relevant experience?
- Were we able to make sense of the new concept of Insolvency Professional Entity (IPE) having undergone a series of after thoughts and still unclear to many?
- Was the introduction of 29A, a hasty step, which eventually required couple of tweaks, especially regarding MSME's and meant diluting the earlier harsh stand taken against the promoters in general?
- Did amendments only got influenced by the requirements of big cases forgetting the repercussions on the corporate world beyond the Big Boys club?
- Were the Resolution Applicants not justified in seeking waivers and contingent liabilities while submitting their plans for resurrection of CD's by not willing to take responsibility of the previous baggage?
- Could the orders be more conclusive and final as expected under Section 31(1) of the Code?
- Were all the timelines mentioned practical?
- Were relaxations only required at the Judicial level and not elsewhere?

Answers to most of the above would depend on the respective stakeholder and on merits of each case. After all it has been a herculean attempt by the Government to bring forth a legislation with the intention to shake the status quo in borrowing lending relationships in a country where noble intent/legislation is not always supported by an effective implementation due to the diverse culture, challenging infrastructure and past practises and '***the chalta hai***' attitude. May be somewhere lack of accountability at various levels added to the chaos. Kudos to the Government to have taken such a bold step for such a massive clean-up but then some of these initiatives were marred by few knee jerk reactions, lack of pre-emption and ability to see through the impact of this legislation on various stakeholders.

MV: This pre-emption, vision and ability to see through is the basic trait for any policy making. Regular tweaks on one side were a sign of being pro-active but too much of a patch work seemed one step forward and two backwards while losing sight of the corporate world (beyond the initial big cases).

Few other issues which at times irritated and are to be diluted in times to come are:

Compliances: When the going is tough, the tough gets going. But why add to it by having something unproductive when the life of the CD itself is at stake? The whole focus ideally during CIRP should be on the going concern concept and ensuring finding the appropriate Resolution Applicant to save the CD. The compliances (which in most cases in CIRP have been ignored by the previous managements/ promoters /boards) have come as a burden on the professional in command. If the IP has been a CA, he was more concerned about the financial reporting/IT returns and if the IP was a CS, then the companies act compliances took priority and finally a Lawyer IP ensured more focus on the litigations. What was required in all cases was a going concern and a genuine hunt for the most appropriate RA and during the process, maintaining relationships across board across all stakeholders. That itself was and is a herculean task and requires all the focus and time but compliances and over reporting took lot of productive time and the victim was and can be the very future of the CD. The scenario is not much different in Liquidation where again the focus should be on either the sale as a going concern or selling the assets, but surely on maximization of recovery in either of the scenarios.

MV: Compliances to be brought to minimum while CIRP and practically zero during liquidation. When the survival of the CD is at stake, to me these compliances are no more than cosmetics which need not be applied when the patient is in ICU. In liquidation, the death warrant has been signed and any compliance is practically irrelevant.

Interpretations (where they should not be required): A suggestion that a simple language which is not prone to much interpretation be used everywhere. Most of the time we have seen the 'intent' of the legislator being interpreted by the judiciary through their orders. This should be only required where due to inconsistency between other existing laws there is a confusion created. But in other cases, the intent is to be clarified only by the initiator who is not far away, who need not wait for these confusions, who need not only wait for amendments. The problem gets worse when different benches have had interpreted similar provisions differently.

MV: A mechanism of having a round table with legislator, judiciary and the practitioner, together on all issues requiring a debate to be there and the eventual requirement to file applications just to seek interpretations would be reduced.

Application of provisions of other statutes/ Acts in the times of IBC: We have a Sec 238, giving the overriding powers to IBC application (only in case of inconsistency). Be it the application of Sec. 230 of the CA 2013 or the application of other provisions like those regarding board meetings and timelines under different statutes clashing with CIRP timelines or the application of the concept of liability of the co-guarantors under a contract to IBC have all added to the confusion. IBC is a specific regime signifying a very specific scenario where if all does not go well the CD would perish and all the compliances and timelines will be irrelevant. Even the eligibility of a financial creditor to file petitions against the principal borrower and the corporate guarantor at the same time does not augur well as same claim leads to two CIRP, makes one FC part of two COC's and increases the chance of bringing down two different entities simultaneously. It further adds to the infrastructure challenge. Not all answers are readily available and all of the available ones may not be simple but the ones being adopted are not serving the cause either. No doubt, any action would have some reaction but just picking up a provision of another statute to a CD under CIRP without fitting into the context can be dangerous and might add to chaos.

MV: To me, every provision of all the existing statutes would by the very genesis be inconsistent with IBC. Primarily because the context is different. In IBC, the CD may or may not survive whereas all the earlier statutes were on the basis premise that the CD for sure is a perpetual legal entity and that to me is the biggest inconsistency. In this scenario, how can any provision borrowed from any other statute be just picked up and applied in an IBC scenario?

Then comes the regular crucial time loss on account of the eventual debate (legal and other forums) regarding the *prospective / retrospective application* of amendments that we have been a witness of in last three years. Could we now learn and avoid these confusions once and for all, when while making any amends, there is a clarification in no unclear terms that this would apply to only new or all the cases (including pending).

MV: Why this remains such a million-dollar question all the time and we are subjected to a guessing game for some time before we get a clarification on a simple point; prospective or retrospective? Why this is left to judiciary to interpret all the time? Why can't the legislator pre-empt the impact and take a call on the application for once, to ensure clarity and transparency.

On impressing the Rest of the World with the changes that are bring made in the Indian landscape, the author would really want to focus within and if applied correctly, the world will start appreciating. The impact of our actions must be seen inside out and not the other way wound.

Quick learnings from the existing challenges would help the legislator draft the specific legislations on the Cross Border/Group insolvency and Individual Insolvency space in a new light and in all likely hood reducing the friction amongst various stakeholders, learning from our recent past.

Let us all wish that we have IBC 2.0 in a different avatar suiting the ever-changing Indian context, especially in the current scenario of upheaval caused by the CV.

Disclaimer

The above are personal views of the Author arising from his personal experience and interactions with other stakeholders on the evolution of Code. Different stakeholders had different views depending on the touch points they had while dealing with the CIRP/ CD. Nothing mentioned above is conclusive and does not give a comprehensive list of queries or issues raised, nor are the solutions or suggestions stated above are a full proof panacea but mere suggestions which if considered in the larger context and coupled with other relevant data and information available with authorities can surely give an insight into improving the Code as we move forward.

On the Current Situation

From the Author: -

Friends, these are challenging times and desperate times call for desperate measures. We know, when going gets tough, the tough gets going. An IP as the captain of the ship had been in any case entrusted to ensure the CD is driven out of troubled waters and these times again put to test the mettle of the professionals. The current times (and these are in all likely hood going to be excluded for all applicable timelines under CIRP, irrespective of the stage of CIRP) are the testing times and require abundant caution while taking care of yourself, your family and your colleagues. On one side the lockdown must be taken seriously and on the other if there is a process which can be continued using technology with minimal or no human engagement, should be tried out. Your COC and other meetings should be all put online using the appropriate technologies. After all, in times of 'social distancing' the safety of human life is paramount, whether it is your own team or the team at CD.

All the steps as appropriate are to be taken and should be taken in utmost good faith and more flexibility to be enshrined in all your actions.

Together, we all would come out as winners.

Wishing you all the best!!

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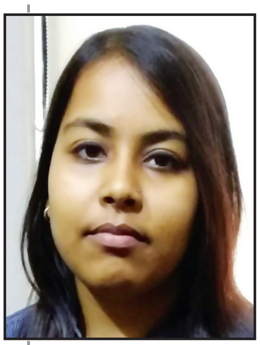
Videocon Ruling: Setting A Benchmark For Group Insolvency



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Introduction

1. It is common business practice for group entities to regularly engage in related party transactions such as cross collateralisation, guarantee comforts, tunnelling or significant influence arrangements. While such structures largely respect the separate legal status of the group companies, practice suggests such inter-linkages in business, operations and management often raise significant challenges when any one or more entity in the group becomes insolvent. In such cases, for maximisation of value to the stakeholders and to enhance the prospects of resolution, creditors may seek substantive consolidation.

While the legal framework on group insolvency law is still a work in progress, in various cases NCLT is taking cognizance of the corporate behaviour while adjudicating upon group insolvency matters. Recently, the Hon'ble National Company Law Tribunal Mumbai Bench, in the case of *State Bank of India v. Videocon Industries Ltd.* (2020) 115 taxmann.com 104 (NCLT-Mum.) held that for the purpose of the corporate insolvency resolution process, the foreign oil and gas assets and properties, including any claim, interest therein, of Videocon Group held through the foreign subsidiaries of the Corporate Debtor will be regarded as the property of the Corporate Debtor.

Facts of the-case *SBI v. Videocon Industries Ltd.* (2020) 115 taxmann.com 104 (NCLT-Mum.)

2. Videocon Industries Limited ("VIL") was engaged in the business of telecommunications, consumer and electronic goods and oil and gas exploration. For the purpose, VIL established subsidiaries/ step down subsidiaries (including overseas ones). The overseas oil and gas business was being taken care of by VOVL Ltd. (Indian), Videocon Hydrocarbon Holdings Ltd. ("VHHL") and other step down subsidiaries (Overseas) which held participating interest (PIs) in oil and gas acreages.

VIL and VOVL also mobilised loans in VHHL, on the basis of SBLC facility availed by them as co-borrowers. While VIL was later on released as a borrower, but a corporate guarantee was obtained from VIL.

On the basis that SBLC facilities were granted to VOVL and that VOVL had defaulted, the lenders were desirous of selling the PIs held by VOVL and the overseas companies. However, ** filed an application before NCLT for determination of the following questions:

(*a*) Whether the foreign oil and gas assets and properties, including any claim, interest therein, of Videocon Group held through the subsidiaries could be said to be the property of the Corporate Debtor?

(b) Whether the provision of Section 14 of the Code would apply to the said foreign oil and gas assets and properties, including any claim, interest therein?

Group Insolvency Framework in India

3. The NCLT, Mumbai Bench has in its order dated 08.08.2019, laid down certain parameters while ordering for consolidation of 13 Videocon group companies- (*i*) common control; (*ii*) common directors; (*iii*) common assets; (*iv*) common liabilities; (*v*) inter- dependence; (*vi*) interlacing of finance; (*vii*) pooling of resources; (*viii*) co-existence for survival; (*ix*) intricate link of subsidiaries; (*x*) intertwined accounts; (*xi*) inter-looping of debts; (*xii*) singleness of economics of units; (*xiii*) common financial creditors; (*xiv*) cross shareholding.

The Working Group on Group Insolvency, in its report dated 23.09.2019, has recommended that a 'corporate group' may include holding, subsidiary and associate companies, as defined under the Companies Act, 2013. However, an application may be made to the Adjudicating Authority to include companies that are so intrinsically linked as to form part of a 'group' in commercial understanding, but are not covered by the definition of corporate group above as well. It was further stated that while procedural coordination mechanisms may be applicable only to those group companies which have defaulted, and which are covered by the Code for the purpose of insolvency resolution or liquidation, however, rules against perverse behaviour may be applicable to all group companies, regardless of their solvency.

The prevalence of corporate groups has thrown up special challenges which require modifications to the principle of treating companies within a group as completely separate entities. In light of the aforesaid, it is pertinent to refer to precedents available across the globe.

Precedents Abroad

4. Relying on *Raymond*, In re 529 B.R. at 475 and *Logistics Information Sys., Inc.* v. *Braunstein (In Re Logistics Information Sys., Inc.)*, 432 B.R. 1 (D. Mass. 2010), *Cameron Const. & Roofing Co., Inc.*, In re 565 B.R. 1 (2016), the US Bankruptcy Code allowed consolidation and observed as follows:

> "Bankruptcy courts may substantively consolidate two or more related entities and thereby pool their assets. Substantive consolidation treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities. *Genesis Health Ventures, Inc.* v. *Stapleton (In Re Genesis Health Ventures, Inc.)*, 402 F.3d 416, 423 (3d Cir. 2005) .... Substantive consolidation of two or more debtors' estates is widely accepted. See, e.g., *Owens Corning*, In re 419 F.3d 195, 207 (3d Cir. 2005); *Bonham*, In re 229 F.3d 750, 764 (9th Cir. 2000); *Reider* v. *Fed. Deposit Ins. Co. (In Re Reider)*, 31 F.3d 1102, 1106-07 (11th Cir. 1994); *Drabkin* v. *Midland-Ross Corp. (In Re Auto-Train Corp.)*, 810 F.2d 270, 276 (D.C. Cir. 1987). Substantive consolidation of a non-debtor with a debtor, as here, is less common, but increasingly accepted. The trend toward greater court approval of substantive consolidation has its genesis in the increased judicial recognition of the widespread use of interrelated corporate structures.... *Eastgroup Props.* (v. *Southern Motel*), 935 F.2d (245) at 249 ((1991)) (quoting *Murray Indus., Inc.*, In re 119 B.R. 820, 828-29 (Bankr. M.D. Fla. 1990)). Without the check of substantive consolidation, debtors could insulate money through transfers among inter-company shell corporations with impunity. In Re Bonham, 229 F.3d at 764.
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> ** ** **
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> Within this circuit, bankruptcy courts have approved the application of substantive consolidation to non-debtors, often in cases in which the non-debtor is a subsidiary or alter ego of the debtor. See, e.g., *Gray* v. *O'Neill Props. Group, L.P. (In Re Dehon, Inc.)*, No. 02-41045, 2004 WL 2181669, at *3 (Bankr. D. Mass. Sept. 24, 2004) (Large corporations, such as the Debtor, often use multi-tiered corporate structures, and substantive consolidation has been used to reach the assets and liabilities of a non-debtor subsidiary corporation.); *Murphy* v. *Stop & Go Shops, Inc. (In Re Stop & Go of Am., Inc.)*, 49 B.R. 743, 745 (Bankr. D. Mass. 1985)."

S & G Financial Services, In re 451 B.R. 573, the US Bankruptcy Court held that consistent with the directive of Sampsell, it is well within the equitable powers of a bankruptcy court to allow substantive consolidation of entities under appropriate circumstances, whether or not all of those entities are debtors in bankruptcy. It further held that a bankruptcy court has the jurisdiction over non-debtor entities to determine the propriety of an action for *substantive consolidation, insofar as the outcome of such proceeding could have an impact on the bankruptcy case.*

Permian Producers Drilling, Inc., In re 263 B.R. 510 (D. Tex. 2000), the US District Court for the Western District of Texas observed as follows:

"The absence of any statutorily prescribed standard has meant that the responsibility for developing standards for determining whether substantive consolidation should be granted has been left largely to the courts. The courts, however, have not developed a universally accepted standard for substantive consolidation. *Bonham*, 229 F.3d at 765-66; 2 COLLIER ON BANKRUPTCY ¶ 105.09(2). Rather, whether the circumstances warrant substantive consolidation is a highly fact specific analysis that must be made on case-by-case basis. Bonham, 229 F.3d at 765-66.

Under the more traditional test the elements test the existence of a combination of elements showing a strong relationship among the debtors is a prerequisite for substantive consolidation. The substantial relationship must also be coupled with additional elements such as commingling of separate assets and liability so as to make it prohibitively expensive or difficult to sort out the proper assignment and ownership of the assets and liabilities. The elements most commonly cited by courts under this test are:

(1) the degree of difficulty in segregating and ascertaining individual assets and liability;

(2) the presence or absence of consolidated financial statements;

(3) the profitability of consolidation at a single physical location;

(4) the commingling of assets and business functions;

(5) the unity of interests and ownership between the various corporate entities;

(6) the existence of parent and inter-corporate guarantees on loans; and

(7) the transfer of assets without formal observance of corporate formalities."

Hemingway Transp., Inc, In re *954 F.2d 1 (1st Cir. 1992), the US Court of Appeals observed that consolidation is permitted only if it is first established that the related debtors' assets and liabilities are so intertwined that it would be impossible, or financially prohibitive, to disentangle their affairs*[1]*. Further, the court held that the trustee may request consolidation to conserve for creditors the monies which otherwise would be expended in prolonged efforts to disentangle the related debtors' affairs*[2]*, however, while considering the application for consolidation, the bankruptcy court must balance the potential benefits of consolidation against* *any potential harm to interested parties. (See Also:* Steury, In re *94 B.R. 553, 554-55 (Bankr.N.D. Ill. 1988); Amereco Envtl. Services, Inc., In re 125 B.R. 566, 568 (Bankr.W.D. Mo. 1991);* In Re *Helms, 48 B.R. 714, 717 (Bankr.D. Conn. 1985); Ford, In re 54 B.R. 145, 148 n. 6 (Bankr. W.D. Mo. 1984))*

Snider Bros., Inc., In re 18 B.R. 230 (Bankr. D. Mass. 1982), relying on the cases *Food Fair, Inc.*, In re 10 B.R. 123, 124 (Bkrtcy.S. D.N.Y.1981) and *Vecco Construction Industries, Inc.*, In re 4 B.R. 407, 6 B.C.D. 461, 1 C.B.C.2d 216 (Bkrtcy. E.D.Va.1980), the US Bankruptcy Court observed that the only real criterion is the economic prejudice of continued debtor separateness *versus* the economic prejudice of consolidation. While holding that there is no one set of elements which, if established, will mandate consolidation in every instance, the court observed that the fact that corporate formalities may have been ignored, or that different debtors are associated in business in some way, does not by itself lead inevitably to the conclusion that it would be equitable to merge otherwise separate estates.

