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One day Conference on Personal Guarantor to Corporate Debtor dated 4th January 2020

Webinar conduced on IBC Amendment (Ordinance), 2019 and IBBI (Liquidation Process) (Amendment) Regulations, 2020

L-R: Shri K R Saji Kumar, Executive Director, IBBI;
Mr. Vinod Kothari, Managing Partner (Vinod Kothari Consultants) and
Dr. Binoy J Kattadiyil, Managing Director, ICSI IIP

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For ICSI IIP Members
- **ICSI Institute of Insolvency Professionals**
  'ICSI House', 3rd Floor, 22,
  Institutional Area, Lodi Road,
  New Delhi- 110 003.
  Phones : 45341099, 45341048
  E-Mail : nitin.satija@ICSI.edu

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Section 30, read with section 12, of the Insolvency and Bankruptcy Code, 2016 and regulation 36B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution plan - Submission of - NCLAT by order held that in Corporate Insolvency Resolution Process (CIRP) of corporate debtor, period during which matter remained pending for adjudication as to how voting share of allottees (financial creditors) would be counted for purpose

of counting 270 days, was to be excluded for purpose of counting 270 days of CIRP - Above judgment was assailed before Supreme Court, questioning power of NCLT/NCLAT, as the case may be, to exclude any period from statutory period in exercise of inherent powers sans any express provision in I & B Code in that regard - It was found that recent amendment to I & B Code had come into effect, thereby amending section 12 to freeze or peg maximum period of CIRP to 330 days from insolvency commencement date - Further, recently inserted section 12A enabled adjudicating authority to allow withdrawal of an application filed under section 7 or section 9 or section 10, on an application made by applicant with approval of 90 per cent voting share of CoC - Similarly, sub-clause (7) of regulation 36B inserted with effect from 4-7-2018, dealing with request for resolution plans unambiguously postulates that resolution professional may, with approval of Committee, reissue request for resolution plans, if resolution plans received in response to earlier request are not satisfactory, subject to condition that request is made to all prospective resolution applicants in final list - Whether therefore, in view of legislative changes which have expanded scope of resolution plan, IRP of corporate debtor is to be allowed to invite revised resolution plan from final bidders who had submitted resolution plan on earlier occasion with a view to revive corporate debtor - *Held*, yes (Paras 16, 18 and 21)

- **Embassy Property Developments (P.) Ltd. v. State of Karnataka**
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  (2020) 157 SCL 445 (SC) • P-8

Section 60, read with section 14, of the Insolvency and Bankruptcy Code, 2016 - Corporate person's adjudicating authorities - Adjudicating Authority - Whether wherever corporate debtor has to exercise a right that falls outside purview of IBC, 2016 especially in realm of public law, they cannot, through Resolution Professional, take a bypass and go before NCLT for enforcement of such a right - *Held*, yes - Corporate insolvency resolution process against corporate debtor had been initiated and Resolution Professional was appointed - A mining lease granted by Government of Karnataka under Mines and Minerals (Development and Regulation) Act, 1957 was terminated on allegation of violation of statutory rules and terms & conditions of lease deed - Resolution Professional filed application before NCLT for setting aside order of Government of Karnataka and same was allowed on ground that order of Government of Karnataka was in violation of moratorium declared in terms of section 14(1) - Government of Karnataka filed writ petition against order of NCLT and High Court by impugned order adjourned matter to 23-9-2019 and granted stay of operation of direction contained in order of NCLT - Whether NCLT did not have jurisdiction to entertain an application against Government of Karnataka for a direction to execute Supplemental Lease Deeds for extension of mining lease and since NCLT chose to exercise a jurisdiction not vested in it in law, High Court was justified in entertaining writ petition, on basis that NCLT was *coram non judice* - *Held*, yes - Whether however, NCLT and NCLAT would have jurisdiction to enquire into questions of fraud in initiation of corporate insolvency proceedings under IBC Code - *Held*, yes - Whether thus, though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957 and rules issued thereunder, especially when disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action and, hence, High Court was justified in entertaining writ petition - *Held*, yes (Paras 40, 48 and 52)

- **Rahul Jain v. Rave Scans (P.) Ltd.**
  (2020) 113 taxmann.com 342/
  (2020) 157 SCL 531 (SC) • P-21

Section 30 of the Insolvency and Bankruptcy Code, 2016, read with Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution plan - Submission of - Corporate Insolvency Resolution Process was initiated against respondent company - Resolution plan submitted by appellant was approved by NCLT - Second respondent *i.e.* one of financial creditors dissented with resolution plan contending that it had been provided with 32.34 per cent of its admitted claim, whereas other financial creditors had been provided with 45 per cent of their admitted claims - Appellate authority *i.e.* NCLAT set aside Tribunal's directions and required appellant to increase liquidation value of offer to second respondent - According to appellate authority, resolution plan

approved by Tribunal did not conform to test in section 30(2)(*e*), and was discriminatory against similarly situated 'secured creditors' - Whether since resolution process began well before amended regulation 38 of 2016 Regulations came into force in January 2017, and, moreover, resolution plan was prepared and approved before that event, impugned directions of appellate authority, requiring appellant to match pay-out offered to other financial creditors with second respondent, was not justified - *Held*, yes - Whether, therefore, impugned order was to be set aside and order passed by Tribunal was to be restored - *Held*, yes (Para 13)

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- **Practical Questions** • P-1

• Can an uninvoked corporate guarantee given by the CD be considered as a 'debt' due and payable under the IBC?

• Can a CD challenge the maintainability of a section 7 application on the grounds that by invoking pledge of shares agreement, the FC and other lenders have become 95% shareholder of CD, thus discharging CD from the liability?

• Can the NCLT direct Central Government to get an investigation carried out by SFIO into allegations of fraud or siphoning of funds by the CD?

• What is the nature of the requirement u/s 31(4), IBC for CCI's prior approval in respect of a resolution plan?

• Can a secured financial creditor, while opting out of liquidation process to realise the secured assets u/s. 52(1)(*b*), IBC, sell the secured assets to the persons who are ineligible in terms of section 29A, IBC.

• Can a promoter who is ineligible u/s 29A, IBC submit a scheme for compromise or arrangement u/ss 230-232, Companies Act, 2013?

• What is the jurisdiction of Directorate of Enforcement (DoE) to attach CD's property (or part thereof) which is undergoing CIRP?

• Can a question of 'fraud' be inquired into by the NCLT/NCLAT in the proceedings initiated under the Code?

• Does the IBC confer any adjudicatory powers upon the IRP/RP?

• What is the maintainability of CIRP proceedings in respect of a CD which is a tea unit and whose management is taken over by the Central Government u/s. 16G(1)(*c*) of the Tea Act, 1953, and against whom winding up proceedings cannot be initiated without the consent of the Central Government?