Conclusion

5. The following points are relevant while considering consolidation:

(*a*) One question that may arise here is who can apply for consolidation? Whether the corporate debtor or creditors may request for consolidation or whether reference has to be made only by the insolvency professional?

While the application in the case of Videocon was made by the Chairman of the Corporate Debtor (to reduce his exposure as a personal guarantor), the application for consolidation should be made for the general benefit of the creditors and not to safeguard the personal interest of the guarantors of the Corporate Debtor. This does not imply that merely because third parties like guarantors will be in an advantageous position, NCLT will not consider consolidation, however, the NCLT should allow such application only if the same is made by the insolvency professional for maximisation of value to the stakeholders.

(*b*) Again, the next question may be whether NCLT may order for consolidation of a debtor with a non- debtor?

In the case of *Videocon*, the NCLT has allowed consolidation of solvency and insolvent companies. In fact, on analysis of the precedents cited above also, it is clear that the courts may order for consolidation of a debtor entity with a non- debtor or solvent entity, however, consolidation will not be a general principle, and will depend on the facts and circumstances of each case.

(c) Further, in cases where the consolidation involves foreign companies, whether the courts can overlook the foreign insolvency laws and other relevant laws such as local property laws?

In the case of *Videocon*, while the NCLT ordered for consolidation of assets of Indian companies and foreign companies based on certain parameters, the NCLT should have also regarded the foreign laws where the foreign companies are operating and/or are incorporated, more specifically, the insolvency regime of the country where the foreign companies are incorporated and the local property laws therein. Also, until the advent of the cross border insolvency framework, enforcing the provisions of the IBC outside India may be a huge challenge.

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1. See Also: In Re Augie/Restivo Baking Co., 860 F.2d 515, 519 (2d Cir. 1988); In Re R.H.N. Realty Corp., 84 B.R. 356, 358 (Bankr.S.D.N.Y. 1988); In Re Blum, 49 B.R. 422, 427 n. 1 (Bankr.W.D. Mo. 1985)
2. See Also: In Re Evans Temple Church of God in Christ & Community Ctr., Inc., 55 B.R. 976, 981 (Bankr.N.D. Ohio 1986)

INSIGHTS

The Lingering Question - Has the Amended Law in the Insolvency and Bankruptcy Code, 2016 (IBC), Failed Homebuyers?

SMRITI SHUKLA

Interestingly, the recent amendment in the Insolvency and Bankruptcy Code (**IBC**)**,** 2016 through an ordinance concerning Homebuyers appears to be a sinister move by the legislatures and may have far-reaching consequence. The amendment has triggered the homebuyers and consequently they have preferred to challenge Section 3 of the ordinance which adds provisos in Section 7 of the IBC, 2016. This section hinders homebuyers from obtaining the benefits available to other financial creditors under the Code and thus making it *ultra vires* the Constitution. I argue in disagreement with the amendment under Insolvency and Bankruptcy Code, 2016 (IBC) and upholding the perspectives in the recent petition filed by the homebuyers in the Supreme Court.

In India, under the purview of Insolvency and Bankruptcy Code, 2016 "Financial Creditors" are recognized "class" under the ambit of "Creditors". The Supreme Court in the case of *Pioneer Urban Land & Infrastructure* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 ("**Pioneer**") too upheld the same by treating them as Financial creditors and granting them absolute right to move insolvency proceeding against the defaulting builder. But unfortunately, the present ordinance has created a separate class of financial creditors insofar as Homebuyers are concerned about bringing a condition, *i.e.*, minimum threshold of 100 or 10% of the allottees in the project, whichever is less, to move to the NCLT for starting any insolvency process against the defaulting party. Before the amendment, the quantum of debt was the governing factor for insolvency proceeding rather than the number of financial creditors. Even a single financial creditor including a homebuyer, who has claim amount of atleast Rs. 1 lakh can approach the NCLT for initiating insolvency proceeding. Hence, it becomes a pertinent issue to discuss the standpoints taken in the writ petition by homebuyers and how this amendment is equipped with legal and logical fallacies.

Firstly, under the provision of IBC one who owns financial debt is a financial creditor. Section 5(8) of the IBC defines financial debt as "a debt along with interest, if any, which is disbursed *against the consideration for the time value of money*". In the real estate project, the amount raised by the homebuyers is against the consideration for the time value of money. From the inception of the code, the homebuyers are included in the sphere of financial creditors. Meaning thereby, debt owed by the Financial creditors are "class" within section 5(8) of the IBC and as aforesaid discussed the financial creditors forms a "class" within the group of creditors. The same perspective was upheld in the *Pioneer* case (*supra*). But the ordinance overlooked the views opined by the Hon'ble Supreme Court and created a distinct legal framework for the same class of people. Thus, the legislature failed to appreciate the need of the people and further created a "class within a class" which is manifestly arbitrary.

As a matter of fact, it is seen that the developers delay in completion of flats and thus Pioneer case tried to ensure that those homebuyers are treated as financial creditors and get rightful place in the committee of creditors. But, now homebuyers have to ensure a requisite number and take the liability of keeping them intact until the filing and adjudication of the petition. In the case of *State of U.P* v. *Committee of Management, Mata Tapeshwari Saraswati Vidya Mandir* (2010) 1 SCC 639 the Hon'ble Supreme Court held that creation of class within a class is arbitrary, and thus making it *ultra vires* the constitution. In light of the above-mentioned case, it is evident that the ordinance has denied the benefits to the homebuyers and is against the object and reasons of the IBC.

Secondly, one of the arguments for introducing such a condition through an ordinance is to ensure that the homebuyers don't misuse the Code. This object was adequately replied by the Hon'ble Supreme Court in the case of *Pioneer* (*supra*) wherein court said: "*The Code is thus beneficial legislation which can be triggered to put the corporate debtor back on its feet in the interest of unsecured creditors like allottees*". Hence, here the argument for creating separate class does not satisfy the test of intelligible differentia and there is no reasonable nexus with the object sought to be achieved under Art. 14 of the Constitution.

Thirdly, the said new proviso of the IBC purports to set out the discriminatory condition for homebuyers and is manifestly arbitrary which can be firmly said in the light of the case of *Shayara Bano* v. *Union of India* (2017) 9 SCC 1, wherein court took the test of manifest arbitrariness to invalidate legislation under the guise of

Article 14. In the *Pioneer* case (*supra*), the court has equated the homebuyers with fixed deposit holders and unsecured debentures of the company. But after this amendment, the homebuyers will have to unnecessarily comply with the condition given in section 7 and fixed deposit holders and unsecured debentures whose claim is more than 1 Lakh can easily approach the NCLT. Hence, the present legislation in question is the capricious, arbitrary and irrational move of the legislature to overturn a law laid down by Hon'ble Supreme Court.

Fourthly, the restriction on the homebuyers of their right to approach for insolvency proceeding is whimsical and unconstitutional as it denies them to access their Fundamental Right. In the petition, they raised the contention that home for a family is a basic human desire and is part of the right to life. In *Chitra Sharma v. Union of India* (2017) 85 taxmann.com 209/144 SCL 1 (SC) the court took the same view and treated them as part of the right to life, and as a fundamental guarantee. And thus the legislature has erred in not appreciating the rights of the Homebuyers.

Fifthly, it is pertinent to mention herein that the words of the present ordinance are evasive, ambiguous and would worsen the situation. The ordinance has mentioned about the minimum threshold for instituting the insolvency proceeding against the defaulting party, i.e., 10% or 100 in number whichever is less. But it failed to delineate the situation wherein some allottees settle or withdraws. This issue has been adequately deliberated and discussed in the Companies Act, 2013 or the Consumer Protection Act, 1986. Section 244 of the Companies Act, 2013 explains class legislation and the procedure governing the same which is absent in the present ordinance.

Sixthly and finally, the legislation is erred from clew to earring. It has given retrospective effect. This will affect not only those homebuyers whose matter is at the final hearing who have to comply condition within a month but also those who have lost money and home and additionally paid 25,000 as court fee.

Thus, to prevent the misuse of the law by the homebuyers, the legislation has gone beyond the spirit of the constitution and denied the right of homebuyers in entirety. The amendment does not provide any cogent reason to support the amendment and is backed up unreasonable conceptual reasoning. The aim of the present petition filed by homebuyers before Supreme Court is thus to correct the erroneous legislative judgment.

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INSIGHTS

Accumulated welfare benefits of employees and treatment under Resolution Plans

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Background

The preamble of the Insolvency and Bankruptcy Code, 2016 ("Code") enshrines the principle of balance of interests of all stakeholders. A major part of the stakeholders is represented by employees and workmen. Employees and workmen are one of the most significant pillars on which the economy runs, and hence, it becomes important to understand their footing under the Code and ensure that they have necessary safeguards from being put in a helpless position in a situation where the employer gets into insolvency.

It must be noted that section 5(20) read with section 5(21) includes claims in respect of employment under the ambit of "operational debt", and as such empowers employees to initiate an application for insolvency against its employer, under section 9 of the Code, that is, as an operational creditor. Further, section 53 of the Code accords priority to the workmen dues at par with secured creditors, and next priority is given to employee dues. Hence, while on one hand their position as an applicant is secured, the position of its claims, especially terminal claims remains a rather unexplored sphere.

In this article, the author attempts to place her views on the treatment of claims of employees and workmen, especially terminal benefits in the event of approval of resolution plan.

Who is an "employee" or "workman" under the Code?

While it is not defined in the Code, the term "employee" in general parlance refers to a person who is hired by the employer to perform a particular job or specific labour of the employer, and is entitled to a specific wage or salary and performs the work under the control or regulation set by the employer.

On the other hand, section 3(36) of the Code states that the term "workmen" shall have the same meaning as provided under section 2(s) of the Industrial Disputes Act, 1947, which states that "workman means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, 9 that dispute, or whose dismissal, discharge or retrenchment has led to that dispute….."

Hence, the author takes the liberty to say that the terms "employee" and "workmen" are wide enough to include within its scope all persons who have been employed in a company.

Types of claim

For the purpose of the Code, the term 'workmen dues' has to be interpreted in terms of *Explanation* to section 326 of the Companies Act, 2013. As per the definition incorporated therein, the dues would cover wages and salaries, accrued holiday remuneration, workmen compensation, and all sums due from the provident fund, the pension fund, the gratuity fund, or any other fund for the welfare of the workmen, maintained by the company.

Broadly, the claims of employees and workmen may be classified as –

Service claims arising during the terms of employment in lieu of service offered by the employee, viz. salary, wages, bonus dues etc.;

Welfare claims, which arise in view of societal considerations, to ensure that the employee's welfare is ensured even after cessation of employment, e.g. gratuity, leave encashment superannuation dues, provident fund dues, workmen compensation for closure of the entity, etc. Such claims are mostly dependent on the tenure of employment.

Since unpaid salaries/wages, and other sums accruing during the term of employment are also simultaneously recognized by the company in its books, claims towards such dues can be easily substantiated unlike the other category of claims which are represented only by way of provisions (e.g. provision for gratuity, etc.).

Hence, in a situation where the employer (company) goes into insolvency resolution process, general concerns may arise as to the treatment of such welfare claims under the resolution plans, given that the resolution plan may or may not provide for continuation of the same set of workforce of the corporate debtor. In particular, issue will relate to 'running of time' in cases the employees/workmen are retained, as most of the welfare claims depend on 'continuity in services' for a particular period of time.

In this article, we shall analyse the position of welfare claims of employees/workmen under different instances during CIRP.

Position of welfare claims

Whether welfare claims be filed by employees/workmen

Upon commencement of CIRP of a company, employees and workmen of the company are required to submit their claims in Form D, under Regulation 9 of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"), in which the employees/workmen set out their claims, along with proof thereof.

A pertinent question that arises here is whether the claims so submitted can include claims towards welfare claims also?

In light of the fact that a company under CIRP continues as a going-concern, the pre-requisites for claiming benefit claims, *i.e.* termination of employment, is not met and as such, the employee/workman might not be in a position to claim the same at this juncture. Although, it must be noted that there is no explicit bar on the employees/workmen from making such claims.

In some cases, it might be possible that the employees/workmen file claims only w.r.t. their welfare claims even though no sums pertaining to salary/wages are actually outstanding.

In any case, the books of the corporate debtor will have details of provisions against different kinds of welfare claims. The information memorandum prepared by the resolution professional shall have the details of such provisions, besides details as to employees/workmen. The resolution applicant, while preparing the resolution plan, should take these details into account.

Treatment of welfare claims under resolution plans

The Code was introduced with an objective to drive a failing company out of insolvency, resolution plan being the wheel. A resolution plan is a proposal that set outs a blueprint for revival of the corporate debtor as a going concern, free of all its past liabilities and dues, which essentially acts as the most significant catalyst/motivator for resolution applicants.

Section 30 of the Code, read with Regulation 37 of the CIRP Regulations states that a resolution plan must provide for measures for reviving the company out of resolution, and the mode in which payments shall be made towards CIRP cost and creditors. While it is a given assumption that the claims towards dues during the course of employment viz. salary/wages etc. must form part of the resolution plan, whether or not welfare claims are considered/ ought to be considered under resolution plans remains a question.

As mentioned above, a resolution plan is proposed to absolve the corporate debtor of all its past dues in lieu of the sum offered under the plan. However, what remains a matter of dilemma is whether the term "all" also includes the welfare claims of employees. It is essential to note that the question of welfare claims comes into picture upon termination of employment by way of closure of business altogether and hence, such claims are those which have not been recognised by the corporate debtor in its books as on the date of insolvency commencement.

In the case under consideration, there is no closure/dissolution of business *per se*; the resolution plan implies that the business of the corporate debtor will be taken over as a going-concern and as such, the question of disbursing welfare claims at the time of approval of resolution plan does not arise, unless the resolution plan, *per se*, seeks to terminate the services of the employees/workmen.

Scenario 1- Resolution plan proposes to terminate the services of employees/workmen

Such clause shall be deemed as termination, and as such, the employees/workmen shall have the right to receive their claims towards gratuity, provident fund and other social security schemes. For instance, in the case of *State Bank of India* v. *Calyx Chemicals and Pharmaceuticals Limited*, the resolution applicant being consortium of two companies, namely M/s Khilari Infrastructure Pvt. Ltd and M/s Topnotch Chemicals Pvt. Ltd explicitly provided for payment of benefit claims to the employees/ workmen of the corporate debtor till date of commencement of CIRP, as the plan provided for termination of employees.

It must be noted that in the case of *Calyx Chemicals* (supra), the very fact that the resolution plan provides for termination of all employees, leaves no iota of doubt that the employees became eligible to receive benefit claims and as such was provided for.

The above ruling makes it clear that where the resolution plan itself provides for termination of employment, the employee/ workmen shall be eligible to receive their benefit claims under the plan itself as soon as the resolution plan is approved.

Scenario 2- Resolution plan proposes to continue the services of the employees/workmen

Given that most of the welfare claims are statutory, the corporate debtor will have to pay such claims even after resolution. An important question, however, would be – whether, for the purpose of determining eligibility for and the quantum of welfare claims, the tenure of service of the employee shall be counted from the (original) date of joining the corporate debtor or from the date of approval of resolution plan.

It must be noted that approval of a resolution plan implies that the corporate debtor continues, either by way of a change in management, or by any other scheme of arrangement/ compromise etc, the essence in all cases being the same - an arrangement. Hence, it is clear that approval of a resolution plan implies revival and not rebirth of the corporate debtor; and for the workmen/ employees, it is nothing but continuance of employment, the only change being that of management or the name. Thus, it shall not be prudential to say that only because a resolution plan absolves past dues and liabilities, welfare claims can also be washed-out.

A parallel may be drawn with schemes of arrangement, merger etc. under the Companies Act, 2013, under which absorption of employees of the transferor by the transferee is a common practice, wherein the tenure of employment of such employees is calculated w.e.f. their association with the transferor company in the first instance. Drawing analogy, resolution plans, which are essentially nothing but arrangements, must also imbibe the same principle.

Furthermore, section 25FF of the Industrial Disputes Act, 1947, a significant labour law in India, provides that in case of transfer of business, employees are deemed as automatically transferred if:

- the services was uninterrupted;
- the new employment terms are not less favourable; and
- **the previous employment term is recognised for the purposes of calculating severance pay on termination of employment.**

Owing to the gravitas of impact that a change in employer has on the employee and his rights, despite the aforesaid provisions of the ID Act, the Hon'ble Supreme Court in *Sunil Kr. Ghosh* v. *K. Ram Chandran* ((2011) 14 SCC 320) held that no employee/ workman can be forced to work under a new employee by way of an arrangement, operation of law, whatsoever; and as such, held that in the event employees are transferred to a new employer, it is mandatory for the old employer to take the consent of the workmen even if there is no change in the terms and conditions of their service and they are transferred on same or more favourable terms. In the event the workmen do not consent to such transfer, they will have to be given retrenchment compensation as per the provisions of the ID Act.

Again, in *Bombay Garage Ltd.* v. *Industrial Tribunal* (1953) 1 Lab LJ 14 (Bombay), the Hon'ble High Court of Bombay held that "an employer cannot deprive his employees of the benefits that have accrued to them by reason of past services merely by transferring his business to another person or to another limited company." Hence, it is established that rightful claims of workmen/ employees cannot be washed-out.