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• An 'Acknowledgement' in writing within expiration of prescribed period will mark a new commencement period for limitation to base a claim and the same will not create a new contract. It only extends the limitation period.

• After the liquidation the Committee of Creditors has no role to play and they are simply claimants whose matters are to be determined by the Liquidator.

• When the Resolution Plan is approved and has reached finality, all the dues stand cleared in terms of the plan and no issue can be raised before any Court of Law or Tribunal.

• There is no provision in the Code or Regulations under which the bid of any Resolution Applicant has to match liquidation value

• The period from date of notice under section 13(2) of SARFEASI Act to date of order passed by the court will be excluded for calculating limitation period for a section 7 application

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- **Deposit of unclaimed dividend and/or undistributed proceeds of liquidation process in accordance with regulation 46 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016** • P-1

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From Chairman's Desk

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

Dear Professionals,

It's a start of a new year 2020, and I take this opportunity to congratulate *Team ICSI IIP* for spearheading and continuing with their tradition of good work as an Insolvency Professional Agency!

The business today is, and has always been, challenging as well as rewarding, and when the nation is aiming to expand its economy in a big way and become a 5 trillion dollar economy in a defined period of time, the fact which cannot be ignored, and is thus to be always kept in mind is that it is the entrepreneurs who have the capability to make the nation realise its said objective, since it is the entrepreneurs who can act as the engine drivers to the nation's growth process. Furthermore, while it is important to take steps to encourage the entrepreneurs to undertake business activities through facilitating *ease of entry* and *ease of access to capital*, a strong legal mechanism is always to be put in place so as to ensure that the banks and financial institutions are kept in a healthy shape; it is only through such Banks and Financial Institutions that the nation can realise its latter objective. Furthermore, the nation cannot lose sight of the fact that there are going to be business failures, and thus, an exit mechanism (for all genuine cases of default) is also needed.

By enacting and implementing the *Insolvency and Bankruptcy Code, 2016,* the Government of India has taken a major leap in this direction with some early fruits already visible to us. While IBC was being envisaged and framed, the nation

already had the benefit of having worked out legislations like the SICA, 1985 (now repealed), RDB Act, 1993, SARFAESI Act, 2002 *etc* which dealt with the subject of *insolvency* and *bankruptcy* is a piecemeal manner, and thus, the experience and the opportunity was rightly made use of, and this very progressive piece of legislation was enacted. But, what is important to realise is that being a progressive legislation, it is always a work in progress; that being so, the legislation requires a periodic review as far as its working is concerned since there is no particular template available for such a legislation. Thus, the need to amend, supplement, and clarify on the language of the statute is always a good practice.

I have come across many comments (some charitable, while some not), questioning the efficacy of the legislation (including the amendments), but, what is to be kept in mind is that this is a futuristic, clean, professionally driven and resolution based legislation which deals with a situation, which in India always carried a big taboo with it. The benefits of IBC are too many; while some are immediately visible, others are to emerge as we move forward. We have a legislation, which if periodically amended in response to demands of the time, will undoubtedly help in establishing a robust mechanism which shall not only facilitate *ease of entry*, but also *ease of exit* for the business.

My admiration for the legislation, and the way it is being implemented is on account of more than one factor. The chief amongst such factors is that it has not only defined strict timelines within which different acts/actions are to be undertaken as a part of the insolvency resolution (or liquidation) process, but the necessary element of *professionalism* has been injected into the process through the appointment of Insolvency Professionals to ensure that there is no delay. It also enables *transparency* in the way the entire process is executed and allows a complete and comprehensive institutionalisation of the process. IBBI, which is the chief regulator under the IBC undertakes regular and systematic training of the professionals to maintain quality of professional services provided by them. This not only gives life to the legislation but also makes it relevant and effective. The grace with which IBC allows all genuine business failures to make an exit out of the business is perhaps what shall make it to be admired by all entrepreneurs, and that is how an ideal law should be. An ideal law has to think comprehensively and

not just stand out in becoming a silo of legislation. It has to conceptualise a framework which is supported by a robust institutional mechanism who address all the emerging issues and concerns of the stakeholders and ensure that it gets going.

The Code has brought about a behavioural change in how the businesses are to be run. People now fear triggering of the insolvency resolution process as that would mean they losing control over their company. Furthermore, the effectiveness of the legislation has been strengthened through introduction of different provisions for instance s.12A, s.29A and the recent introduction of s. 32A into IBC.

While the Government, the Legislature and the Regulator have been very proactive in undertaking all necessary measures to keep spirit of the legislation alive, the support and *words of wisdom* which have come from the judiciary, especially Hon'ble Supreme Court, are beyond any description. The tribunals established under IBC, *viz* the NCLT and the NCLAT, have also been very forthcoming in dealing with the matters expeditiously, with some of their rulings been given a legislative shape, and are being discussed and appreciated by all stakeholders.

I wish all our professional members and the ICSI IIP the very best in all their endeavours, and also look forward to witnessing an increasing contribution of the professional members in the success of the IPA.

President's Message

CS ASHISH GARG
President
Institute of Company
Secretaries of India

"Don't find the fault, find the remedy"
– Henry Ford –

Dear Professional Members,

Today is a very humbling day for me. It not only reminds me of my deep connect and association with ICSI, starting from my very first day as a student of the Institute, to the present day when I have assumed the role and responsibilities associated with the position of President of this very revered institute (ICSI). I also have my responsibilities connected with the functioning of ICSI IIP which is an Insolvency Professional Agency (IPA) and a 100% subsidiary of ICSI. I am glad to be interacting with you through this medium of *Insolvency and Bankruptcy Journal*.

The *Insolvency and Bankruptcy Code*, as I see and understand, is amongst the second generation economic reforms brought in by the Government of India within a very short period of time and with a very strong determination to deal with the long-standing problem of mounting number of non-performing assets (NPAs) in the banking sector. Amongst the most distinctive and effective features of this legislation lies the strict time-lines for completion of different acts/actions. The new set of professionals called as the Insolvency Professionals have been created under the statute. The Insolvency Professionals who have been conferred with the huge responsibility of not only initiating the process of take-

over of CD's management (from its erstwhile management) and run the entire CIRP in a manner so as to ensure that the best resolution plan is discovered and implemented for revival of CD, but he is also conferred with all necessary powers and authority to ensure that he is able to follow the prescribed procedure within the time-lines prescribed. The Code which separates the commercial aspects of insolvency and bankruptcy from its judicial aspects envisages a market mechanism to rescue firms in which are in financial distress. It also facilitates closure of firms in economic distress, in accordance with the prescribed procedure. So, a distinction between financial distress and economic distress is required to be made by the CoC in order to arrive at a decision whether to go for revival or liquidation of the CD respectively, and the role of an RP in this entire process can *neither be understated nor be overstated*!