The rulings, as above, may lead to the following observations –

(*i*) the employees of the corporate debtor are entitled to the welfare benefits

(*ii*) where plan provides for continuance of employment, the employees must be given the option/right to opt out of such continued employment

(*iii*) in case of continued employment, the employee shall be entitled to welfare claims in accordance with tenure of employment (original).

Impact of defaults in contributions by the Corporate Debtor

A major chunk of what constitutes "benefit claims" are of the nature which require regular contributions by the employer and employee both. Considering that the Indian set-up has been infamous for rampant default in contribution by employers, it shall be important to understand consequence of such default upon the incoming resolution applicant/transferee in other cases.

In such conundrum, one may see section 17B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 which provides that:

> "Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, **the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer** under any provision of this Act or the Scheme…" (Emphasis Supplied)

However, the proviso to section 17B provides that the liability of the transferee shall be limited to the value of assets taken over. Going by such provision, it may be presumed that since under the Corporate Debtor, under the Code, is taken over in totality, a harmonious interpretation of the Code and EPF Act would imply that the resolution applicant shall be liable to make good default in contributions by the Corporate Debtor. Hence, default in contribution, if any, shall be informed to the resolution applicant to ensure that the same can be covered under the plan.

The Hon'ble Supreme Court in *McLeod Russel India Ltd.* v. *Regional Provident Fund Commissioner,* 2014 (8) Scale 272[1]. Also appreciated the transferees liability to make good the defaults by the old employer, and as such secured the employees from wrong-doings of the employer.

Hence, the author is of the view that the laws in place also have an anti-washout sentiment which must be upheld under the Code, so as to reap optimum benefits from the existing legal framework.

Conclusion

In the said pretext, while a prudential perspective shall to be provide for benefit claims of the employees/workmen, in absence of any explicit provision under the Code, is left to be a matter of interpretation.

The author is of the view that specific guidelines w.r.t. treatment of benefit claims under resolution plan are required to be laid down. In absence of guiding provisions, regulations in this regard, the employees/ workmen will be put in a helpless and vulnerable state, which shall only make "welfare" claims, a misnomer.

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1. See also: *Assistant Provident Fund* v. *M.Girilal (Hon'ble Madras High Court) Dalgaon Agro Industries Ltd. v. Union of Inia (Hon'ble Calcutta High Court).*

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Aashish Mohan Gupta

v.

Hind Inn and Hotels Ltd.

VENUGOPAL M., JUDICIAL MEMBER

KANTHI NARAHARI AND V.P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1282 OF 2019*

FEBRUARY 12, 2020

Section 5(21), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational debt - Operational creditor was awarded civil work of construction of Hotel by corporate debtor - As per work order, retention money of 5 per cent would be retained from every running account bill which was to be released after completion of defects liability period of one year from date of award of completion certificate and issue of defect liability certificate, to be issued by corporate debtor to operational creditor - Operational creditor filed application under section 9 submitting that corporate debtor had not paid retention money after completion of defects liability period and even after issuance of demand notice - Appellant submitted that retention money did not fall within definition of operational debt - Whether since retention money was part of main bill raised towards services rendered by operational creditor to corporate debtor, it could not be treated as separate money - Held, yes - Whether further, since operational creditor had rendered services and there was no dispute with regard to said services, it could not be accepted that said claims would not fall under definition of operational debt Held, yes - (Para 17)

Section 238A of Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Limitation period - As per work order awarded by corporate debtor to operational creditor, retention money of 5 per cent would be retained from every running account bill which was to be released after completion of defects liability period - Defect liability period was completed on 1-4-2015 and thereafter, operational creditor had requested corporate debtor to release money - Operational creditor filed application under section 9 as corporate debtor failed to pay amounts due even after issuance of demand notice - Appellant submitted that application under section 9 filed on 27-4-2018 was barred by limitation - Whether since cause of action for release of retention money commenced on 21-7-2015 when mail was sent by corporate

* Arising out of order of NCLT CTC Projects (P.) Ltd. v. Hind Inns and Hotels Ltd. [2020] 113 taxmann.com 285 (NCLT - CHD)

debtor stating that operational creditor had attended to all concerns and rectified same, instant application being filed within a period of three years was not barred by limitation - Held, yes (Para 17)

FACTS

- The operational creditor was awarded a work by the corporate debtor for civil work of construction of Ginjar Hotel. As per the work order, the retention money of 5 per cent would be retained from every running account bill which was to be released after completion of defects liability period of one year from the date of award of completion certificate and issue of defect liability certificate, to be issued by the corporate debtor to the operational creditor.
- The claim of the operational creditor was that the corporate debtor retained the retention money and had not paid the same even after completion of defects liability period. The operational creditor issued a demand notice to the corporate debtor. Failing to pay the amounts, even after issuance of demand notice, the operational creditor filed application under section 9 before the Adjudicating Authority.
- The Adjudicating Authority having considered all aspects in the application, admitted the application and initiated Corporate Insolvency Resolution Process including declaration of Moratorium.
- The appellant submitted that the Retention Money does not fall within the definition of operational debt as defined in section 5(21) and that the application filed was time barred.
- On the other hand, the operational creditor submitted that the cause of action for release of retention money commenced on 21-7-2015 and the application was filed before the Adjudicating Authority on 27-4-2018 was within a period of three years and contended that it was within the period of limitation. It was further submitted that the retention money was towards the services rendered by the operational creditor to the corporate debtor and it could not be treated as separate money.

HELD

- From the reading of e-mail of the corporate debtor addressed to the operation creditor, it is opined that the corporate debtor had accepted that all the works have attended by the operational creditor and further requested the operational creditor to attend to the work as a special case request. From the reading of the e-mail, it is viewed that the request made by the corporate debtor is not part of the original work and it is a special request made to the operational creditor to do the work. (Para 16)
- There is no record or document to establish that there exists any dispute nor raised any dispute by the corporate debtor, hence, it is concluded that there is no pre-existing of dispute. The operational creditor had awarded the work and the retention money cannot be treated as separate money. The

retention money is a part of main bill which was retained by the corporate debtor as per the terms of the work order and the same shall be released after completion of the work and issuance of the completion certificate. Further the defect liability period completed on 1-4-2015 and thereafter the operational creditor had requested the corporate debtor to release money. It is viewed that it is not barred by limitation. The Adjudicating Authority rightly observed and held that the debt fell due from 27-7-2015 when the mail was sent by Ginjar Hotel of the corporate debtor stating that the operational creditor had attended to all the concerns and rectified the same. The other submission of the appellant that debt does not fall within the definition of section 5(21) is concerned, the operational creditor had rendered services and there is no dispute with regard to the said services and it cannot be accepted that the said claims will not fall under the definition of operational debt. (Para 17)

- In the instant case, the demand notice dated 1-3-2018 was received by the corporate debtor on 9-3-2018. However, they fail to bring to the notice of the operational creditor with regard to existence of dispute in their reply or even shown existence of dispute prior to the issuance of demand notice. (Para 22)

- Therefore, it is viewed that the respondent No. 1 had not raised any dispute which is existing prior to the issuance of demand notice. Further section 3(2) define default. As per said section, the default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or corporate debtor as the case may be. The debt has been defined in section 3(11) means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. In view of the definition of debt and default, the retention money, which is part of the main bill, comes under the definition of debt and default. (Para 23)

Case Review

CTC Projects (P.) Ltd. v. Hind Inns and Hotels Ltd. (2020) 113 taxmann.com 285 (NCLT - CHD) affirmed.

B.K. Educational Services Pvt. Ltd. v. Parag Gupta & Associates (2018) 98 taxmann.com 213/150 SCL 293 (SC) and Jignesh Shah v. Union of India (2019) 109 taxmann.com 486/156 SCL 542 (SC) (Para 27) distinguished.

Sandeep Bajaj, Ms. Aakanksha Nehra and Ms. Aditi Pundhir, Advs. for the Appellant.

Abhishek Anand, Ms. Honey Satpal, Vivek Malik, Vivek Sinha and Kartikeya Jain, Advs. for the Respondent.

For Full Text of the Judgment see
(2020) 116 taxmann.com 792 (NCLAT - NEW DELHI)

SUPREME COURT OF INDIA

Anand Rao Korada Resolution Professional
v.
Varsha Fabrics (P.) Ltd.

INDU MALHOTRA AND R. SUBHASH REDDY, JJ.
CIVIL APPEAL NOS. 8800-8801 OF 2019
NOVEMBER 18, 2019

Section 231, read with sections 238 and 14, of the Insolvency and Bankruptcy Code, 2016 - Bar of jurisdiction - A financial creditor filed petition under section 7 against corporate debtor which was admitted by NCLT and moratorium was declared - However, during pendency of moratorium, High Court by impugned order started auction proceedings of assets of corporate debtor - Whether High Court ought not to have proceeded with auction of property of corporate debtor, once proceedings under IBC had commenced, and an order declaring moratorium was passed by NCLT - Held, yes - Whether thus, impugned order passed by High Court was to be set aside - Held, yes (Para 9)

FACTS

- The respondent companies entered into a Share Purchase Agreement ('SPA') by which Respondent No. 5 divested its 100 per cent shareholding in corporate debtor in favour of Respondent Nos. 1 to 3. Corporate debtor shut down its factory on 8-5-2007.
- The Workers Union of corporate debtor filed writ petition before the Odisha High Court praying *inter alia* for cancellation of the SPA dated 10-7-2006, and payment of the arrears and current salaries of the workmen.
- The workers union filed another Writ Petition on 28-3-2011 for payment of their dues before the Odisha High Court.
- The High Court *vide* order dated 14-3-2012 directed the Deputy Labour Commissioner, to recover the workmen's dues by sale of the assets of corporate debtor through a public auction.
- During the pendency of proceedings before the High Court a financial creditor filed a petition under section 7 of the IBC, 2016 before the NCLT for initiation of the corporate insolvency resolution process ('CIRP') against the corporate debtor, since it had committed a default in paying the financial debt.

- The NCLT *vide* order dated 4-6-2019 admitted the insolvency petition and declared a moratorium in accordance with the provisions of sections 13 and 15 of the IBC. The moratorium was declared for the purpose referred to in section 14. The Appellant was appointed as the insolvency resolution professional.
- During the pendency of the moratorium, writ petition was posted for hearing on 14-8-2019 before the High Court. The Additional Government Advocate submitted that the valuation of the land in Mouza - Tara Nagar owned by Respondent No. 4 was Rs. 6,05,000 per acre. The High Court directed the Additional Government Advocate to file an affidavit with respect to the valuation conducted.
- The High Court by a further order dated 5-9-2019, recorded the submission of the Appellant - Resolution Professional that there were other companies which had expressed an interest to participate in the public auction. The matter was posted for further hearing on 17-9-2019.
- The Appellant - Resolution Professional filed the instant Civil Appeals to challenge the Interim Orders dated 14-8-2019 and 5-9-2019 passed by the Odisha High Court in writ petition on the ground that since the CIRP against corporate debtor had commenced, the proceedings before the High Court in W.P. ought to be stayed.

HELD

- In view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the property of the corporate debtor, once the proceedings under the IBC had commenced, and an order declaring moratorium was passed by the NCLT. The High Court passed the impugned Interim Orders dated 14-8-2019 and 5-9-2019 after the CIRP had commenced in this case.
- The moratorium having been declared by the NCLT on 4-6-2019, the High Court was not justified in passing the orders dated 14-8-2019 and 5-9-2019 for carrying out auction of the assets of the Respondent No. 4 - Company *i.e.* the corporate debtor before the NCLT. The subject matter of the auction proceedings before the High Court is a vast chunk of land admeasuring about 330 acres, including Railway lines and buildings.
- If the assets of the Respondent No. 4 - Company are alienated during the pendency of the proceedings under the IBC, it will seriously jeopardise the interest of all the stakeholders.
- As a consequence, the impugned Interim Orders dated 14-8-2019 and 5-9-2019 passed by the Odisha High Court are set aside, as parallel proceedings with respect to the main issue cannot take place in the High Court. The sale or liquidation of the assets of

Respondent No. 4 will now be governed by the provisions of the IBC. (Para 9)

It is open for Workers' Union to file an application under Regulation 9 of the Insolvency and bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 for payment of arrears, salaries and other dues before the competent authority. (Para 10)

Bijoy Kumar Jain, AOR *for the Appellant.* **C.U. Singh**, Sr. Adv., **Ashish Prasad**, **Ms. Mukta Dutta**, **Rajesh J.**, **Rohit Sharma**, Advs., **Mahfooz Ahsan Nazki**, AOR, **Vikram Banerjee**, ASG, **R.R. Rajesh**, **Rajesh K. Singh**, **Anshul Gupta**, Advs., **Raj Bahadur Yadav**, **Shibashish Misra**, **Ms. Archana Pathak Dave**, AOR, **Sandeep Pathak** and **Ms. Deepsha Talwa**, Advs. *for the Respondent.*

For Full Text of the Judgment see
[2019] 111 taxmann.com 474 (SC)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Anubhav Anilkumar Agarwal
v.
Bank of India

S.J. MUKHOPADHAYA, CHAIRPERSON
SHREESHA MERLA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 1504 OF 2019
FEBRUARY 7, 2020†

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 18 of the Limitation Act, 1963 - Corporate insolvency resolution process - Limitation period - Application filed under section 7 by financial creditor-bank was admitted and CIRP was initiated against corporate debtor - Appellant contended that date of default/NPA was 31-12-2014 whereas application was filed in year 2019, *i.e.* three years after occurrence of default; therefore, same was barred by limitation - Whether date of default stands forwarded, if borrower acknowledges debt and agrees to pay on a future date in terms of Section 18 of the Limitation Act - Held, yes - Whether since in instant case, corporate debtor by its letter dated 18-3-2016/ 20-3-2016 specifically stated that it will make an effort to save their bank account from getting NPA and citing good reputation and goodwill, corporate debtor agreed to pay amount and acknowledged dues, period of limitation stands shifted to date on which corporate debtor agreed to pay and thus, application under section 7 was not barred by limitation - Held, yes (Paras 10 to 13)

FACTS

- The financial creditor bank moved an application under section 7 pursuant to which the Adjudicating Authority initiated 'Corporate Insolvency Resolution Process' against corporate debtor who was the Guarantor.
- The appellant submitted that term corporate Debtor was declared a Non-Performing Asset (NPA) on 31-12-2014. Therefore, if the period of limitation is counted from the date of default/ NPA, the application under

† **Arising out of order dated 26-11-2019, passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in CP (IB) No. 900/I&B/MB/2019.**

section 7 was barred by limitation by 31-12-2017. Admittedly, the application under section 7 was filed in the year 2019 showing the debt payable as on 10-2-2019. Thus, the appellant pleaded that the application under section 7 was barred by limitation.

- The respondent claimed that the application was not barred by limitation, as the corporate debtor has acknowledged the debt in April 2016.

HELD

- Normally, the period of limitation is to be counted from the date of default/ NPA. However, the date of default stands forwarded, if the borrower acknowledges the debt and agrees to pay on a future date in terms of section 18 of the Limitation Act. (Para 10)
- In the instant case, the corporate debtor by its letter dated 18-3-2016/20-3-2016 has specifically stated that it will make an effort in reducing their outstanding dues and raise other funding to save their bank account from getting NPA. (Para 11)
- The last three paragraphs of the aforesaid letter show that to save the bank account from getting NPA and citing the good reputation and goodwill, the corporate debtor agreed to pay the amount and acknowledged the dues. (Para 12)
- In view of the letter dated 18-3-2016 written to the bank, it is held that the period of limitation stands shifted to the date on which the corporate debtor agreed to pay and thus, the application under section 7 was not barred by limitation. (Para 13)

Case Review

Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd. (2019) 101 taxmann.com 464/151 SCL 555 (NCL-AT) (Para 14) distinguished.

Abhijeet Sinha, Mahesh Agarwal, Divyand Chandiramani, Syaishir Divatia and Rajeev Kumar, Advs. for the Appellant.

Aditya Dewan, Somesh Dhawan, Jayant Mehta, Siddharth Chechani, Sugam Seth, and Syed Sarfarar Karim, Advs. for the respondent.

For Full Text of the Judgment see
[2020] 116 taxmann.com 793 (NCLAT - NEW DELHI)

SUPREME COURT OF INDIA

Anuj Jain
v.
Axis Bank Ltd.

A.M. KHANWILKAR AND DINESH MAHESHWARI, JJ.