The role of ICSI IIP as a frontline regulator under the IBC is primarily focussed on not only educating and spreading awareness about the letter and spirit of IBC legislation, but also to ensure that its professional members are able to base their actions in line with the needs and requirements of the legislation (including the Rules and Regulations framed thereunder).

I wish all our Professional members the very best in all their future endeavours!

Let's build on this foundation together!

Managing Director's Message

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

Words are often considered to be an imperfect medium to convey one's thoughts. But, when it comes to the task of legislating a law, the legislature is not only required to overcome this limitation by getting into the task of employing the correct language, phrase and expression, but also to anticipate all future foreseeable circumstances wherein such words (or phrases or expressions) can be attributed a different meaning and interpretation than the one intended by itself, and thus ensure (or at least attempt to) that no ambiguity exists in the language. In case of a reformative legislation like the IBC, the task can never be said to be accomplished since newer challenges always keep emerging with time in the application of this law.

The Insolvency and Bankruptcy Code, conceived in the year 2016 as a *leap in an unknown territory* or a *'leap of faith'* (as rightly and very eminently described by Dr. M.S. Sahoo, Chairperson, IBBI) was undoubtedly a *need of the hour,* and with the passage of time, since then, the legislation has already passed many litmus tests, thus proving its efficiency and practicality. It reminds me of the well-known proverb *`necessity is the mother of all inventions'*. After all, the reform brought in through IBC has only been *a reform by, for and of the stakeholders*.

The speed as well as efficiency with which IBC provisions have been implemented, the manner and commitment with which the emerging challenges are being dealt with, fills me with a great amount of admiration and appreciation for the

work done by all the stakeholders. It simply reassures of a very bright future ahead!

The Code is an attempt to resolve the state of *insolvency* of a Corporate Debtor through a resolution plan, and though it does not give any particular shape, colour or texture to a resolution plan, it rightly leaves the decision within the domain and wisdom of the Committee of Creditors which is in the best position to decide as to what lies in the best interest of the Corporate Debtor. A resolution plan, which has the capacity to resolve insolvency of a firm, envisages application of mind by the CoC through deliberations and finally a vote for approval. In the entire mechanism envisaged under the IBC, the CoC is constituted to evaluate different options for the CD, *i.e.*, if CD's business is viable, then steps have to be taken in the direction of resolution of insolvency through a resolution plan, and in case where the business is not viable, necessary steps have to be taken to realise the maximum value out of CD's assets. By rescuing viable businesses and closing non-viable ones, the Code releases the entrepreneurs from genuine failures by enabling them to get in and get out of a business with ease, undeterred by failure, which in the ultimate analysis does promotes entrepreneurship. One of the underlying themes of IBC is that a company is a contract *inter se* the shareholders and creditors (*i.e.* between the equity and debt) whereunder the agreement is that, as long as the debt of the creditors is serviced by the company, equityholders shall remain in complete control over the affairs of the firm, and in case where the firm fails to service the debt, a shift of control from equityholders to creditors of the firm takes place. The Code also recognises the fact that the enterprise value of a firm reduces exponentially with time, and any prolonged uncertainty over the ownership and control (as also the apprehensions accompanying the state of insolvency) of the firm leads to flight of customers, vendors, employees, workmen etc., and thus lies the need for the timely conclusion of a resolution plan for preservation of value of assets.

The recent amendment brought in through IBC (Amendment) Ordinance, 2019 has *inter alia* put in the requirement of *minimum threshold for certain classes of financial creditors for initiating insolvency resolution process. Vide* the said amendment it has been made clear that in case of a real estate project, if an allottee initiates the resolution process, the application thereof

has to be filed jointly by a minimum of 100 allottees (of the same real estate project), or 10% of the total allottees (under that project), whichever is less. As for other financial creditors, it has been provided that where the debt owed is either in the form of securities or deposits, or to a class of creditors, the application u/s 7 has to be filed jointly by at least 100 creditors (in the same class), or 10% of the total number of such creditors (in the same class), whichever is less. Furthermore, given the virtues of carrying on the Corporate Debtor as a going concern (wherever deemed appropriate in the commercial wisdom of the CoC) it has been provided that any existing license, permit, registration, quota, concession, or clearance, given by the Government (or local authority) to the Corporate Debtor shall neither be suspended nor terminated on the mere ground of *insolvency*, provided that there should be no default in payment of current dues by the CD for the use or continuation of such grants. Also, to ensure that there are no adverse implications on CD's operations, it has been provided that even during the moratorium period, RP can direct for supply of goods and services which are critical to CD's operations.

The other change introduced through the amendment ordinance has been that a clarification has been provided that there is no restriction *vis-a-vis* certain CDs making an application for initiating CIRP in respect of another CD. These CDs include: (a) those undergoing an insolvency resolution process, (b) those who have completed the resolution process 12 months before making the application, (c) CDs who have violated terms of the resolution plan, and (d) CDs in respect of whom a liquidation order has been passed. In effect, the ordinance clarifies on the position of law, making it clear that CDs undergoing CIRP are not disallowed to initiate CIRP against another CD. There is yet another sea-change introduced *vide* the 2019 amendment ordinance which concerns ***CD's liability for prior offences.*** In cases wherein a resolution plan results in change in management or control of CD, the CD shall not be liable for any criminal offence committed prior to the commencement of the CIRP. The liability shall, thus, cease from the date of approval of the resolution plan (by the NCLT). Effectively, an immunity has been provided to the CD from actions against its property, such as attachment, confiscation or liquidation of property. The amendment is not only based on logic, but is

also bound to result in more number of resolutions taking place under IBC. The provision further clarifies that such immunity against prior offences shall be available if such other person was neither the promoter nor in the management or control of the CD, or a related party of such a person, and was not a person against whom investigating authorities have submitted or filed a complaint, or have reasons to believe that he/she abetted or conspired to commit the offence. The amendment recognises the fact that for effectuating purposes of the Code, it is necessary that any threat of attachment of CD's assets and any threat of proceedings by investigating agencies against the CD for the wrongdoings of the previous management are done away with. It is only when a protection from criminal liability (arising out of the past liabilities of the former owners) is assured, that the potential investors will feel comfortable in acquiring the assets. The amendment ordinance is in line with all the steps that have been taken so far in the direction of increasing *ease of doing business* in India. By insulating successful resolution applicants of stressed assets from the wrongdoings of the earlier management, the ordinance boosts confidence of potential bidders in the entire insolvency resolution process. The ordinance, by providing scope for identification of last mile funding scenarios (as interim finance) aids the entire rehabilitation process. Also, the immunity provided u/s.32A shall act as an enabler for cleaner acquisitions, thereby incentivising higher bids and promoting an investor-friendly regime.