CIVIL APPEAL NOS. 6777-6797, 8512-8527 AND 9357-77 OF 2019[1*]

FEBRUARY 26, 2020

Section 43, read with sections 44, 49 and 66, of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Preferential transactions and relevant time - Whether for a transaction to fall within mischief sought to be remedied by sections 43 and 44, it ought to be a preferential one answering to requirements of sub-section (2) of section 43; and preference ought to have been given at a relevant time, as specified in sub-section (4) of section 43 - Held, yes - Whether if a transaction entered into by a corporate debtor is not falling in either of exceptions provided by sub-section (3) of section 43 and satisfies three-fold requirements of sub-sections (4) and (2), it would be deemed to be a preference during a relevant time, whether or not in fact it were so; and whether or not it were intended or anticipated to be so - Held, yes - Applicant lender bank extended various credit facilities in favour of JAL, which was holding company of corporate debtor JIL - In respect of such credit facilities, corporate debtor JIL created security in favour of applicant bank executing various mortgage deeds whereby several parcels of land of JIL were put under mortgage with lender of JAL - Such transactions took place around time when accounts of JIL were declared NPA - For creation of mortgage to secure debt of JAL - Corporate debtor did not take 'No objections' of its own lenders - Finding these transactions preferential, undervalued and fraudulent, NCLT held that security interest created by JIL in favour of lender of JAL was to be released and discharged - However, said order of NCLT was set aside by impugned order of NCLAT - Whether impugned transactions had been of transfers for benefit of JAL, who a related party of corporate debtor JIL and its creditor and surety by virtue of antecedent operational debts as also other facilities extended by it; and impugned transactions have effect of putting JAL in a beneficial position than it would have been in event of distribution of assets being made in accordance with section 53 and, thus, corporate debtor JIL had given a preference in manner laid down in sub-section (2) of section 43 - Held, yes - Whether since impugned transactions had not been in ordinary

* Arising from Axis Bank v. Anuj Jain (2019) 108 taxmann.com 13 (NCLAT).

course of business or financial affair of JIL, impugned transactions were not of excepted transfers in terms of sub-section (3) of section 43 - Held, yes - Whether thus, transactions in question are hit by section 43 and NCLT having rightly held so, had been justified in issuing necessary directions in terms of section 44 in relation to transactions concerning in question and NCLAT had not been right in interfering with well-considered and justified order passed by NCLT - Held, yes (Paras 18.2, 19.5, 22.5, 25.7, 25.8 and 27)

Section 5(7), read with section 5(8), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial creditor - Whether if a corporate debtor has given its property in mortgage to secure debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within definition of 'debt' under section 3(10), however, it would remain a debt alone and cannot partake character of a 'financial debt' within meaning of section 5(8) - Held, yes – Applicant bank extended various credit facilities in favour of JAL, which was holding company of corporate debtor JIL - In respect of such credit facilities, corporate debtor JIL created security in favour of applicant bank executing various mortgage deeds whereby several parcels of land of JIL were put under mortgage with lender of JAL - Held, yes - Whether debts in question were in form of third party security; said to have been given by corporate debtor JIL so as to secure loans/advances/facilities obtained by JAL from respondent-lenders; such a 'debt' is not and cannot be a 'financial debt' within meaning of section 5(8) and, hence, respondent-lenders, mortgagees, are not 'financial creditors' of corporate debtor JIL - Held, yes - Whether thus, lender of JAL on strength of mortgages in question, may fall in category of secured creditors, but such mortgages being neither towards any loan, facility or advance to corporate debtor nor towards protecting any facility or security of corporate debtor, it can not be said that corporate debtor owes them any 'financial debt' within meaning of section 5(8) and, hence, such lenders of JAL do not fall in category of 'financial creditors' of corporate debtor JIL - Held, yes (Paras 47.2, 48 and 54)

FACTS

- JAL was a public listed company which was awarded the rights for construction of an expressway from Noida to Agra. A concession agreement was entered into with the Yamuna Expressway Industrial Development Authority. JIL was set up as a special purpose vehicle. Finance was obtained from a consortium of banks against the partial mortgage of land acquired and a pledge of 51 per cent of the shareholding held by JAL.
- IDBI instituted a petition under section 7 before the NCLT, seeking initiation of Corporate Insolvency Resolution Process (CIRP) against JIL, while alleging that JIL had committed a default in repayment of its dues to the tune of Rs. 526.11 crores. JIL filed its objections to the petition but later on, withdrew the objections and furnished consent for resolution plan under the provisions of the Code. NCLT initiated the CIRP in respect of JIL. An order of moratorium

was issued under section 14 by which, the institution of suits and continuation of pending proceedings, including execution proceedings were prohibited and appellant was appointed as an Interim Resolution Professional.

- IRP, in pursuance of the order of NCLT, called for submissions of claims by financial creditors, by operational creditors, by the workmen and employees and by other creditors.
- During CIRP of Jaypee Infratech Ltd., the Interim Resolution Professional preferred an application before the Adjudicating Authority seeking orders for avoidance of the impugned transactions, whereby several parcels of land were put under mortgage by the promoter of JIL with the lenders (Axis Bank and Others) of JAL, the holding company of JIL. The contention of IRP, that the transactions in question were preferential, undervalued and fraudulent within the meaning of sections 43, 45 and 66, were accepted in part by the Adjudicating Authority the NCLT, in its order dated 16.05.2018 and necessary directions were issued for avoidance of at least six of such transactions.
- The NCLAT, however, took an entirely opposite view of the matter and upturned the order so passed by NCLT, while holding that the transactions in question did not fall within the mischief of being preferential or undervalued or fraudulent; and that the lenders in question (the lenders of JAL) were entitled to exercise their rights under the Code.
- Aggrieved, the IRP, one of the creditors of the corporate debtor JIL and the associations of home buyers, who had invested in the proposed projects of JIL and JAL, had preferred these appeals.
- During CIRP, two of the respondent banks namely, ICICI Bank Limited and Axis Bank Limited, sought inclusion in the category of financial creditors of JIL but IRP did not agree and declined to recognize them as such. Being aggrieved by the decisions so taken by IRP, the said banks preferred separate applications under section 60(5) before NCLT while asserting their claim to be recognized as financial creditors of the corporate debtor JIL, on account of the securities provided by JIL for the facilities granted to JAL. The NCLT rejected the applications so filed by the said banks, by way of its orders dated 9-5-2018 and 15-5-2018 respectively, while concluding that on the strength of the mortgage created by the corporate debtor JIL, as collateral security of the debt of its holding company JAL, the lenders of JAL could not be categorized as financial creditors of JIL for the purpose of the Code.
- The appeals against the said orders dated 9-5-2018 and 15-5-2018 were purportedly allowed as per the result recorded in the impugned order dated 1-8-2019.
- Aggrieved, one of the lenders of the corporate debtor JIL, IIFCL had also questioned this aspect of the order impugned while asserting that such

mortgagees could not be taken as financial creditors of the corporate debtor JIL.

- In instant batch of appeals before Supreme Court, the extensive arguments were finally concluded on 10-12-2019. Even while reserving the orders, looking to the facts and circumstances of the case, the operation of the order passed by NCLAT was stayed by SC, insofar relating to the prayer of the lender-banks of JAL for treating them as financial creditors of JIL.

HELD

Preferential transaction at a relevant time: concept and connotations

- The basic concept of 'preference' as per the law dictionaries and lexicons is the act of 'paying or securing to one or more of his creditors, by an insolvent debtor, the whole or part of their claims, to the exclusion of the rest'. (Para 17.1)

- It could be readily noticed that as far back as from 15th century, the concept of 'preference' has been taken note of and the principles relating to avoidance of certain preferences have evolved, particularly in the fields of mercantile laws and more particularly in the laws governing insolvency and bankruptcy; and definitively from 1874, various jurisdictions have defined, described and dealt with 'preferential transfer' as being the transaction where an insolvent debtor makes transfer to or for the benefit of a creditor so that such beneficiary would receive more than what it would have otherwise received through the distribution of bankruptcy estate.

- The time factor also plays a crucial role in such measures of avoidance. This 'relevant time' for the purpose of avoidance of preferential transactions is now commonly referred to as the 'look-back' period. Significantly, when the preferential transaction is with an unconnected party, the look-back period is comparatively lesser than that of the transaction with a connected party, who is referred to as 'insider' or 'related party'. (Para 17.2)

- Coming to the corporate personalities, it is elementary that by the very nature and legal implications of incorporation, ordinarily, several individuals and entities are involved in the affairs of a corporate person; and impact of the activities of a corporate person reaches far and wide, with the creditors being one of the important set of stakeholders. If the corporate person is in crisis, where either insolvency resolution is to take place or liquidation is imminent; and the transactions by such corporate person are under scanner, any such transaction, which has an adverse bearing on the financial health of the distressed corporate person or turns the scales in favour of one or a few of its creditors or third parties, at the cost of the other stakeholders, has always been viewed with considerable disfavour. (Para 17.3)

- Noteworthy distinctive features, in the scheme of the Companies Act, 2013 and Insolvency and Bankruptcy Code, 2016, as regards preferences in relation to the corporate personalities, are that while section 328 of the Act of 2013 deals with fraudulent preference and section 329 Companies Act, 2013 thereof deals with transfers not in good faith but, on the other hand, in the Code, separate provisions are made as regards the transactions intended at defrauding the creditors (section 49 IBC) as also for fraudulent trading or wrongful trading (section 66 IBC). The provisions contained in section 43, however, indicate the intention of legislature that when a transaction falls within the coordinates defined therein, the same shall be deemed to be a preference given at a relevant time and shall not be countenanced. Therefore, intent may not be of a defence or support of any preferential transaction that falls within the ambit of section 43 of the code (Para 17.4)

Analysing section 43 of the Code

- Section 44 provides for the consequences of an offending preferential transaction *i.e.*, when the preference is given at a relevant time. Under section 44, the Adjudicating Authority may pass such orders as to reverse the effect of an offending preferential transaction. Amongst others, the Adjudicating Authority may require any property transferred in connection with giving of preference to be vested in the corporate debtor; it may also release or discharge (wholly or in part) any security interest created by the corporate debtor. The consequences of offending preferential transaction are, obviously, drastic and practically operate towards annulling the effect of such transaction. (Para 18)

- Looking at the broad features of section 43, it is noticed that as per sub-section (1) thereof, when the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has, at a relevant time, given a preference in such transactions and in such manner as specified in sub-section (2), to any person/persons as referred to in sub-section (4), he is required to apply to the Adjudicating Authority for avoidance of preferential transactions and for one or more of the orders referred to in section 44. If twin conditions specified in sub-section (2) of section 43 are satisfied, the transaction would be deemed to be of preference. As per clause (*a*) of sub-section (2) of section 43, the transaction, of transfer of property or an interest thereof of the corporate debtor, ought to be for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and as per clause (*b*) thereof, such transfer ought to be of the effect of putting such creditor or surety or guarantor in beneficial position than it would have been in the event of distribution of assets under section 53. (Para 18.1)

- However, merely giving of the preference and putting the beneficiary in a better position is not enough. For a preference to become an offending one for the purpose of section 43, another essential and rather prime requirement is to be satisfied that such event, of giving preference, ought to have happened within and during the specified time, referred to as "relevant time". The relevant time is reckoned, as per sub-section (4) of section 43, in two ways: (a) if the preference is given to a related party (other than an employee), the relevant time is a period of two years preceding the insolvency commencement date; and (b) if the preference is given to a person other than a related party, the relevant time is a period of one year preceding such commencement date. In other words, for a transaction to fall within mischief sought to be remedied by sections 43 and 44, it ought to be a preferential one answering to requirements of sub-section (2) of section 43; and preference ought to have been given at a relevant time, as specified in sub-section (4) of section 43. (Para 18.2)

- However, even if a transaction of transfer otherwise answers to and comes within the scope of sub-sections (4) and (2) of section 43, it may yet remain outside the ambit of sub-section (2) because of the exclusion provided in sub-section (3) of section 43. (Para 18.3)

- Sub-section (3) of section 43 specifically excludes some of the transfers from the ambit of sub-section (2). Such exclusion is provided to: (a) a transfer made in the ordinary course of business or financial affairs of the corporate debtor or transferee; (b) a transfer creating security interest in a property acquired by the corporate debtor to the extent that such security interest secures new value and was given at the time specified in sub-clause (i) of clause (b) of section 43(3) and subject to fulfilment of other requirements of sub-clause (ii) thereof. The meaning of the expression "new value" has also been explained in this provision. (Para 18.4)

Indicting parts - deemed preference at a relevant time

- In order to understand and imbibe the provisions concerning preference at a relevant time, it is necessary to notice that as per the charging parts of section 43 *i.e.*, sub-sections (4) and (2) thereof, a corporate debtor shall be deemed to have given preference at a relevant time if the twin requirements of clauses (*a*) and (*b*) of sub-section (2) coupled with the applicable requirements of either clause (*a*) or clause (*b*) of sub-section (4), as the case may be, are satisfied. (Para 19)

- To put it more explicit, the sum total of sub-sections (2) and (4) is that a corporate debtor shall be deemed to have given a preference at a relevant time if: (i) the transaction is of transfer of property or the interest thereof of the corporate debtor, for the benefit of a creditor or surety or guarantor for or on account of an antecedent financial debt or operational debt or other liability; (ii) such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets in accordance with section 53; and (iii) preference is given, either during the period of two years preceding the insolvency commencement date when the beneficiary is a related party (other than an employee), or during the period of one year preceding the insolvency commencement date when the beneficiary is an unrelated party. (Para 19.1)

- By way of these statutory provisions, legal fictions are created whereby preference is deemed to have been given; and is deemed to have been given at a relevant time, if the stated requirements are satisfied. (Para 19.2)
- Applying various principles enumerated to the provision at hand *i.e.*, section 43, it could reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per section 44, irrespective whether the transaction was in fact intended or even anticipated to be so. (Para 19.3)

Exclusion part

- Even when the above-stated indicting parts of section 43 as occurring in sub-sections (4) and (2) are satisfied and the corporate debtor is deemed to have given preference at a relevant time to a related party or unrelated party, as the case may be, such deemed preference may yet not be an offending preference, if it falls into any or both of the exclusions provided by sub-section (3) *i.e.*, having been entered into during the ordinary course of business of the corporate debtor or transferee or resulting in acquisition of new value for the corporate debtor. (Para 19.4)

Net concentrate of section 43

- Thus, the net concentrate of section 43 is that if a transaction entered into by a corporate debtor is not falling in either of exceptions provided by sub-section (3) of section 43 and satisfies three-fold requirements of sub-sections (4) and (2), it would be deemed to be a preference during a relevant time, whether or not in fact it were so; and whether or not it were intended or anticipated to be so. (Para 19.5)
- The analysis foregoing leads to the position that in order to find as to whether a transaction, of transfer of property or an interest thereof of the corporate debtor, falls squarely within the ambit of section 43, ordinarily, the following questions shall have to be examined in a given case:

(i). As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?

(ii). As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor?

(iii). As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with section 53?

(iv). If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date?

(v) As to whether such transfer is not an excluded transaction in terms of sub-section (3) of section 43? (Para 20)

- If the transactions in question are to fall squarely within the mischief of section 43, they must satisfy all the specifications and ingredients of sub-sections (2) and (4) of section 43 and ought not to be within the exclusion provided in sub-section (3) thereof. (Para 21)

Whether impugned transactions are preferential, falling within the ambit of sub-section (2) of section 43

- The fact that JAL, a public listed company with more than 5 lakhs individual shareholders, is the holding company of the corporate debtor JIL is neither of any doubt nor of any dispute. As on 31-3-2017, JAL owned 71.64 per cent of shares of JIL, having a value of Rupees 995 crores. The background had been that when in the year 2003, JAL was awarded the rights for construction of an expressway and a concession agreement was entered into with the Yamuna Expressway Industrial Development Authority, JIL was set up as a special purpose vehicle. Finance was obtained from a consortium of banks against partial mortgage of land acquired and pledge of 51 per cent of the shareholding of JAL. Housing plans were envisaged for construction of real estate projects in two locations of the land acquired, one in Wish Town, Noida and another in Mirzapur. (Para 22.1)

- JIL was declared NPA by Life Insurance Corporation of India on 30-9-2015 and by some of its other lenders on 31-3-2016. Then, IDBI Bank Limited instituted a petition under section 7 before NCLT, seeking initiation of Corporate Insolvency Resolution Process against JIL, while alleging that JIL had committed a default to the tune of Rs. 526.11 crores in repayment of its dues. On 9-8-2017, NCLT passed an order under section 7 and appointed an Interim Resolution Professional.

The IRP made an application on 6-2-2018, seeking directions that the transactions entered into by the directors and promoters of corporate debtor creating mortgages of 858 acres of immovable property owned by it to secure the debts of JAL are preferential, undervalued, wrongful, and fraudulent and, hence, the security interest created by corporate debtor JIL in favour of the lenders of JAL be discharged and such properties be deemed to be vested in corporate debtor. The NCLT allowed the said application on 16-5-2018 with respect to six of the impugned transactions covering about 758 acres of land. On the appeals filed by lenders of JAL, NCLAT, by its impugned order dated 1-8-2019, set aside the order passed by NCLT and held that such lenders of JAL were entitled to exercise their rights under the Code. (Para 22.1.1)

- The date 9-8-2017 is the insolvency commencement date in instant case. The transactions in question, even if of putting the concerned properties under mortgage with the lenders, carry the ultimate effect of working towards the benefit and advantage of the borrower *i.e.*, JAL who obtained loans and finances by virtue of such transactions. It is true that there had not been any creditor-debtor relationship between the lender banks and corporate debtor JIL but that will not be decisive of the question of the ultimate beneficiary of these transactions. The mortgage deeds in question, entered by the corporate debtor JIL to secure the debts of JAL, obviously, amount to creation of security interest to the benefit of JAL. (Para 22.2.1)

- Now, the capacity of JAL is admittedly that of the holding company of JIL as its largest equity shareholder (with approximately 71.64 per cent shareholding). Moreover, JAL had admittedly been the operational creditor of JIL, for an amount of approximately Rs. 261.77 crores. JAL itself maintains that it had been providing financial, technical and strategic support to JIL in various ways. It is the assertion that apart from making investment in terms of equity shareholding to the tune of Rs. 995 crores, JAL had pledged its 70,83,56,087 equity shares held in JIL in favour of the lenders of JIL; had also entered into Promoter Support Agreement to the lenders of JIL to meet the DSRA obligation of JIL towards its lenders; and had further extended Bank Guarantees of Rs. 212 crores to meet the DSRA obligation of JIL. These assertions, put JAL in such capacity that it is a related party to JIL and is a creditor as also surety of JIL. In other words, the corporate debtor JIL owed antecedent financial debts as also operational debts and other liabilities towards JAL. (Para 22.2.2)

- In the scenario taken into comprehension there is nothing to doubt that corporate debtor JIL has given a preference by way of mortgage transactions in question for benefit of its related person JAL (who has been the creditor as also surety for JIL) for and on account of antecedent financial debts, operational debts and other liabilities owed to such related person. In the given fact situation, it is plain and clear that the transactions in question meet with all requirements of clause (*a*) of sub-section (2) of section 43. (Para 22.3)

- In the given scenario, the requirements of clause (*b*) of sub-section (2) of section 43 are also met fair and square. On behalf of the respondents, emphasis is laid on the fact that in the distribution waterfall in case of liquidation (per section 53), JAL, as an operational creditor, stands much lower in priority than the other creditors and stakeholders. Such submissions, only strengthen the position that by way of the impugned transfers, JAL is put in a much beneficial position than it would have been in the absence of such transfers. It has rightly been contended on behalf of the appellants that with the transactions in question, JAL has been put in an advantageous position *vis-à-vis* other creditors on the counts that: a) JAL received a huge working capital (approx. Rupees 30000 crores), by way of loans and facilities extended to it by the respondent-lenders; and b) by way of the transactions in question, JAL's liability towards its own creditors shall be reduced, in so far as the value of the mortgaged properties is concerned, which is said to be approximately Rs. 6000 crores. As a necessary corollary of the beneficial and advantageous position of the related party JAL with creation of such security interest over the properties of JIL, in the eventuality of distribution of assets under section 53, the other creditors and stakeholders of JIL shall have to bear the brunt of the corresponding disadvantage because such heavily encumbered assets will not form the part of available estate of the corporate debtor. Obviously, JAL stands dearly benefited and has derived such benefits at the cost, and in exclusion, of the other creditors and stakeholders of the corporate debtor JIL. The applicability of clauses (*a*) and (*b*) of sub-section (2) of section 43 is clear and complete in relation to the impugned six transactions. (Para 22.4)

- Therefore, in relation to the instant case, the answers to questions (*i*), (*ii*) and (*iii*) are that: the impugned transactions had been of transfers for the benefit of JAL, who is a related party of the corporate debtor JIL and is its creditor and surety by virtue of antecedent operational debts as also other facilities extended by it; and impugned transactions have the effect of putting JAL in a beneficial position than it would have been in the event of distribution of assets being made in accordance with section 53. Thus, the corporate debtor JIL has given a preference in the manner laid down in sub-section (2) of section 43. (Para 22.5)

The requirements of sub-section (4) of section 43 IBC - related party and look-back period

- Even when all the requirements of sub-section (2) of section 43 are satisfied, in order to fall within the mischief sought to be remedied by section 43, the questioned preference ought to have been given at a relevant time. In other words, for a preference to become an avoidable one, it ought to have been given within the period specified in sub-section (4) of section 43. The extent of 'relevant time' is different with reference to the relationship of the beneficiary with the corporate debtor inasmuch as, for the persons falling within the expression 'related party' within the meaning of section 5(24) of the code, such period is of two years before the insolvency commencement date whereas it is one year in relation to the person other than a related party. (Para 23)

- The scheme of IBC is to disapprove and disregard such preferential transaction which falls within the ambit of section 43 and to ensure that any property likely to have been lost due to such transaction is brought back to the corporate debtor; and if any encumbrance is created, to remove such encumbrance so as to bring the corporate debtor back on its wheels or in other event (of liquidation), to ensure *pro rata*, equitable and just distribution of its assets. Such provisions as contained in sections 43 and 44 came into operation as the comprehensive scheme of corporate insolvency resolution and liquidation from the date of being made effective; and merely because look-back period is envisaged, for the purpose of finding 'relevant time', it cannot be said that the provision itself is retrospective in operation.

- The fraudulent preferences in the affairs of corporate persons had been dealt with by the legislature in the Companies Act, 1956 and have also been dealt with in the Act of 2013. Though therein, essentially, the fraudulent preferences and transfers not in good faith are dealt with whereas, in the scheme of IBC, separate provisions are made as regards the transactions intended at defrauding the creditors (section 49 IBC) as also for fraudulent trading or wrongful trading (section 66 IBC). The provisions contained in section 43, however, indicate the intention of legislature that when a preference is given at a relevant time and thereby, the beneficiary of preference acquires unwarranted better position in the event of distribution of assets, the same may not be countenanced. Looking to the scheme of IBC and the principles applicable for the conduct of the affairs of a corporate person, it cannot be said that anything of a new liability has been imposed or a new right has been created. Maximisation of value of assets of corporate persons and balancing the interests of all the stakeholders being the objectives of the Code, the provisions therein need to be given fuller effect in conformity with the intention of the legislature. (Para 23.1.1)

- If the contentions urged on behalf of the respondents were to be accepted, the result would be of postponing the effective date of operation of sub-section (4) of section 43 by two years in the case of related party and to one year in the case of unrelated party, and thereby, effectively postponing the application of entire section 43 for a period of two years! That cannot be and had never been the intention of legislature. It is also noteworthy that by virtue of proviso to sub-section (3) of section 1, different dates can be provided for enforcement of different provisions of the Code; and in fact, different provisions have been brought into effect on different dates. However, after coming into force of the provisions, if a look-back period is provided for the purpose of any particular enquiry, it cannot be said that the operation of the provision itself would remain in hibernation until such look-back period from the date of commencement of the provision comes to an end. There is nothing in the Code to indicate that any provision in Chapter II or Chapter III be taken out and put in operation at a later date than the date notified. Such contentions being totally devoid of substance, deserve to be, and are, rejected. (Para 23.1.2)

- As noticed, the preference is given to JAL who is a related party of JIL. Hence, the look-back period is two years preceding insolvency commencement date *i.e.*, 9-8-2017 per clause (*a*) of sub-section (4) of section 43; and accordingly, the point of enquiry would be as to whether the preference had been given during the period of two years preceding 9-8-2017. Therefore, the transactions commencing from 10-8-2015 until the date of insolvency commencement shall fall under the scanner. As noticed, it has been one of the major contentions of the respondents that most of the impugned transactions were not of creation of any new encumbrance by JIL and in fact, most of the properties in question had already been under mortgage with the respective lenders much before the period under consideration *i.e.*, much before 10-8-2015. (Para 24)

- It may at once be noticed that the transaction that was clearly falling beyond the period under consideration was, in fact, kept out of the purview of section 43 by NCLT itself, being that relating to Property No. 7. (Para 24.1)

- So far as the transaction relating to Property No. 6 is concerned, being the mortgage deed dated 4-3-2016, towards Short-Term Loan Facility to JAL of Rs. 1000 crores by State Bank of India, the same obviously falls within the look-back period. Even if JAL had allegedly entered into the facility agreement with this lender bank on 26-3-2015, this date is hardly of any bearing so far as transaction by the corporate debtor JIL is concerned, which was made only on 4-3-2016. (Para 24.2)

- In relation to the transactions concerning Property No. 1 and Property No. 2, for securing loans by the Consortium to JAL, it is submitted that there had been initial mortgage dated 24-2-2015 that was released on 15-9-2015 and a so-called re-mortgage was made on 15-9-2015 and thereafter, this was also released on 29-12-2016 and again the so-called re-mortgage was made on 29-12-2016. It is sought to be asserted that it had not been a case of creation of a fresh mortgage. Similarly, in relation to the transactions concerning Property No. 3, it is alleged that there had been initial mortgage dated 12-5-2014 for 433.35 acres of land of which, 240 acres was released on 30-12-2015, 35.05 acres was released on 24-6-2016 and the remaining 158.1739 acres of land was also released on 7-3-2017 but was remortgaged on this very date 7-3-2017. As regards Property No. 4, it is alleged that the same was put under mortgage initially on 12-5-2014, was released on 7-3-2017 and was re-mortgaged on this very date 7-3-2017. As regards Property No. 5, it is alleged that the same was put under mortgage initially on 24-6-2009, the mortgage was extended on 27-11-2012 and on 23-3-2013; it was released on 4-11-2015 and was re-mortgaged on 24-5.2016. (Para 24.3)

- It has been one of the major contentions of the respondents that most of the impugned transactions were not of creation of any new encumbrance by JIL and in fact, most of the properties in question had already been under mortgage with the respective lenders. The submissions of respondents in relation to the aforesaid five transactions, that they had been of so-called remortgage/s, carry their own shortcomings and cannot be accepted. In the first place, it is opined that on release by the mortgagee, the mortgage ceases to exist and it is difficult to countenance the concept of a so-called re-mortgage. The so-called re-mortgage, on all its legal effects and connotations, could only be regarded as a fresh mortgage; and it obviously befalls on the mortgagor to consider at the time of creating any fresh mortgage as whether such a transaction is expedient and whether it should be entered into at all. Noticeable it is that in relation to Property Nos. 1 and 2, even if the initial mortgage had been dated 24-2-2015 falling beyond the look-back period, it was released on 15-9-2015 and this date (15-9-2015) falls within the look-back period. Even if the same property has been again mortgaged with the same lender/s on the same day of release, the same cannot be countenanced for the transaction operates towards extending unwarranted preference to JAL by the corporate debtor JIL. Significant it is to notice that while making this mortgage dated 15-9-2015, the facility amount being obtained by JAL got swelled from Rs. 3250 crores to a whopping Rs. 24109 crores and the number of creditors went up from 2 to 24. Such a transaction had only been of a fresh mortgage to secure extra facilities obtained by JAL and thereby, extending unwarranted advantage to JAL at the cost of the estate of JIL. In the other transaction dated 29-1-.2016, by which the properties in question were again put under mortgage with the lender/s, the facility amount was shown as Rs. 23491 crores. The transactions on 15-9-2015 and 29-12-2016 cannot be given credence with reference to the previous mortgage deed dated 24-2-2015. Similar is the case in relation to Property No. 3. Even when the previous mortgage was given on 12-5-2014 *i.e.*, beyond the look-back period, there had been release deeds on 30-12-2015 and 26-6-2016 as regards certain parcels of land. So far the release of land to JIL is concerned, the same causes no problem and only works to the benefit of JIL and its stakeholders. However, when the remaining land was also released on 7-3-2017, its fresh mortgage, even if on the same date, cannot be countenanced and is hit by section 43, being a deemed preference. The very same considerations apply in relation to the Property No. 4 too. As regards Property No. 5, even if there had been certain previous mortgage transactions falling beyond the look-back period, the property got released on 4-11-2015; and thereafter, the fresh mortgage on 24-5-2016, with increased facility amount from Rs. 1470 crores to Rs. 1767 crores, suffers from the same vice, of being a deemed preference to a related party during the period of two years preceding the insolvency commencement date. (Para 24.3)

- For what has been discussed, the conclusion is inevitable that the impugned preference was given to a related party during a relevant time. (Para 24.4)

- The transactions in question had been of deemed preference to related party JAL by the corporate debtor JIL during the look-back period of two years and have rightly been held covered within the period envisaged by sub-section (4) of section 43. (Para 24.5)

Ordinary course of business or financial affairs

- Even when it is held that the impugned transactions answer to the requirements of sub-section (2) of section 43 and fall within the period specified in sub-section (4) thereof, the question still remains as to whether the impugned transactions do or do not fall within the exclusion provided by sub-section (3) of section 43. Two types of transfers, as specified in clauses (a) and (b) of sub-section (3) of section 43, are not to be treated as preference for the purpose of sub-section (2). It has been the mainstay of respondent-lenders that, in any case, the transfers in question were made in the ordinary course of their business and hence, fall within clause (a) of section 43(3) that excludes the transfer made in the ordinary course of business or financial affairs of the corporate debtor or the transferee. It has been forcefully argued that the lenders of JAL are the transferees in the transactions in question and their ordinary course of business being of providing financial support with loans and advances, such transfers are not included in sub-section (2) of section 43 by virtue of the exclusion provided in sub-section (3) thereof. On the other hand, the main plank of submissions on behalf of the appellants has been that the expression “or” occurring in clause (a) of sub-section (3) of section 43, seemingly disjunctive of corporate debtor on one hand and transferee on the other, is required to be read as "and" so as to be conjunctive and covering only the transfers made in the ordinary course of business or financial affairs of the corporate debtor and the transferee. It is submitted on behalf of the appellants that such mortgage transactions had neither been in the ordinary course of business or financial affairs of the corporate debtor JIL nor secure new value in the property acquired by the corporate debtor and, hence, are not excepted transactions within the meaning of sub-section (3) of section 43. (Para 25)

- Having taken into comprehension the scheme of the Code and the purpose and purport of the provisions contained in section 43, there is force and substance in the submissions made on behalf of the appellants. (Para 25.1)

- As noticed, in the scheme of such provisions in the Code, the underlying concept is to disregard and practically annul such transactions which appear, in the course of insolvency resolution or liquidation, to be preferential so as to minimise the potential loss to other stakeholders in the affairs of the corporate debtor, particularly its creditors. What is to be examined for the purpose of section 43 is the conduct and affairs of the corporate debtor. If the beneficiary of the transaction in question is a related party of the corporate debtor, the period of enquiry is enlarged to two years whereas this period is one year in other cases. During such scanning, by virtue of sub-section (3) of section 43, two types of transfers are kept out of the purview of sub-section (2), which would not be treated as preference. Though in the instant case, are is concerned only with the phraseology occurring in clause (a) of sub-section (3) but, one may usefully refer to clause (b) thereof, for an insight into the underlying concept for providing exception in regard to certain transfers and keeping them out of the purview of 'preference'. (Para 25.1)

- By virtue of clause (b) of sub-section (3) (read with Explanation thereto), any transfer creating a security interest in the property 'acquired' by the corporate debtor is not to be treated as preference to the extent that such security interest secures new value in monetary terms or in terms of goods, services or new credit or in release of a previously transferred property. Any micro dissection of clause (b) of sub-section (3) of section 43 is not required in the instant case. Suffice it to notice that even a bare look at the provision brings forth the concept that value enhancement or strengthening of the corporate debtor ought to be the result of a transfer, if it is to remain out of the ambit of sub-section (2) and not to fall within the mischief of being preferential. (Para 25.2.1)

- Another feature of vital importance is that the matter is examined with reference to the dealing and conduct of the corporate debtor; and qua the health and prospects of the corporate debtor. Applying the well-known principles of noscitur a sociis, where under the questionable meaning of a doubtful word could be derived and understood from its associates and context; and usefully recapping that the scheme of section 43 is essentially of scanning through the affairs of the corporate debtor and to discredit and disregard such transaction by the corporate debtor which tends to give unwarranted benefit to one of its creditor/surety/guarantor over others, the purport of clause (*a*) of sub-section (3) of section 43 is also principally directed towards the corporate debtor's dealings. In other words, the whole of conspectus of sub-section (3) is that only if any transfer is found to have been made by the corporate debtor, either in the ordinary course of its business or financial affairs or in the process of acquiring any enhancement in its value or worth, that might be considered as having been done without any tinge of favour to any person in preference to others and thus, might stand excluded from the purview of being preferential, subject to fulfilment of other requirements of sub-section (3) of section 43. (Para 25.22.)