As I see the future, a market for interim finance, resolution plans and liquidation assets would develop; resolution processes would be initiated and finalised early resulting in rescue of failing firms; only a few unviable firms would face the destiny of being liquidated resulting in release of resources expeditiously to alternative uses. This in turn would encourage the entrepreneurs to commence new businesses without any fear of failure. The pace of competition and innovation shall continue, and the credit market would expand, making Corporate Finance a mix bag of debt finance (secured and unsecured) from Banks and others which shall definitely have a significant and a positive impact on the economic growth of the Nation.

I have my strong belief and faith that without the efforts and commitment that has been shown by our Professional

members, the journey ever since implementation of the Code would not have been so glorious and rewarding. ICSI IIP, as a part of its mandate and in discharge of its responsibilities as an Insolvency Professional Agency (IPA), keeps regularly organising and participating in different activities including webinars, interactive meetings, seminars, conclaves *etc.* with a view to spread awareness about this new legal regime. In the month of January, 2020, we conducted a webinar on the recent IBC (Amendment) Ordinance, 2019 and IBBI Liquidation Process (Amendment) Regulations, 2020 wherein the Experts, apart from sharing their knowledge, thoughts and views on the said subjects, also addressed the queries received. We also partnered in a one-day conference for Bankers & CoC members conducted in Chennai.

This being the first issue of our *Insolvency and Bankruptcy Journal* in the New Year, 2020, I wish to place on record the excellent job performed by all our Professional Members in the preceding year (2019), and I also wish them *the very best* in all their future endeavours.

Looking forward to receive your continuous support in all our future activities and actions!

Applicability of section 29A to schemes of arrangement and sale by secured creditors – Brief analysis

SIKHA BANSAL
Senior Associate
resolution@vinodkothari.com

Section 29A of the Insolvency and Bankruptcy Code, 2016 (`Code'), touted as one of the most controversial provisions of the Code, is now also applicable to schemes of arrangement and sale by secured creditors outside liquidation.

The Insolvency and Bankruptcy Board of India has made several amendments to the IBBI (Liquidation Process) Regulations, 2016 (`Liquidation Regulations') *vide* the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020[1]. The Amendment, amongst others, stipulates that a person who is not eligible under the Code to submit a resolution plan for the corporate debtor –

(i) shall not be party in any manner to such compromise/ arrangement – proviso to regulation 2B(1), and

(ii) shall not be a buyer (that is, the secured creditor shall not sell to such person) of assets, which a secured creditor may sell outside liquidation – regulation 37(8).

(hereinafter, referred to as `Amendment').

The note discusses the backdrop and implications of the Amendment.

Rationale behind the Amendment

The Amendment possibly comes in the wake of an existing gap in the law and recent rulings of Hon'ble National Company Law Appellate Tribunal (`**NCLAT**').

The NCLAT in *Jindal Steel and Power Ltd. v. Arun Kumar Jagatramka* (2020) 114 taxmann.com 133 held that while a scheme under section 230 is maintainable for companies in liquidation under the Code, ***the same is not maintainable at the instance of a person ineligible under section 29A of the Code***. The NCLAT relied on the observations of Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. v. Union of India* (2019) 101 taxmann.com 389/152 SCL 365 , holding that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by ***protecting the corporate debtor from its own management*** and from a corporate death by liquidation.

Further, in *State Bank of India v. Anuj Bajpai (Liquidator)* (2020) 115 taxmann.com 15 (NCLAT) held that a secured creditor realising assets outside of liquidation under the Code ***cannot sell the assets to persons ineligible under section 29A***. The NCLAT, in the said ruling, quoted the following being the rationale for prohibiting secured creditors from selling assets to ineligible persons - (i) public interest such that ineligible persons remain ousted from the management or ownership of assets; (ii) possibility of a `cartel' between defaulters and financial creditors, which can defeat the objective of maximization of value of assets.

Schemes of arrangement vis-à-vis section 29A[2]

The Amendment says that an ineligible person shall not be a ***'party in any manner'*** to such compromise or arrangement. The scope of the expression seems to be very wide. In the context of a scheme of arrangement, the following persons can be called as a *party* to such scheme – (i) the proposer of the scheme; (ii) a participant; (iii) the approver of the scheme; and (iv) a beneficiary of the scheme.

Hence, when the corporate debtor has been through insolvency proceedings and liquidation order has been passed, an ineligible person cannot propose a scheme. Such a person cannot even take part in voting process (inspite of being a member). As can be inferred from the objective behind bringing the Amendment, an ineligible person cannot be made a beneficiary under the scheme, directly or indirectly.

As such, schemes under section 230 cannot be said to be *"surrogate"* route for the defaulting promoters to acquire the corporate debtor after a failed resolution. It is implied that courts can always look behind the *names*. In one of the cases under the Companies Act, it was held where the petitioner is not the actual propounder of the scheme with a view to revive the company for the benefit of the company, but they have merely lent their name to a propounder who does not qualify under the section, the application for sanction of scheme is liable to be dismissed. See *S Krishna Murthy v. Hoysala*

Building Development Co. (P.) Ltd. (2012) 21 taxmann.com 522/113 SCL 409 (Kar.).

There might be additional considerations surrounding the provision – whether the existing promoters/directors can be retained by the propounder of the scheme, purely out of business considerations. These concerns are yet to be examined.

Secured Creditors vis-à-vis section 29A

The rights of a secured creditor during liquidation of a corporate debtor have been dealt with under section 52 of the Code. The secured creditor has been given a right to choose between realisation of its security interest outside of the liquidation process or to relinquish such right and merge such security interest into the liquidation estate.

The conventional right given to the secured creditor is attributed to the fundamental principle of respecting commercial bargains even during insolvency proceedings. A secured creditor can stand outside winding up proceedings and enforce its security[3]. It is an established rule that such rights should not be tampered with, except where there are higher societal considerations (for instance, cutting out a portion of such realisations for workmen). The right to realise, therefore, is a commercial right of the secured creditor. There is nothing in the SARFAESI Act, 2002 or even any other law which specifies who cannot be a buyer, when a secured creditor realizes its security interest.

The Amendment, however, now puts fetters on the right on the secured creditor. The secured creditor shall not have the liberty to choose any buyer and shall have to exclude persons who are ineligible under section 29A from the list of eligible buyers.

Understandably, proceedings under the Code are collective proceedings, as assets form a part of the common pool, wherefrom creditors are paid in accordance with their priority in the waterfall. Even a scheme of arrangement is a collective remedy. The core idea is to revive the business and/or maximise the value with the hope that the going concern/slump value would be more than the value of scattered assets. Ousting erstwhile management will ensure that the business/assets do not go into the same hands, which could not act (or say, produce results) in the best interests of the collective body of creditors.

However, enforcement action by secured creditors is either individual or at the most, a class remedy. A secured creditor seeks to settle its dues by realizing the security interest. Fairly enough, the secured creditor remains accountable for any surplus arising out of realisation; however, it has first claim on the secured asset which it created by contract prior to the debtor going into insolvency. While possibility of a secured creditor forming a cartel with the erstwhile management cannot be ruled out; yet putting a blanket ban arises out of a conclusive presumption, which may or may not exist.

At the outset, a technical gap in the law can be noticed. The amendment has been made by way of insertion of sub-regulation (8) in regulation 37. Now, regulation 37 does not apply if the secured creditor enforces his security interest under SAR-

FAESI Act or RDDBFI Act. Hence, it can be contended that the restriction relating to sale to ineligible persons does not apply to such secured creditors – however, the same does not appear to be the intent of the lawmakers.

Concluding remarks

With this amendment, section 29A has assumed the role of an impregnable fort, and applies to all scenarios – (i) resolution, (ii) liquidation sales (including going concern sale in liquidation), (iii) schemes of arrangement in liquidation, and even to (iv) sale by secured creditors outside liquidation. The essence is – once the company has entered insolvency proceedings, all transactions with respect to the company have to be guided by the law envisaged under the Code, and has to be within the four corners of the Code. That might lead to curtailment of rights of members (under section 230 of the Companies Act) or rights of creditors (under SARFAESI Act/RDDBFI Act).

The introduction of section 29A was to strengthen the insolvency resolution process such that certain persons are prohibited from submitting resolution plans who, on account of their antecedents, may adversely impact the credibility of the processes under the Code.

While extending the applicability of section 29A to all and sundry may be backed by considerations involving public interest, however, there might be some side-effects as well, for instance – ***(i)*** self-filing provisions under section 10 of the Code might be rendered redundant as no promoter would initiate insolvency proceedings to be ousted from his own company forever, ***(ii)*** it adds to the element of uncertainty to debtor-creditor agreements, as in at the time of entering into the lending arrangement, the secured creditor has to take into account the fact that several classes of persons would be disqualified to buy assets on which it is relying – this might affect credit affordability for corporates, and rather become counter-productive to the objective of the Code (promoting availability of credit); and ***(iii)*** it might narrow down the market for stressed assets; ***(iv)*** it reduces the risk-appetite of the entrepreneurs, and the entrepreneurs will be incapacitated to acquire assets even in their personal capacities.

Though the jury is out, a final judgment on the issue of impact of this amendment on the Indian Economy is yet to be delivered.

(Note: The views are personal to the author and do not necessarily represent the views of the organization.)

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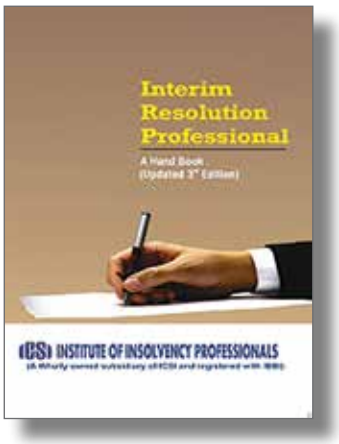
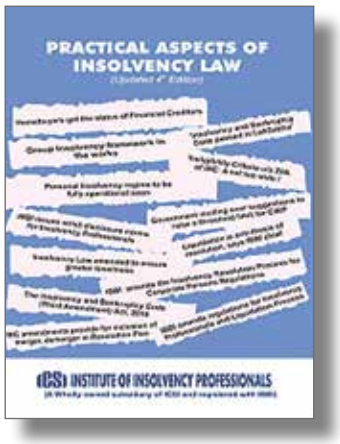
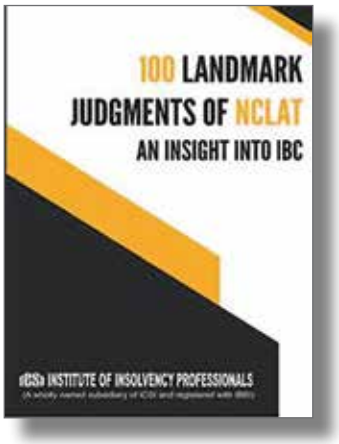
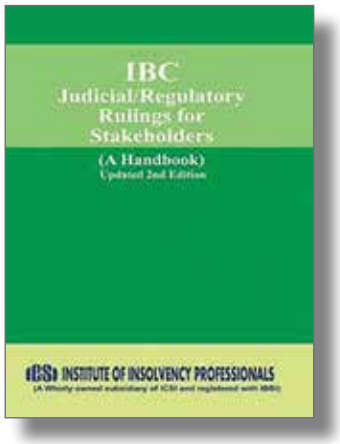
1. Notification No. IBBI/2019-20/GN/REG053, dated 06.01.2020.
2. See also, "Schemes under Section 230 with a pinch of section 29A – Is it the final recipe?", by Sikha Bansal at, http://vinodkothari.com/2019/11/schemes-under-section-230-with-a-pinch-of-section-29A/.
3. See *Allahabad Bank* v. *Canara Bank*, (2004) 4 SCC 406, wherein the Supreme Court extensively discussed the rights of secured creditors *vis-à-vis* winding up proceedings.

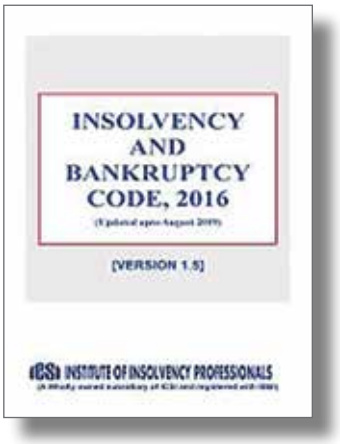
PUBLICATIONS

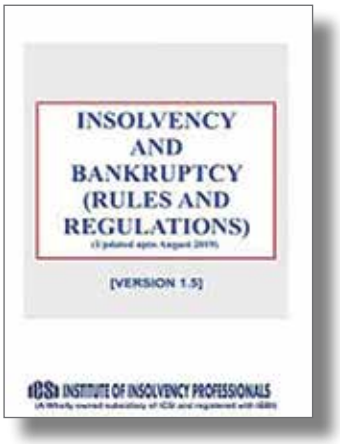


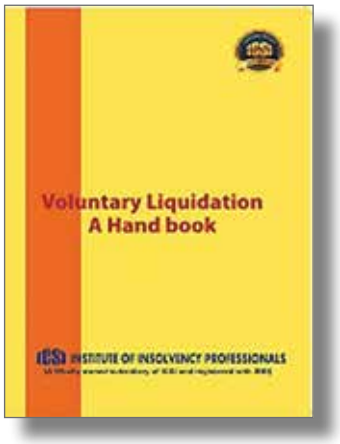












Notification of Amendments to SARFAESI Act

RICHA SARAF
Legal Advisor,
Vinod Kothari
Consultants (P.) Ltd.