- Needless to reiterate that if the transfer is examined with reference to the ordinary course of business or financial affairs of the transferee alone, it may conveniently get excluded from the rigour of sub-section (2) of section 43, even if not standing within the scope of ordinary course of business or financial affairs of the corporate debtor. Such had never been the scheme of the Code nor the intent of section 43 thereof. It has rightly been contended on behalf of the appellants that for the purpose of exception under clause (*a*) of sub-section (3) of section 43, the intent of legislature is required to be kept in view. If the ordinary course of business or financial affairs of the transferee (lenders of JAL in the instant case) would itself be decisive for exclusion, almost every transfer made to the transferees like the lender-banks/financial institutions would be taken out of the net, which would practically result in frustrating the provision itself. (Para 25.3)

- It remains trite that an interpretation that defeats the scheme, intent and object of the statutory provision is to be eschewed and for that matter, if necessary, by applying the principles of purposive interpretation rather than literal. (Para 25.4)

- Looking to the scheme and intent of the provisions in question and applying the principles aforesaid, the submissions made on behalf of the appellants that the said contents of clause (*a*) of sub-section (3) of section 43 call for purposive interpretation so as to ensure that the provision operates in sync with the intention of legislature and achieves the avowed objectives are to be accepted. Therefore, the expression "or", appearing as disjunctive between the expressions "corporate debtor" and "transferee", ought to be read as "and"; so as to be conjunctive of the two expressions *i.e.*, "corporate debtor" and "transferee". Thus read, clause (*a*) of sub-section (3) of section

43 shall mean that, for the purposes of sub-section (2), a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the corporate debtor and the transferee. Only by way of such reading of "or" as "and", it could be ensured that the principal focus of the enquiry on dealings and affairs of the corporate debtor is not distracted and remains on its trajectory, so as to reach to the final answer of the core question as to whether corporate debtor has done anything which falls foul of its corporate responsibilities. (Para 25.5)

- The result of discussion is that the transfers in question could be considered outside the purview of sub-section (2) of section 43 only if it could be shown that same were made in the 'ordinary course of business or financial affairs' of the corporate debtor JIL and the transferees. Even if transferees submit that such transfers had been in the ordinary course of their business, the question would still remain if the transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL so as to fall within the exception provided by clause (*a*) of sub-section (3) of section 43. (Para 25.6)

- Thus, the enquiry now boils down to the question as to whether the impugned transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL. It remains trite that an activity could be regarded as 'business' if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive. (Para 25.6.1)

- Taking up the transactions in question, it is opined that even when furnishing a security may be one of normal business practices, it would become a part of 'ordinary course of business' of a particular corporate entity only if it falls in place as part of 'the undistinguished common flow of business done'; and is not arising out of 'any special or particular situation'. Though one may assume that the transactions in question were entered in the ordinary course of business of bankers and financial institutions like the present respondents but on the given set of facts, there is not an *iota* of doubt that the impugned transactions do not fall within the ordinary course of business of the corporate debtor JIL. As noticed, the corporate debtor has been promoted as a special purpose vehicle by JAL for construction and operation of Yamuna Expressway and for development of the parcels of land along with the expressway for residential, commercial and other use. It is difficult to even surmise that the business of JIL, of ensuring execution of the works assigned to its holding company and for execution of housing/building projects, in its ordinary course, had inflated itself to the extent of routinely mortgaging its assets and/or inventories to secure the debts of its holding company. It had also not been the ordinary course of financial affairs of JIL that it would create encumbrances over its properties to secure the debts of its holding company. In other words, it is opined that the ordinary course of business or financial affairs of the corporate debtor JIL cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company; and that too at the cost of its own financial health. As noticed, JIL was already reeling under debts with its accounts with some of the lenders having been declared NPA; and it was also under heavy pressure to honour its commitment to the home buyers. In the given circumstances, it is to be held that the transfers in questions were not made in ordinary course of business or financial affairs of the corporate debtor JIL. (Para 25.6.2)

- The submissions that security was disclosed in the Annual Reports or that none of the creditors expressed dissent are of no effect because such disclosure or want of objection by creditors, by themselves, do not operate as estoppel against anybody nor would take the transaction out of the purview of the legal fiction predicated in section 43, if it is otherwise of a preference at a relevant time. Similarly, the distinction between 'NPA' and 'wilful default'; the submission that NPA could be regularized ; and further the submission that the mortgages were created before JIL was declared NPA, are hardly of any bearing on the question as to whether the impugned transactions had been in the ordinary course of business or financial affairs of JIL. The answer to this question could only be in the negative. That is to say that the impugned transactions had not been in the ordinary course of business or financial affairs of JIL. (Para 25.7)

- Therefore, the impugned transactions are not of excepted transfers in terms of sub-section (3) of section 43. (Para 25.8)

The concern expressed by lenders of JAL is legally untenable

- The argument of lenders, that holding the transactions in question as preferential would result in impacting large number of transactions undertaken by the bankers/financial institutions, of financing in the ordinary course of their business; and the consequences may be devastating and irreversible on the economy, has only been noted to be rejected. (Para 26)

- It needs hardly any emphasis that in the ordinary course of their business, when the bankers or financial institutions examine any proposal for loan or advance or akin facility, they are supposed to, and they indeed, take up the exercise commonly termed as 'due diligence' so as to study the viability of the proposed enterprise as also to ensure, *inter alia*, that the security against such loan/advance/facility is genuine and adequate; and would be available for enforcement at any point of time. Given the nature of transaction, the lenders must prefer a clean security to justify the transaction as being in the ordinary course of their business. In the same exercise, in the ordinary course of their business, if they are at all entering into a transaction whereby a third party security, including that of a subsidiary company, is to be taken as collateral, they are obliged to undertake further due diligence so as to ensure that such third party security is a prudent and viable one and is not likely to be hit by any law. In that sequence, they remain under obligation to assure themselves that such third party whose security is being taken, is not already indebted or in red and is not likely to fail in dealing with its own indebtedness. In the context of IBC, such requirement is moreover imperative on a bare look at the provisions contained in Part II thereof. Interesting it is to notice on the facts of the instant case that in fact, several of the respondent lenders are shown to be the direct creditors of JIL too, to the extent of the advances made to JIL. They and the co-respondents cannot plead ignorance about the actual state of affairs and financial position of JIL. Despite such knowledge, if they chose to take the business risk of accepting security from JIL and that too, for securing the loans/advances/ facilities made over to JAL, who was a directly related party of JIL for being its holding company, they themselves remain responsible for present legal consequences. (Para 26.1)

Summation: The transactions in question are hit by section 43 IBC

- Thus, the transactions in question are hit by section 43 and NCLT having rightly held so, had been justified in issuing necessary directions in terms of section 44 in relation to transactions concerning Property Nos. 1 to 6. NCLAT had not been right in interfering with well-considered and justified order passed by NCLT in this regard. (Para 27)

Search and commandeering of preference at a relevant time

- As per the charging parts of section 43 *i.e.*, sub-sections (4) and (2) thereof, a corporate debtor shall be deemed to have given preference at a relevant time if the twin requirements of clauses (*a*) and (*b*) of sub-section (2) coupled with the applicable requirements of either clause (*a*) or clause (*b*) of sub-section (4), as the case may be, are satisfied. However, even if the requirements of sub-sections (4) and (2) are satisfied, a transaction may not be regarded as an offending preference if it falls in either or both of the exceptions provided by sub-section (3) of section 43. (Para 28)
- Looking to the legal fictions created by section 43 and looking to the duties and responsibilities per section 25 for the purpose of application of section 43 in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows:

  1. In the first place, the resolution professional shall have to take two major but distinct steps. One shall be of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate

debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of 'related party' in terms of section 5(24) and another of the remaining persons.

2. In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to bifurcation of the identified transactions into two sub-sets: One concerning related party/parties and other concerning unrelated party/parties with each sub-set requiring different analysis. The sub-set concerning unrelated party/ parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.

3. Having, thus, obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find: (i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor; and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor. These steps shall lead to short listing of such transactions which carry the potential of being preferential.

4. In the next step, the said shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to clause (*a*) of sub-section (2) of section 43.

5. In yet further step, such of the scanned and scrutinised transactions that are found covered by clause (*a*) of sub-section (2) of section 43 shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per section 53. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it does not fall within the exclusion provided by sub-section (3) of section 43.

6. In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass

through another filtration to find if it does not answer to either of the clauses (*a*) and (*b*) of sub-section (3) of section 43.

7. After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he shall be required to apply to the Adjudicating Authority for necessary order/s in relation to the transaction/s that had passed through all the positive tests of sub-section (4) and sub-section (2) as also negative test of sub-section (3). (Para 28.1)

- On a motion made by the resolution professional after and in terms of the exercise aforesaid, the Adjudicating Authority, in its turn, shall have to examine if the referred transaction answers to all the descriptions noted above and shall then decide as to what order is required to be passed, for avoidance of the impugned transaction or otherwise. (Para 28.2)

- Looking to the legal fictions created by Section 43 and looking to the duties and responsibilities of the resolution professional and the Adjudicating Authority, ordinarily an adherence to the process illustrated above shall ensure reasonable clarity and less confusion; and would aid in optimum utilization of time in any insolvency resolution process. (Para 28.3)

Other aspects of the application made by IRP – allegations of transactions being undervalued and fraudulent

- Having found that the transactions in question cannot be countenanced, for being of preference during a relevant time to a related party; and having approved the order passed by NCLT in that regard, it is not considered necessary to deal with the other length of arguments advanced by the parties on the questions as to whether the transactions are undervalued and/or fraudulent too. (Para 29)

- It is noticed that in the instant case, the IRP moved one composite application purportedly under sections 43, 45 and 66 while alleging that the transactions in question were preferential as also undervalued and fraudulent. In the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per sections 45 and 46 and significantly, such application can also be made by the creditor under section 47. The consequences of undervaluation are contained in sections 48 and 49. Per section 49, if the undervalued transaction is referable to sub-section (2) of section 45, the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor. As the transactions in question are already held preferential and, hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by section 45/46/47 or section 66. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority. (Para 29.1)

- In the instant case, it is noticed that NCLT in its detailed and considered order essentially dealt with the features of the transaction in question being preferential at a relevant time but recorded combined findings on all these three aspects that the impugned transactions were preferential, undervalued and fraudulent. (Para 29.2)

ISSUE: WHETHER LENDERS OF JAL COULD BE CATEGORISED AS FINANCIAL CREDITORS OF JIL

Preliminary and background

- The discussion and conclusion on the first issue itself would have been the end of the matter because the transactions in question stand disapproved as being preferential. However, there remains another significant issue to be adjudicated which, though not adverted to by NCLAT, is indeed involved in these matters. (Para 30)
- The issue is as to whether the lenders of JAL could be categorized as financial creditors of JIL for the purpose of IBC? (Para 30.1)
- The issue aforesaid was raised before NCLT by two of the respondent banks namely, ICICI Bank Limited and Axis Bank Limited by way of separate applications under section 60(5) seeking to question the decision of IRP rejecting their claims to be recognized as financial creditors of the corporate debtor JIL on account of the securities provided by JIL for the facilities granted to JAL. The NCLT rejected the applications so filed, by way of its orders dated 9-5-2018 and 15-5-2018 respectively, while concluding that on the strength of the mortgages created by the corporate debtor JIL, as collateral security of the debts of its holding company JAL, the applicants cannot be treated as financial creditors of the corporate debtor JIL. (Para 31)
- The aforesaid orders dated 9-5-2018 and 15-5-2018 were questioned before NCLAT by the said lenders of JAL. These appeals formed part of the bunch of appeals decided by NCLAT by way of

the impugned common order dated 1-8-2019 and, as per the final result recorded therein, these two appeals also stand allowed. However, fact of the matter remains that nothing has been discussed by NCLAT in the impugned order dated 1-8-2019 as regards the subject-matter of these two appeals *i.e.,* as to whether the said lenders of JAL could be categorized as financial creditors of JIL or not; and the entire discussion in the impugned order and the final conclusion therein had only been in relation to the order dated 16-5-2018 that was passed by NCLT on the application for avoidance filed by IRP. (Para 31.1)

- The appellant IIFCL, apart from raising other contentions, has also questioned this aspect of the order impugned that the aforesaid two appeals, involving the issue as to whether the mortgagees of the corporate debtor could be taken as financial creditors, have been allowed by NCLAT without recording any findings and without any discussion in that regard. (Para 31.2)

- Though, ordinarily, such omission in the impugned order dated 1-8-2019 might have resulted in the matter being remitted to the Appellate Tribunal for appropriate consideration and finding but, as aforesaid, in the entire process, adherence to the time limit is also of significance; and in view of the fact that the respective parties have advanced elaborate submissions on the merits of the issue as to whether such lenders of JAL could be treated as financial creditors of the corporate debtor JIL and have invited the decision of the Court, it is deemed just, proper and expedient to finally decide the relevant questions in this regard. (Para 31.3)

- In view of the conclusion that is reached in relation to the principal issue, the transactions in question are denuded of their value and worth, per the force of the order by NCLT under section 44 of the court, which has been approved by the court. To be more specific, the security interests created by the corporate debtor JIL over the properties in question stand discharged in whole. Therefore, the respondent-lenders cannot claim any status as creditors of the corporate debtor JIL and there could arise no question of their making any claim to be treated as financial creditors as such. However, for its relevance, it is deemed appropriate to determine the issue as to whether the lenders of JAL, because of creation of the mortgages in question, could be treated as financial creditors of JIL, independent of the finding that the transactions in question are hit by section 43. (Para 31.4)

- The Adjudicating Authority, NCLT, in its order dated 9-5-2018 as passed on the application moved by ICICI Bank Limited, with reference to the nature of transaction in question, whereby JIL had extended collateral security towards the facility extended to its holding company JAL as also with reference to the definition and connotations of the expressions 'financial debt' and 'financial creditor' as occurring in IBC, essentially proceeded to find that in such a transaction, as regards the corporate debtor JIL, no consideration for time value for money was involved; and hence, the transaction in question did not qualify as 'financial debt' *qua* the corporate debtor JIL. (Para 33)

- While observing that in the scheme of the Code and CIRP Regulations thereunder, the claims are invited from the creditors of the corporate debtor *i.e.*, financial creditors, operational creditors and other creditors, and not from any person or creditors of the holding company of the corporate debtor; and while further observing that the resolution professional had righty observed that the mortgages in questions were not like guarantee or indemnity, NCLT observed that the basic ingredient of financial debt *i.e.*, 'debt alongwith interest disbursed against time value of money' was lacking in the impugned transactions. (Para 33.3)
- Accordingly, NCLT rejected the application of ICICI Bank Limited by way of its order dated 9-5-2018. (Para 33.4)
- Thereafter, the other application filed by Axis Bank Limited was rejected by NCLT on 15-5-2018, while following the earlier order dated 9-5-2018. (Para 33.4.1)
- The aforesaid orders dated 9-5-2018 and 15-5-2018 were questioned in two appeals before NCLAT by the said lenders of JAL; and the said appeals stand allowed in the impugned order dated 1-8-2019 without any discussion as regards the issue involved therein. A *prima facie* view was indicated by SC in the order dated 10-12-2019, that such lenders of JAL cannot be categorized as financial creditors of JIL and had stayed the operation of impugned order to that extent. (Para 34)

Unique position of financial creditor - as explained in Swiss Ribbons

- The gist of the matter is as to whether the subject transactions could be categorised as 'financial debts' within the meaning of section 5(8) so as to confer the status of 'financial creditors' upon the respondents, lenders of JAL. (Para 38)
- The expressions "financial creditor" and "financial debt" as occurring in the Code have come up for consideration before the Court in several decisions, including those in the above-mentioned cases of *Swiss Ribbons P. Ltd.* v *Union of India* (2019) 4 SCC 17 (decided on 25-1-2019), *Pioneer Urban Land and Infrastructure Ltd.* v *Union of India* (2019) 8 SCC 416 (decided on 9-8-2019) and *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) SCC Online SC 1478 (decided on 15-11-2019), which have been referred to and relied upon by the parties for one proposition or another. In fact, the observations as occurring in the last of the said decisions, in the case of Essar Steel, as relied upon by the learned counsel for the respondents, are based on those occurring in the decision in Swiss Ribbons. (Para 38.1)

- The law declared by this Court in the case of Swiss Ribbons, while rejecting the contentions that classification between financial creditor and operational creditor was discriminatory and violative of Article 14 of the constitution of India , shall have some bearing on the claim of the respondent-lenders for being treated as financial creditors of JIL. (Para 39)

- The unique position assigned to a 'financial creditor', who plays a crucial role in insolvency resolution process as against the role of other creditors, has been extensively explained by the Court in the case of Swiss Ribbons, albeit in the context of its differentiation with the category of 'operational creditor'. (Para 39.2)

- A financial creditor is conferred with a major, rather pivotal, role in the processes contemplated by Part II of the Code. It is the financial creditor who lends finance on a term loan or for working capital that enables the corporate debtor to set up and/ or operate its business; and who has specified repayment schedules with default consequences. The most important feature, as the Court has said, is that a financial creditor is, from the very beginning, involved in assessing the viability of the corporate debtor who can, and indeed, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress. Hence, a financial creditor is not only about *in terrorem* clauses for repayment of dues; it has the unique parental and nursing roles too. In short, the financial creditor is the one whose stakes are intrinsically inter-woven with the well-being of the corporate debtor. (Para 39.3)

- While defining 'financial creditor' and 'financial debt' in section 5(7) and section 5(8), both the expressions "means" and "includes" have been used. As per the definition, while "financial creditor" means a person to whom a "financial debt" is owed, it also includes a person to whom such debt has been legally assigned or transferred to. Obviously, a comprehension of this definition of "financial creditor" cannot be complete without taking into account as to what is the meaning assigned to the expression "financial debt". Again, the term "financial debt" has also been defined with the expressions "means" and "includes". A "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money; and it includes the money borrowed or raised or protected in any of the manners prescribed in sub-clauses (*a*) to (*i*) of section 5(8). (Para 40)

- The larger parts of the expressions employed in the definition of "financial debt" in sub-section (8) of section 5 with their connotations were explicated in Pioneer Urban by a three-Judge Bench of the Court. (Para 41)

- The Court, even while interpreting sub clause (*f*) of section 5(8) on the question as to whether an allottee under a real estate project could fall thereunder, analysed the gamut of the relevant expressions of 'disbursement', 'borrowing' and 'time value of money', being the root ingredients of 'financial debt' within the meaning of the Code. (Para 41.1.1)