The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016[1] was brought in to introduce certain amendments to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002[2] ("**SARFAESI Act**"), however, few sections relating to the subject of `*registration of security interest by secured and other creditors*', `*effect of registration of transactions*', `*right of enforcement of securities*' and `*priority to secured creditors*' were not notified. The Ministry of Finance (Department of Financial Services) has now, *vide* notification No SO. 4619(E)[3] dated 26.12.2019, notified Sections 17, 18 and 19 of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 ("**Amendment Act**"), which shall come into force on 24.01.2020. In this article, the author has tried to discuss the effect of the said notification.

Who is required to register security interest with CERSAI?

Sections 26B of the SARFEASI Act (inserted by way of Section 18 of the Amendment Act) extends the provision of registration requirements under the SARFEASI Act to any security interest over any property[4]. The effect of amendment is as follows:

S. No.	Particulars	Whether required to file details of security interest with CERSAI?	
		Before Amendment	After Amendment
1.	A secured creditor	Yes	Yes
2.	A party (not being a financial institution or bank) having attachment order w.r.t. a property from a civil court or any other authority	No	Yes
3.	Tax authority on issuance of an attachment order for recovery of tax dues	No	Yes
4.	Any other authority or officer of the Central Government or any State Government or local authority on issuance of an order for attachment of any property for recovery of any government dues	No	Yes

Note: This is in line with the attempt of the Central Government to integrate the database of security interests, and create a unified electronic centralised repository of information about non-ownership interests in asset. Also, since the Insolvency and Bankruptcy Code, 2016 ("**Code**") provides for registration with "*information utilities*", it is understood that CERSAI can also act as one of the significant information utilities for the purpose of the Code in future.

What is the impact of filing or non-filing of Security Interest?

(a) Doctrine of constructive notice for charge registered prior in time:

Section 26C(1) of SARAESI Act (inserted by way of Section 18 of the Amendment Act) stipulates that registration of interests, including attachment orders, will serve as a public notification, so that anyone dealing with the property cannot claim to be ignorant about the existence of such interests. Further, Section 26C(2) provides priority to registered charges, *i.e.* where there is a registered security interest, any subsequent security interest on the property will be subordinated to a pre-registered interest. While the priorities are a matter of contract and the general rule is that priorities should be as per the contract, but Section 26C(2) provides that the unregistered creditor will not be able to claim the priority available to a registered security interest. In this regard, let us consider the following illustrations:

Case 1: A extends loan to C, by creating a security interest on a Property X. Subsequently, B, who is unaware of the loan extended by A, extends loan to C, by creating a security interest in Property X. B then registers its security interest with CERSAI.

In this case, who will have priority?

Since security interest of A was not registered, B will have priority.

Case 2: A extends loan to C, by creating a security interest on a Property X and registers it's security interest with CERSAI. Subsequently, B, who is unaware of the loan extended by A, extends loan to C, by creating a security interest in Property X. B then registers it's security interest with CERSAI.

In this case, who will have priority?

Since security interest of A is registered, B cannot take the plea that it was not aware of the interest of A in Property X. Here, A will have priority.

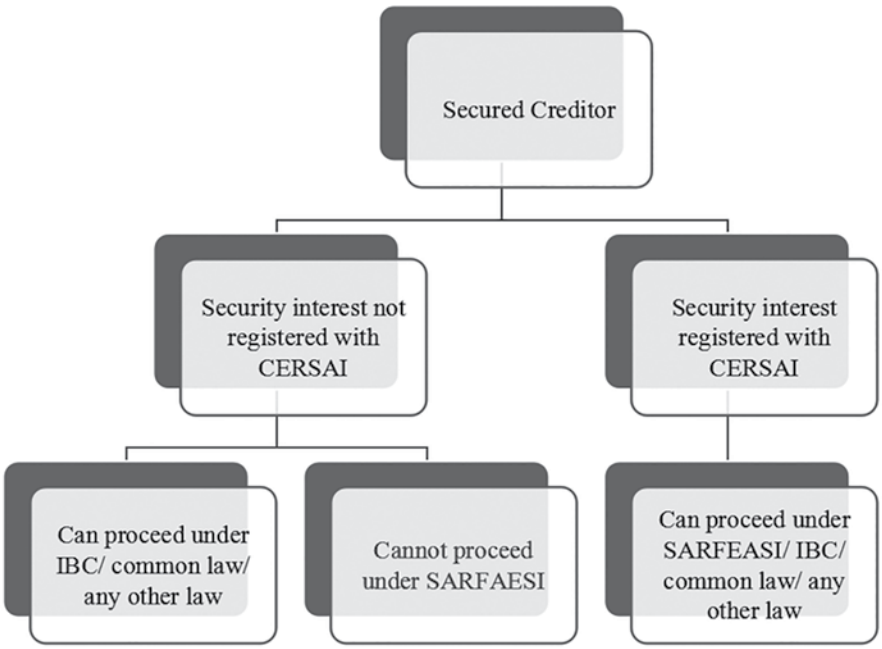
Note: The above amendment is in line with Section 80 of the Companies Act, 2013, which stipulates that the date of registration is the date on which the doctrine of constructive notice comes into play, with this effect that any person acquiring the property which has been subjected to the charge or any part thereof or any share or interest therein, shall be deemed to have notice as from the date of registration. ***(English and Scottish Mercantile Investment Co. Ltd. (1892) 2 QB 700 (CA))***

(b) Bar on exercise of SARFAESI powers in case of unregistered security interests:

Section 26D provides that no secured creditor shall be entitled to exercise the rights of enforcement of securities under SARFAESI Act unless the security interest has been registered with CERSAI. In this regard, it is relevant to note that this section is only applicable to secured creditors, and does not affect the right of enforcement of any other persons, or even the right of enforcement under common law or any other law by a secured creditor.

Here, one of the questions which may arise is whether the secured creditor, on being unregistered, will lose status of being "secured" in winding-up or formal insolvency proceedings (say, the Code) – there is no clarity with respect to the same. It may be noted that law pertaining to such proceedings (here, the Code) generally provides the manner in which the claim of a particular creditor is to be verified and admitted. For instance, in case of the Code, the verification of a secured creditor can be done through information utilities/any other source (which may include MCA filings as well). Therefore, it is viewed that non-registration of security interest with CERSAI will not alter the status of the creditor under other laws.

Remedies available to a secured creditor (after amendment)



Note: A key question will be w.r.t. the trigger point for the section. There may be various cases under different stages of enforcement under the SARFAESI Act, and assuming that steps may have already been initiated by a secured creditor, whether by way of issue of a notice, it seems quite illogical to hold that the proceedings shall not continue.

(c) Priority to registered security interests over statutory dues:

Section 26E provides that after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority. This amendment has been made to harmonize the provisions of the SARFAESI Act with Section 53 of the Code.

(d) Penal Provisions Omitted:

Section 27 of the SARFAESI Act stipulated that if a default is made- (i) in filing under Section 23, the particulars of every transaction of any securitisation or asset reconstruction or security interest created by a securitisation company or reconstruction company or secured creditor, or (ii) in sending under Section 24, the particulars of modification referred to in that section, or (iii) in giving intimation under Section 25, every company and every officer of the company or the secured creditor and every officer of the secured creditor who is in default shall be punishable with fine which

may extend to Rs. 5,000/- for every day during which the default continues. The penal provisions as provided in the said section will now be deemed to be omitted pursuant to Section 19 of the Amendment Act, however, as already discussed above, the effect of non- registration has been made even more severe.

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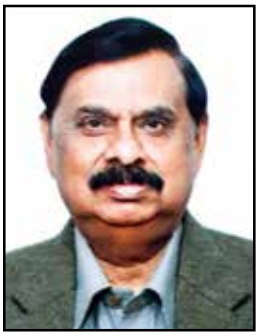
1. https://drtcbe.tn.nic.in/Actsrules/SARFAESI%20AMENDMENT%20ACT%202016.pdf.
2. http://legislative.gov.in/sites/default/files/A2002-54.pdf.
3. http://egazette.nic.in/WriteReadData/2019/214921.pdf.
4. The effective date is to be notified by the Central Government for such filings.

Key Highlights of Protective Provisions to Stressed-Asset Buyers Under IBC (Second Amendment) Bill, 2019



DELEP GOSWAMI
FCS, Advocate,
Supreme Court of India,
New Delhi.

ANIRRUD GOSWAMI
Advocate,
Goswami & Goswami,
New Delhi

Introduction

1. On Thursday, 12th December, 2019, the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 was introduced in the Lok Sabha and the Bill, *inter alia*, introduces many new provisions, most importantly the provisions which accord protection to stressed-asset buyers and also enhances the limit for home-buyers and debenture-holders (treated as financial creditors) for initiating corporate insolvency resolution process (CIRP) and this provision is proposed to be given retrospective effect. The intent of the IBC (Second Amendment) Bill aims at removing the difficulties and hurdles being faced by the new stressed-asset buyers and to make acquisition of the stressed-assets through CIRP more attractive to the investors.

This article is an attempt to highlight only some of the key provisions of the Second Amendment Bill and it is expected to enlighten the professionals about the implication of the proposed amendments.

While introducing the IBC (Second Amendment) Bill, 2019, the Union Finance Minister reiterated the statement of objects and reasons for the Insolvency and Bankruptcy Code, 2016 (the Code) which was enacted with a view to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of

credit and balance the interests of all the stakeholders.

Need for the IBC (Second Amendment) Bill, 2019

2. As highlighted at the time of introduction of the IBC (2nd Amendment) Bill, 2019, Union Finance Minister stated that a need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency, in case the company goes into corporate insolvency resolution process or liquidation, to prevent potential abuse of the Code by certain classes of financial creditors, to provide immunity against prosecution of the corporate debtor and action against the property of the corporate debtor and the successful resolution applicant, subject to fulfilment of certain conditions, and in order to fill the critical gaps in the corporate insolvency framework.

Protection accorded to acquirer of stressed-assets under IBC

3. The IBC (2nd Amendment) Bill, 2019 proposes to introduce a new section, namely section 32A so as to provide *that the liability of a corporate debtor for an offence committed prior to the commencement of the CIRP shall cease under certain circumstances enumerated therein.* Sub-section (1) of the proposed section 32A reads as under:

> "After section 32 of the principal Act, the following section shall be inserted, namely:—
>
> `32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—
>
> (*a*) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
>
> (*b*) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:
>
> **Provided** that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:
>
> **Provided further** that every person who was a "designated partner" as defined in clause (*j*) of section 2 of the Limited Liability Partnership

Act, 2008, an "officer who is in default", as defined in clause (*60*) of section 2 of the Companies Act, 2013, or *was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section."*

Therefore, as can be seen from the afore-said, while the new acquirer of stressed-asset gets protection from prosecutions launched against the corporate debtor, the said protection does not extend to the erst-while promoters, directors, key managerial personnel, associates or related parties of the erstwhile promoters of the corporate debtor who were directly or indirectly in-volved in the commission of such offence as per the report submitted or complaint filed by the investigating authority.

It is also pertinent to mention that sub-section (2) of the proposed Section 32A which is being introduced, clearly specifies that "no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31."

The aforesaid immunity to the corporate debtor under section 32A(1) and to the properties of the corporate debtor under section 32A(2) is applicable only in respect of the approved resolution plan under section 31 of the IBC or sale of liquidation assets under the provisions of Chapter III of Part II of the IBC which results in a change of control of the corporate debtor to a person who was not (*a*) a promoter or in the management or control of the corporate debtor or a related party of such a person; or (*b*) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

In this connection, it is relevant to note that the aforesaid proposed changes in the IBC do not dilute or exempt the liability of the erstwhile director or partner of the corporate debtor, as the case may be, as per section 66 of the IBC, who was involved in fraudulent trading or wrongful trading or who knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a CIRP in respect of such corporate debtor and who did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor. On an application made by the resolution professional during

CIRP, the Adjudicating Authority may by an order direct that such a person shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit. Even though this is a very important provision available to the Resolution Professional during CIRP, yet it is rarely used, which could have deterred economic offenders.

Interestingly, *Explanation* (ii) to the proposed section 32A(2) clarifies that nothing prevents from initiating action against the property of any person other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

Proposed sub-section (3) of section 32A mandates that notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.

In this connection, it is relevant to note that the aforesaid proposed changes in the IBC do not dilute or exempt the liability of the erstwhile director or partner of the corporate debtor, as the case may be, as per section 66 of the IBC, who was involved in fraudulent trading or wrongful trading or who knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a CIRP in respect of such corporate debtor and who did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor. *On an application made by the resolution professional during CIRP, the Adjudicating Authority may by an order direct that such a person shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit.*

However, it may be important to highlight that the immunity granted under section 32A of the IBC Amendment Bill is likely to create problems for the investigating agencies like Serious Fraud Investigation Office (SFIO), Enforcement Directorate (ED), Central Bureau of Investigation (CBI), prosecuting agency of the Ministry of Corporate Affairs and may delay completion of the prosecution of such offenders till the aforesaid immunity provisions get tested in the Courts of law and the critical issues get settled.