- In Pioneer Urban (*supra*) the Court has not enunciated that the scope of the expression 'financial debt' be read as if to encompass any debt of whatsoever nature. Rather, a submission made therein, with reference to the decision in Krishi Utapadan Mandi Samiti v Shankar Industries1993 Suppl. (3) SCC 361, that 'and includes' part in a definition may lead to it being extensive, was rejected by the Court while holding that the said decision was not a good law. However, the other extreme of submissions, seeking restrictive interpretation with reference to 'means' part of the definition, was also not accepted and, in that context, the Court observed that the expression 'and includes' speaks of subject-matters which may not necessarily be reflected in the main part of the definition. Obviously, there could be several subject-matters which may not, as such, be found squarely manifested in the expressions employed in the 'means' part of a definition and could be reasonably found in the 'includes' part. However, it has not been laid down as a rule of statutory interpretation that the 'includes' part could stand alone, disjunct from and totally alien to the 'means' part. (Para 41.1.6)

The expressions "means and includes" in the definition clauses - effect

- Looking to the frame of the Code, where the significant expressions "financial creditor" and "financial debt" have been defined with the words "means" and "includes", one may further refer to the principles of construction of such a definition clause in a statute. Tersely put, the law remains settled that where a word is defined to 'mean' something, the definition is *prime facie* restrictive and exhaustive. On the other hand, where the word defined is declared to 'include' something more, the definition is prima facie extensive. However, a little difficulty arises when the definition contains both the words 'means' and 'includes'. (Para 42)

- As noticed, in the case of Pioneer Urban, a suggestion made on behalf of the respondents with reference to the decision in Krishi Utapadan Mandi Samiti (supra), that when the words 'means and includes' are used in a definition, they are to be given a wider meaning and are not exhaustive or restricted to the items contained therein, was not accepted by the Court; and the statement of law in Krishi Utapadan Mandi Samiti (supra) was held to be not that of good law for it ignored the earlier precedents of larger and coordinate Benches and was also out of sync with the later decisions on the same point. However, the other extreme of interpretation, as canvassed by the petitioners, that a financial debt could only be a debt which is disbursed against the consideration for the time value of money, and such requirement pervades all sub-clauses (*a*) to (*i*), was also not accepted as a matter of statutory interpretation by this Court while observing that the expression 'and includes' speaks of subject matters which may not necessarily be reflected in the main part of the definition. Thus, it is evident that the Court did not accept either of the extremities suggested by the parties in Pioneer Urban for interpretation and implication of the expressions 'means and includes' in a definition clause of the statute. Significantly, in Pioneer Urban, none of the extremities had any bearing on the conclusion because, eventually, the amendment in question was held to be only clarificatory in nature; and the Court held that the *Explanation* added to section 5(8)(*f*) by the Amendment Act did not enlarge the scope of the original section. (Para 42.1)

The essentials for financial debt and financial creditor

- For a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (*a*) to (*f*) of section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (*g*) and (*h*) of section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (*a*) to (*h*). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (*a*) to (*i*) of section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said sub clauses (*a*) to (*i*) of section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of section 5(8) of the code. This debt may be of any nature but a part 153 of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money. (Para 43)

- As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken. (Para 44)

- It is also evident that what is being dealt with and described in section 5(7) and in section 5(8) is the transaction *vis-à-vis* the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code. (Para 45)

- Expounding yet further, the peculiar elements of these expressions "financial creditor" and " financial debt", as occurring in sections 5(7) and 5(8), when visualised and compared with the generic expressions "creditor" and "debt" respectively, as occurring in section 3(10) and 3(11), the scheme of things envisaged by the Code becomes clearer. The generic term "creditor" is defined to mean any person to whom the debt is owed and then, it has also been made clear that it includes a 'financial creditor', a 'secured creditor', an 'unsecured creditor', an 'operational creditor', and a 'decree-holder'. Similarly, a "debt" means a liability or obligation in respect of a claim which is due from any person and this expression has also been given an extended meaning to include a 'financial debt' and an 'operational debt'. (Para 46)

- The use of the expression "means and includes" in these clauses, on the very same principles of interpretation makes it clear that for a person to become a creditor, there has to be a debt *i.e.*, a liability or obligation in respect of a claim which may be due from any person. A "secured creditor" in terms of section 3(30) means a creditor in whose favour a security interest is created; and "security interest", in terms of section 3(31), means a right, title or interest or claim of property created in favour of or provided for a secured creditor by a transaction which secures payment for the purpose of an obligation and it includes, amongst others, a mortgage. Thus, any mortgage created in favour of a creditor leads to a security interest being created and thereby, the creditor becomes a secured creditor. However, when all the defining clauses are read together and harmoniously, it is clear that the legislature has maintained a distinction amongst the expressions 'financial creditor', 'operational creditor', 'secured creditor' and 'unsecured creditor'. Every secured creditor would be a creditor; and every financial creditor would also be a creditor but every secured creditor may not be a financial creditor. As noticed, the expressions "financial debt" and "financial creditor", having their specific and distinct connotations and roles in insolvency and liquidation process of corporate persons, have only been defined in Part II whereas the expressions "secured creditor" and "security interest" are defined in Part I. (Para 46.1)

- A conjoint reading of the statutory provisions with the enunciation of the Court in Swiss Ribbons (supra), leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression 'financial creditor' is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor. (Para 47)

- Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus, understood, it is clear that if the former *i.e.*, a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution. (Para 47.1)

- Therefore, a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of 'financial creditors' as per the definitions contained in sub-sections (7) and (8) of section 5. Differently put, if a corporate debtor has given its property in mortgage to secure debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within definition of 'debt' under section 3(10). However, it would remain a debt alone and cannot partake character of a 'financial debt' within meaning of section 5(8). (Para 47.2)

The respondent mortgagees are not the financial creditors of corporate debtor JIL

- Indisputably, debts in question are in the form of third party security; said to have been given by corporate debtor JIL so as to secure loans/advances/facilities obtained by JAL from respondent-lenders. Such a 'debt' is not and cannot be a 'financial debt' within meaning of section 5(8); and hence, respondent-lenders, mortgagees, are not 'financial creditors' of corporate debtor JIL. (Para 48)
- On a contextual reading of the expositions in Essar Steel and Swiss Ribbons, it is but clear that the Court had examined the status of direct secured creditor of the corporate debtor and there had not been any occasion to examine the features related with an indirect secured creditor, who is neither involved in assessing the viability of the corporate debtor nor in lending finances to the corporate debtor for setting up the business. The prime, rather only, area of interest of such indirect secured creditor is in recovery of its debt and not in reorganization of the corporate debtor's business. Thus understood, it is absolutely clear that the class of secured creditors indicated by the Court in Essar Steel and Swiss Ribbons, as being subsumed in financial creditors, is only that of such secured creditors who are directly engaged in advancing credit to the corporate debtor and not the indirect creditors who had extended any loan or facility to a third party but had taken a security from the corporate debtor, whose resolution is under consideration. (Para 50.4)
- Hence, it is opined that the decisions in Swiss Ribbons and Essar Steel do not enure to the benefit of the respondents; rather on the principles enunciated therein, they only operate against the respondents. (Para 50.5)
- On the issue as to whether lenders of JAL could be treated as financial creditors, it is held that such lenders of JAL, on the strength of the mortgages in question, may fall in category of secured creditors, but such mortgages being neither towards any loan, facility or advance to corporate debtor nor towards protecting any facility or security of corporate debtor, it cannot be said that the corporate debtor owes them any 'financial debt' within meaning of section 5(8) and hence, such lenders of JAL do not fall in the category of the 'financial creditors' of corporate debtor JIL. (Para 54)

Conclusion

- Accordingly, these appeals are allowed to the extent and in the manner that:

  1) The impugned order dated 1-8-2019 as passed by NCLAT in the batch of appeals is reversed and is set aside.

  2) The appeals preferred before NCLAT against the order dated 16-5-2018, as passed by NCLT on the application filed by IRP, are dismissed; and consequently, the order dated 16-5-2018 so passed by NCLT is upheld in regard to the findings that the transactions in question are preferential within the meaning of section 43. The directions by NCLT for avoidance of such transactions are also upheld accordingly.

  3) The appeals preferred before NCLAT against the orders passed by NCLT dated 9-5-2018 and 15-5-2018 on the applications filed by the lender banks are also dismissed and the respective orders passed by NCLT are restored with the findings that the applicants are not the financial creditors of the corporate debtor JIL. (Para 55)

Case Review

Downs Distributing Co. (P.) Ltd. v. *Associated Blue Star Stores (P.) Ltd. (1948) 76 CLR 463 (Para 25.6.2); Swiss Ribbons (P.) Ltd.* v. *Union of India (2019) 4 SCC 17 (Para 39); Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India (2019) 8 SCC 416 (Para 41.1) and Essar Steel India Ltd.* v. *Satish Kumar Gupta (2019) SCC OnLine SC 1478 (Para 50.4)* followed.

Keshavlal Khemchand & Sons Pvt. Ltd. v. *Union of India (2015) 4 SCC 770 and State Bank of India* v. *Jah Developers Pvt. Ltd. (2019) 6 SCC 787 (Para 25.7) distinguished.*

SREI Infrastructure Finance Ltd. v. *Sterling International Enterprises Ltd. (M.A. No. 1584/2019 in CP No. 402 of 2018) (Para 53) disapproved.*

IDBI Bank Ltd. v. *Jaypee Infratech Ltd. (2018) 93 taxmann.com 308 (NCLT - Allahabad) and Central Bank of India* v. *Anuj Jain (2018) 96 taxmann.com 150 (NCLT - Allahabad) (Para 55) affirmed.*

Axis Bank Ltd. v. Anuj Jain (2019) 108 taxmann.com 13 (NCLAT)/(2019) 156 SCL 47 (NCLAT) (Para 55) set aside.

For Full Text of the Judgment see
[2020] 114 taxmann.com 656 (SC)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

G. Eswara Rao
v.
Stressed Assets Stabilisation Fund

S.J. MUKHOPADHAYA, CHAIRPERSON
BANSI LAL BHAT, JUDICIAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 1097 OF 2019[1*]
FEBRUARY 7, 2020

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Limitation period - Whether a decree passed by Debts Recovery Tribunal or any suit cannot shift forward date of default - Held, yes - Whether as filing of Balance Sheet/Annual Return being mandatory under section 92(4) of Companies Act, 2013, failing of which attracts penal action under section 92(5) & (6), Balance Sheet/ Annual Return of 'corporate debtor' cannot be treated to be an acknowledgement under section 18 of Limitation Act, 1963 - Held, yes - Corporate debtor availed loan from financial creditor during period 1994 to 1996 - In year 2004, account of corporate debtor was declared as NPA and case was filed before Debt Recovery Tribunal (DRT) - DRT passed a decree in favour of financial creditor on 17-8-2018 - Thereafter, financial creditor filed an application under section 7 before NCLT against corporate debtor - Whether in absence of any acknowledgement under section 18 of Limitation Act, 1963, date of default/NPA was prior to 2004 and thus, application under section 7 filed after year 2018 was barred by limitation - Held, yes (Paras 15 & 28)

FACTS

- The corporate debtor availed loan from financial creditors during period 1994 to 1996 and 2001. Since the corporate debtor defaulted in repayment of loan, account of the corporate debtor was declared as NPA in year 2004 and case was filed before Debt Recovery Tribunal.
- The Debt Recovery Tribunal passed a decree in favour of the financial creditor on 17-8-2018.
- Thereafter, the financial creditor filed an application under section 7 against the corporate debtor. The corporate debtor opposed the application on ground that same was barred by limitation.
- The Adjudicating Authority taking into consideration that the Debts Recovery

* Arising out of order of NCLT, Hyderabad dated 1-10-2019.

Tribunal (DRT) by order dated 17-8-2018 allowed the application of recovery of debt with pendent lite and future interest at the rate of 12 per cent per annum, held that the application was not barred by limitation.

On appeal:

HELD

- Section 92 of the Companies Act, 2013 mandates a company to prepare a return in the prescribed form as they stood on the close of the financial year regarding providing different details. (Para 14)
- As the filing of Balance Sheet/Annual Return being mandatory under section 92(4), failing of which attracts penal action under section 92(5) & (6), the Balance Sheet/Annual Return of the 'corporate debtor' cannot be treated to be an acknowledgement under section 18 of the Limitation Act, 1963. (Para 15)
- In the present case, the corporate debtor defaulted to pay prior to 2004, due to which an application was filed by respondent ('Financial Creditor') before the DRT. A Decree passed by the Debts Recovery Tribunal or any suit cannot shift forward the date of default. On the other hand, the judgment and decree passed by Debts Recovery Tribunal on 17-8-2018, only suggests that debt become due and payable. It does not shifting forward the date of default as decree has to be executed within a specified period. It is not that after passing of judgment or decree, the default takes place immediately, as recovery is permissible, all the debts in terms of judgment and decree dated 17-8-2018 with pendent lite and future interest at the rate of 12 per cent per annum could have been executed only through an execution case. (Para 24)
- By filing an application under section 7, a decree cannot be executed. In such case, it will be covered by section 65, which stipulates that the insolvency resolution process or liquidation proceedings, if filed, fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, attracts penal action. (Para 26)
- The Adjudicating Authority (National Company Law Tribunal) has failed to consider the aforesaid fact and wrongly held that the date of default took place when the judgment and decree was passed by Debts Recovery Tribunal on 17-8-2018. (Para 27)
- As noticed above, in absence of any acknowledgement under section 18 of the Limitation Act, 1963, the date of default/NPA was prior to 2004 and does not shift forward, therefore, the period of limitation for moving application under section 7 was for three years, if counted, to be completed in the year 2007. As date of passing of decree is not the date of default, the application under section 7 was barred by limitation, though the claim may not be barred. For the said reason, the impugned order of Adjudicating Authority was to be set aside and the

application under section 7 filed by the respondent ('Financial Creditor') was to be dismissed. (Para 28)

Ms. Aakriti Dhawan, Mayank Jain, Parmatma Singh and Madhur Jain Advs. for the Appellant.

Sidhartha Barua and Aditya Gupta Advs. for the Respondent.

For Full Text of the Judgment see
[2020] 116 taxmann.com 794 (NCLAT - NEW DELHI)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Maharashtra State Electricity Transmission Co. Ltd. (MSETCL)
v.
Sri City (P.) Ltd.

A.I.S. CHEEMA AND ANANT BIJAY SINGH, JUDICIAL MEMBER
KANTHI NARAHARI, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 1401 OF 2019*
FEBRUARY 3, 2020

Section 30, read with section 238, of the Insolvency and Bankruptcy Code, 2016 - Resolution plan - Submission of - Appellant had entered into a bulk power transmission agreement (BPTA) with corporate debtor for allocation of certain transmission capacity rights through transmission network of appellant for a period of 25 years - Subsequently, CIRP was initiated against corporate debtor - In resolution plan, long term BPTA between appellant and corporate debtor was terminated - Whether in view of provisions of section 238, termination of BPTA with appellant was proper - Held, yes (Para 5)

FACTS

- The appellant had entered into a Bulk Power Transmission Agreement (BPTA) with the corporate debtor, Sai Wardha Power Generation Ltd. for allocation of 135.15 MW of transmission capacity rights through the transmission network of the appellant for a period of 25 years.
- When the CIRP proceeding was initiated against the corporate debtor at the instance of a company, the appellant had filed claim with the Resolution Professional.
- The case of the appellant was that in the Resolution Plan, there was arbitrary termination of the long term BPTA between the appellant and corporate debtor. According to the appellant, in view of section 81 of the Electricity Act, 2003, the agreement could have been terminated only by the parties between themselves or by moving Electricity Regulator.

On appeal:

HELD

- Keeping in view the judgment in the matter of Committee of Creditors of *Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) and provisions of section 238 of

* **Arising out of order of NCLT in Indian Opportunities III Pte. Ltd. & Vista ITCL (India) Ltd. v. Sai Wardha Power Generation Ltd. [2019] 111 taxmann.com 421 (NCLT - Hyd.)**

IBC, the Resolution Plan, which has been accepted cannot be found fault where CoC in its wisdom accepted the plan which terminated the long time agreement. The plan made provision that the Bulk Power Transmission Agreement with the appellant shall be terminated without any obligation, liabilities or penalties, to or on the corporate debtor or the Resolution Applicant. There is no fault on this count. (Para 5)

Case Review

Indian Opportunities III Pte. Ltd. & Vista ITCL (India) Ltd. v. Sai Wardha Power Generation Ltd. (2019) 111 taxmann.com 421 (NCLT - Hyd.) (Para 5) affirmed.

Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta (2019) 111 taxmann.com 234 (SC) (Para 5) followed.

Sudhanshu S. Choudhari, Yogesh S. Kolte and Mahesh P. Swnde Advs. for the Appellant.

S. Ranganathan, Rohit Rajershi, Manish Jha and Ms. Vishrutyi Sahni Advs. for the Respondent.

For Full Text of the Judgment see
[2020] 116 taxmann.com 795 (NCLAT - NEW DELHI)

Practical Questions

Q. 1 Can the CIRP be initiated in respect of a government company ?

Ans. Yes, the CIR process can be initiated against a government company by virtue of it being covered under the definition of "Corporate Person" u/s 3(7)

(SC decision dt. 27th November 2019 passed in the matter of *Hindustan Construction Company Ltd. v. UOI (2019) 111 taxmann.com 468/(2020) 158 SCL 7*)

Q. 2 In case where no fund is created by the CD in violation of Payment of Gratuity Act, 1972, can the liquidator be directed by the AA to make payment of gratuity to employees ?

Ans. No, in such a case the liquidator cannot be directed to make such payment to employees.

(NCLAT decision dt. 11th February 2020 passed in the matter of *Savan Godiwala v Apalla Siva Kumar (2020) 116 taxmann.com 750*)

Q. 3 If in a case the CD writes a letter to its Creditor requesting to send his claim for verification and payment, will such a letter amount of *acknowledgement* **for the purposes of extension of limitation period?**

Ans. Yes, the said act of the CD shall amount to *acknowledgement* and shall cause extension of limitation period.

(NCLAT judgment dt. 7th November 2017 passed in the matter of *Speculum Plast (P.). Ltd. v. PTC Techno (P.) Ltd. (2017) 88 taxmann.com 83*)

Q. 4 Can a shareholder agitate his dispute against the other shareholder by way of intervening in the CIRP proceedings initiated u/s 7, IBC?

Ans. No.

(NCLAT judgment dt. 17th February 2020 passed in the matter of *Laxmi Ventures (I) Ltd. v. State Bank of India (2020) 116 taxmann.com 749*)

Q.5. Can the Directorate of Enforcement also discharge the function of deciding if a Resolution Applicant is ineligible being related party u/s 29A, IBC?

Ans. No, such function is conferred upon the RP, CoC and the AA.

(NCLAT judgment dt. 17th February 2020 passed in the matter of *JSW Steel Ltd. v. Mahender Kumar Khandelwal (2020) 114 taxmann.com 428*)

Q.6. Is a CIRP application maintainable in respect of a CD whose name has been struck-off from the register of Registrar of Companies?

Ans. Yes.

(NCLAT judgment dt. 05th September 2019 passed in the matter of *Hemang Phophalia v. Greater Bombay Co-operative Bank Ltd. (2019) 111 taxmann.com 108/156 SCL 626*)

Q.7. If, during the proceedings u/s 230, IBC, an objection is raised, can the NCLT exercise power to overrule such an objection if it entertains a view that such arrangement and scheme is beneficial for the CD?

Ans. Yes.

(NCLAT judgment dt. 27th February 2019 passed in the matter of Y. Shivram Prasad v. S. Dhannpal (2019) 104 taxmann.com 377/153 SCL 294)

Q.8. Can a plea be maintained against maintainability of a section 7 application asking the AA to consider if or not a resolution would be possible w.r.t. the CD or whether or not it would be possible to keep the CD as a going concern?

Ans. No, such a plea can not be maintained.

(NCLAT judgment dt. 6th September 2019 passed in the matter of *Vineet Khosla Shareholders and (ex) Director Margra Industries Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd. (2019) 110 taxmann.com 217)*

Q.9. Can an application filed u/s 10, IBC be rejected on the ground that the Corporate Debtor is earning sufficient income?

Ans. Yes

(NCLAT decision dt. 15th May 2019 passed in the matter of *Vyomit Shares Stock & Investments (P) Ltd.* v. *SEBI (2019) 107 taxmann.com 155/154 SCL 441*)

Q.10. Can a statement in the balance sheet of the CD (duly signed by the directors) be held to be an acknowledgement of the debt u/s 18, Limitation Act, 1963?

Ans. Yes

(NCLAT decision dt. 25th February 2020 passed in the matter of *Gautam Sinha* v. *UV Asset Reconstruction Co. Ltd. (2020) 116 taxmann.com 748*).

Learning Curves

• HC out not to have proceeded with the auction of property of the CD, once the proceedings under IBC had commenced, and an order declaring moratorium was passed by the NCLT

(*Anand Rao Korada Resolution Professional v. Varsha Fabrics (P) Ltd.* (2019) 111 taxmann.com 474/(2020) 157 SCL 350)

• The period of Limitation is to be counted from the date of default/ NPA. However, the date of default stands forwarded, if the Borrower acknowledges the debt and agrees to pay on a future date in terms of section 18 of Limitation Act.

(*Anubhav Anilkumar Agarwal v. Bank of India* (2020) 116 taxmann.com 793)

• Fault cannot be found in an approved Resolution Plan, where CoC in its wisdom accepted its plan which allows Resolution Applicant to take over with a clean stale and not be forced to continue with any long term arrangement of the CD.

(*Maharashtra State Electricity Transmission Co. Ltd. v. Sri City (P) Ltd. (2020) 116 taxmann.com 795*)

• Decree passed by DRT only suggests that debt becomes due and payable. It does not shift forward the date of default as decree has to be executed within a specified period.

(*G Eswara Rao v. Stressed Assets Stabilisation Fund (2020) 116 taxmann.com 794*).

• The retention bill which is a part of the main bill, comes under the definition of operational debt.

(*Aashish Mohan Gupta v. Hind Inn and Hotels Ltd. (2020) 116 taxmann.com 792*).

CORRIGENDUM TO NOTIFICATION NO. IBBI/2019-20/GN/REG055, DATED 12-2-2020

CORRIGENDUM NO. IBBI/2019-20/GN/REG/055(1) (ADVT-III/4/EXTY/459/19), DATED 14-2-2020

In the notification of the Insolvency and Bankruptcy Board of India published *vide* No. IBBI/2019- 20/GN/REG055 dated 12th February, 2020, in the Gazette of India, Extraordinary, Part III, Section 4, No. 58 dated 12th February, 2020, in serial number 2, for the *Example*, read:

"*Example:* A Form is required to be filed by 29th April, 2020. It shall be filed along with fee as under:

If filed on	*Fee (in Rupees)*
28th April, 2020	0
29th April, 2020	0
30th April, 2020	500
Any day in May, 2020	1000
Any day in June, 2020	1500"

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (AMENDMENT) REGULATIONS, 2020 - AMENDMENT IN REGULATION 40B

NOTIFICATION NO. IBBI/2019-20/GN/REG055, DATED 12-2-2020 AS CORRECTED BY CORRIGENDUM NO. IBBI/2019-20/GN/REG055(1), DATED 14-2-2020

In exercise of the powers conferred by clause (*t*) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely:—

(1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2020.

(2) They shall come into force on the date of their publication in the Official Gazette.

In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, in regulation 40B, for sub-regulation (4), the following sub-regulation shall be substituted, namely: —

"(4) The filing of a Form under this regulation after due date of submission, whether by correction, updation or otherwise, shall be accompanied by a fee of five hundred rupees per Form for each calendar month of delay after 1st April, 2020.

(Example: *A Form is required to be filed by 30th April, 2020. It shall be filed along with fee as under:*

If filed on	*Fee (in Rupees)*
29th April, 2020	0
30th April, 2020	0
1st May, 2020	500
Any day in May, 2020	1000
Any day in June, 2020	*1500*

GUIDELINES FOR APPOINTMENT OF INSOLVENCY PROFESSIONALS AS ADMINISTRATORS UNDER THE SECURITIES AND EXCHANGE BOARD OF INDIA (APPOINTMENT OF ADMINISTRATOR AND PROCEDURE FOR REFUNDING TO THE INVESTORS) REGULATIONS, 2018

PRESS RELEASE, DATED 27-2-2020

The Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018, (Regulations) provide for appointment of Insolvency Professionals (IPs) as Administrators for the purposes specified therein. A copy of the said Regulations is at Annexure A. These Guidelines have been prepared in consultation with SEBI to facilitate appointment of IPs as Administrators.

Guidelines

2. The IBBI and the SEBI have mutually agreed upon to use a Panel of IPs for appointment as Administrators for effective implementation of the Regulations. The IBBI shall prepare a Panel of IPs keeping in view the requirements of SEBI and the Regulations and the SEBI shall appoint the IPs from the Panel as Administrators, as per its requirement in accordance with the Regulations. A Panel shall be valid for six months and a new Panel will replace the earlier Panel every six months. For example, the first panel under these Guidelines will be valid for appointments during April - September, 2020, the next panel will be valid for appointments during October- March, 2021, and so on.

3. An IP will be eligible to be included in the Panel of the IPs if-

(*a*) there is no disciplinary proceeding, whether initiated by the IBBI or the IPA of which he is a member, pending against him;

(*b*) he has not been convicted at any time in the last three years by a court of competent jurisdiction;

(*c*) he expresses his interest to be included in the Panel for the relevant period; and

(*d*) he undertakes to discharge the responsibility as an Administrator, as and when he may be appointed by the SEBI.

(*e*) he has made the compliance under Regulation 7(2) (ca) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 for the year 2018-19.

(*f*) he holds an Authorisation for Assignment (AFA), which is valid on the date of expression of interest and remains valid till the validity of panel. For example, the IP included in the panel for the period April-September 2020, should have AFA which is valid till 30th September, 2020.

4. The Panel shall have Zone wise list of IPs. An IP will be included in the Panel against the Zone where his registered office (address as registered with the IBBI) is located. For example, an IP located in the city of Surat (Gujarat) will be included in Ahmedabad Zone, which covers the State of Gujarat. The areas covered in different Zones are as under:

Zone	Area covered	
New Delhi	1	Union territory of Delhi
Ahmedabad	1	State of Gujarat
	2	State of Madhya Pradesh
	3	Union territory of Dadra and Nagar Haveli
	4	Union territory of Daman and Diu
Allahabad	1	State of Uttar Pradesh
	2	State of Uttarakhand
Amravati	1	State of Andhra Pradesh
Bengaluru	1	State of Karnataka
Chandigarh	1	State of Himachal Pradesh
	2	State of Punjab
	3	State of Haryana
	4	Union territory of Chandigarh

POLICY UPDATE

Zone	Area covered	
	5	Union territory of Jammu and Kashmir
	6	Union territory of Ladakh
Cuttack	1	State of Chhattisgarh
	2	State of Odisha
Chennai	1	State of Tamil Nadu
	2	Union territory of Puducherry
Guwahati	1	State of Arunachal Pradesh
	2	State of Assam
	3	State of Manipur
	4	State of Mizoram
	5	State of Meghalaya
	6	State of Nagaland
	7	State of Sikkim
	8	State of Tripura
Hyderabad	1	State of Telangana
Jaipur	1	State of Rajasthan
Kochi	1	State of Kerala
	2	Union territory of Lakshadweep
Kolkata	1	State of Bihar
	2	State of Jharkhand
	3	State of West Bengal
	4	Union territory of Andaman and Nicobar Islands
Mumbai	1	State of Goa
	2	State of Maharashtra

Expression of Interest

5. The IBBI shall invite expression of interest from IPs in Form A to act as Administrator by sending an e-mail to IPs at their email addresses registered with it and hosting the guidelines on its website. The expression of interest must be received by the IBBI in Form A by the specified date. For example, the IBBI shall invite expression of interest by 7th March 2020 from IPs for inclusion in the Panel for April - September, 2020. The interested IPs shall express their interest by 15th March 2020. The IBBI will send the Panel to SEBI by 25th March 2020. This process will be repeated every six months.

6. It must be explicitly understood that an IP, who is included in the Panel based on his expression of interest, must not:

(*a*) withdraw his interest to act Administrator; or

(*b*) decline to act as Administrator, if appointed by SEBI; or

(*c*) surrender his registration to the IBBI or membership or AFA to his IPA; during the validity of the Panel.

7. It must also be explicitly understood that:

(a) an IP in the Panel will be appointed as Administrator, at the sole discretion of SEBI;

(b) the submission of expression of interest is an unconditional consent by the IP to act as Administrator in accordance with the Regulations; and

(c) an IP who declines to act as Administrator, on being appointed by SEBI, shall not be included in the Panel for the next five years, without prejudice to any other action that may be taken by the IBBI.

Inclusion of IPs in the Panel

8. The IBBI shall include the IPs, who have expressed their interest, in the Panel based on the three parameters the weights of which are as under:

Sl. No.	Parameter	Weight (%)
1	Number of Ongoing Processes (A)	40
2	Number of Completed Processes as IRP/RP (B)	20
3	Number of Completed Processes as Liquidator/ Bankruptcy Trustee (C)	40

(A) Ongoing Processes (40% Weightage)

9. The IP, who has the lowest volume of ongoing processes, will get a score of 100. The IP who has the highest volume of ongoing processes will get a score of 0. The difference between the highest volume and the lowest volume will be equated to 100 and other IPs will get scores between 0 and 100 depending on volume of their ongoing processes.

Take an Example

IP	Volume of Ongoing Processes	Difference between the highest volume and the lowest volume of ongoing Processes of the IP	Formula	Score
1	20	100	100/100 × 100	100
2	40	80	80/100 × 100	80
3	60	60	60/100 × 100	60
4	80	40	40/100 × 100	40
5	100	20	20/100 × 100	20
6	120	0	00/100 × 100	0

The volume of ongoing processes shall be arrived as under:

Sl. No.	Ongoing Processes	Volume
1	IRP of a Corporate Insolvency Resolution Process	05
2	RP of a Corporate Insolvency Resolution Process	10
3	IRP of a Fast Track Process	03

Sl. No.	Ongoing Processes	Volume
4	RP of a Fast Track Process	06
5	Liquidator of a Liquidation/Voluntary Liquidation Process	25
6	RP of an Individual Insolvency Resolution Process	01
7	Bankruptcy Trustee of a Bankruptcy Process	25

(B) Completed Processes as IRP/RP (20% Weightage)

10. The IP, who has the highest experience of resolution, will get a score of 100. The IP who has the least experience will get a score of 0. The difference between the highest and the lowest experience will be equated to 100 and other IPs will get scores between 0 and 100 depending on their experience.

Take an Example

IP	Volume of Completed Processes as IRP/ RP	Difference between the lowest volume and highest volume of completed processes of the IP	Formula	Score
1	120	100	100/100 ×100	100
2	100	80	80/100 × 100	80
3	80	60	60/100 × 100	60
4	60	40	40/100 × 100	40
5	40	20	20/100 × 100	20
6	20	0	00/100 × 100	0

The volume of completed processes shall be arrived as under:

Sl. No.	Completed Processes	Volume
1	IRP of a Corporate Insolvency Resolution Process	05
2	RP of a Corporate Insolvency Resolution Process	10
3	IRP of a Fast Track Process	03
4	RP of a Fast Track Process	06
5	Individual Insolvency	01

(C) Completed Assignments as Liquidator/Bankruptcy Trustee (40% weightage)

11. The IP, who has the highest experience of liquidation and bankruptcy, will get a score of 100. The IP, who has the least experience, will get a score of 0. The difference between the highest and the lowest experience will be equated to 100 and other IPs will get score between 0 and 100 depending on their experience.

Take an Example

IP	Volume of Completed Processes as Liquidator/ Bankruptcy Trustee	Difference between the lowest volume and highest volume of completed processes	Formula	Score
1	120	100	100/100 ×100	100
2	100	80	80/100 × 100	80
3	80	60	60/100 × 100	60
4	60	40	40/100 × 100	40
5	40	20	20/100 × 100	20
6	20	0	00/100 × 100	0

The volume of completed processes shall be arrived as under:

Sl. No.	Completed Processes	Volume
1	Liquidation/Voluntary Liquidation	25
2	Bankruptcy Trustee	25

12. The score of an IP will be the sum total of the three scores as calculated at Paras 9 to 11 above. IPs will be placed in the list as per order of their scores. The IP with higher score will be placed above the IP securing lower score. Further. where two or more IPs get the same score, they will be placed in the Panel in order of the date of their registration with the IBBI. The IP registered earlier will be placed above the IP registered later.

13. The above process will be undertaken by a team of officers of the IBBI, as may be identified by a Whole-Time Member.

Review

14. These guidelines will be reviewed by the IBBI, in consultation with the SEBI, from time to time.

15. These Guidelines shall come into effect for appointments as Administrator with effect from 1st April, 2020.

Form A - For Reference Only

Expression of Interest under Guidelines for Appointment of Insolvency Professionals as Administrators under the Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018

1	Name of Insolvency Professional		
2	Registration Number		
3	a.	No. and Date of Issue/Renewal of AFA	
	b.	Date of Expiry of AFA	
	c.	Name of IPA which has issued AFA	
4	Address and contact details, as registered with the IBBI:		
	a.	E-mail	

	b.	Mobile		
	c.	Address		
5	*Number of Processes as on date:*		*Ongoing*	*Completed*
	a.	As IRP of CIR Process		
	b.	As RP of CIR Process		
	c.	As IRP of Fast Track Process		
	d.	As RP of Fast Track Process		
	e.	As Liquidator of Liquidation/Voluntary Liquidation Process		
	f.	As RP of Individual Insolvency Resolution Process		
	g	As Bankruptcy Trustee		
6	Whether IP has been convicted at any time in the last three years by a court of competent jurisdiction? (Give details)			
7	Whether IP is serving a suspension or debarment from serving as an IP? (Give details)			
8	Whether any disciplinary proceeding, whether initiated by the IBBI or the IPA, is pending against the IP? (Give details)			

Declaration:

I hereby:–

a. confirm and declare that the information given herein above is true and correct to the best of my knowledge and belief and express my interest to act as Administrator, if appointed by SEBI.

b. undertake that if my name is included in the Panel, I shall abide by Guidelines for Appointment of Insolvency Professionals as Administrators under the Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018.

c. undertake that submission of this form is my unconditional consent to act as Administrator at the sole discretion of SEBI during the validity period of the Panel under the Guidelines (*i.e.* 1st April 2020 - 30th September, 2020).

d. undertake that I shall not decline to act as Administrator, on being appointed by SEBI.

●●●

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