Enhancement of minimum threshold for certain Financial Creditors to initiate CIRP

4. As per the existing section 7 of the IBC, a financial creditor, either by itself or jointly with other financial creditors or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

The IBC (2nd Amendment) Bill, 2019 proposes to enhance the threshold limit for initiating CIRP by certain classes of financial creditors and new provisos are

being inserted in sub-section (1) of the existing Section 7 of the IBC. Basically, the first proviso proposed to be inserted deal with such class of financial creditors as referred to in clauses (*a*) and (*b*) of sub-section (6A) of section 21 of the IBC and in respect thereof, an application for initiating corporate insolvency resolution process shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class, whichever is less.

The next proviso proposed to be inserted in Section 7 of the IBC relates to financial creditors who are allottees under a real estate project and states that an application for initiating corporate insolvency resolution process shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent of the total number of such allottees under the same real estate project, whichever is less.

The Bill further clarifies that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2019, such application shall be modified to comply with the requirements of the first and second provisos within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission. This change is proposed to be made applicable retrospectively and may face some legal objections from affected quarters.

Going-Concern Basis of Corporate Debtor During CIRP - Extension of Licences, Permits, etc.

5. Another significant amendment introduced in the IBC (2nd Amendment) Bill, 2019 relates to the facilitating the operation of the corporate debtor as a "going concern" during the CIRP. The Bill proposes to insert the following '*Explanation*' to the sub-section (1) of section 14 of the Code:

> "For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, *a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency,* subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period"

Also, after sub-section (2) of section 14, the following new sub-section is proposed to be inserted, namely:

> "(2A) The supply of goods or services that the interim resolution professional or resolution professional, as the case may be, considers critical to protect

and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except if such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified."

Conclusion

6. While upholding the constitutional validity of the IBC, the Supreme Court of India in *Swiss Ribbons* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 has stated that the IBC is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. The experiment conducted by the Code judged by the generality of its provisions and not by the so-called crudities and inequities have passed constitutional muster. In the working of the Code, the flow of financial resources to the commercial sector in India has increased exponentially as a result of financial debts being repaid. The experiment conducted in enacting the Code is proving to be largely successful. *The defaulter's paradise is lost. In its place economy's rightful position has been regained.* The proposed amendment in the IBC (2nd Amendment) Bill, 2019 is in the right direction to facilitate the Government's keenness to promote ease in doing business in India and also helps in removing certain bottlenecks in sale/ change of hands in respect of the stressed-assets and also to streamline initiation of CIRP in respect of real estate companies. The changes proposed are definitely a welcome move which augurs well for the Indian business scenario.

Overview of IBC Ordinance, 2019

V S DATEY

Background

1. Insolvency and Bankruptcy Code, 2016 came into effect in December, 2016 and was made operational to corporate debtors. The provisions in respect of insolvency resolution and bankruptcy of personal guarantors was made effective from 1-12-2019.

The initial experience of implementation of Insolvency Code is encouraging. Slowly but steadily, attitude of borrowers is also improving. The law is evolving. It is good that amendments are being made on the basis of experience gained. IBBI is amending the Regulations from time to time. Insolvency Code is also being amended from time to time. Amendments were made for first time on 23-11-2017 through Ordinance. The Ordinance was later converted into Act. Further amendments were made on 6-6-2018 again through Ordinance, which were later converted into Act. Further amendments were made *vide* Insolvency and Bankruptcy Code (Amendment) Act, 2019, effective from 16-8-2019.

Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 was introduced in Lok Sabha on 12-12-2019 to make further amendments to Insolvency Code. However, the Bill could not be passed in winter session of Parliament as Parliament adjourned sine die on 13-12-2019.

Hence, Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 (IBC (Amendment) Ordinance, 2019) has been issued on 28-12-2019. With this, the Insolvency Code has been amended for the fourth time since beginning. The Ordinance is welcome as it will remove many hurdles in implementation of Insolvency Code.

The Ordinance may be converted into Act in budget session of Parliament *i.e.* in February/March 2020.

Purpose of the Amendments

2. Purpose of Amendments was stated in Statement of Objects and Reasons appended to Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 which was introduced in Lok Sabha on 12-12-2019. The purpose, as stated in Statement of Objects and Reasons is as follows –

The Insolvency and Bankruptcy Code, 2016 (the Code) was enacted with a view to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order or priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India.

A need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency, in case the company goes into corporate insolvency resolution process or liquidation, to prevent potential abuse of the Code by certain classes of financial creditors, to provide immunity against prosecution of the corporate debtor and action against the property of the corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions, and in order to fill the critical gaps in the corporate insolvency framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code, 2016.

Highlights of amendments w.e.f. 28-12-2019

3. The major amendments are as follows –

- Immunity from prosecution of corporate debtor for offence committed prior to CIRP, if there is change of management (section 32A(1))
- Protection to property of corporate debtor in relation to offence committed prior to CIRP, if there is change of management (section 32A(2))
- Scope of 'interim finance' enhanced to provide for last mile funding to prevent insolvency (section 5(15))
- Minimum number of applicants under section 7(1) In case of numerous small financial creditors (like holders of public deposits or debentures or home buyers).
- Licenses, quotas, essential supplies cannot be cut during period of moratorium (section 14)
- Corporate debtor can file CIRP against another corporate debtor (section 11)

- Insolvency Professional must be appointed on the insolvency commencement date itself (section 16(1))

The major changes made by Ordinance are summarized below. All these changes are effective from 28-12-2019.

Insolvency Commencement Date

4. Section 5(12) of Insolvency Code provides that "Insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under section 7, 9 or section 10 of Insolvency Code, 2016, as the case may be.

This section had a *proviso* which stated that if the IRP (Interim Resolution Professional) has not been appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional (IRP) is appointed by the adjudicating authority – proviso to section 5(12) of Insolvency Code which was inserted w.e.f. 6-6-2018.

This *proviso* has been omitted w.e.f. 28-12-2019 by IBC (Amendment) Ordinance, 2019.

Thus, after amendment, "Insolvency commencement date" will always be the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority.

The reason is that as per amendment made to section 16(1) of Insolvency Code w.e.f. 28-12-2019, IRP is required to be appointed on the insolvency commencement date itself.

Interim Finance can include other debts also to provide last mile funding

5. Section 20(1) of Insolvency Code, 2016 empowers Resolution Professional to raise interim finance to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

Section 5(15) of Insolvency Code, 2016 states that "Interim finance" means any financial debt raised by the resolution professional during the insolvency resolution process period.

This definition has been enlarged w.e.f. 28-12-2019 by adding the words "and such other debt as may be notified". The purpose is to make provision for last mile funding to corporate debtor to prevent insolvency.

Minimum numbers of persons required to apply when there are numerous financial creditors

6. Section 7(1) of Insolvency Code, 2016 provides that financial creditor/s can initiate action, against a corporate debtor when a default occurs. The default can be in respect of any other financial creditor also.

The difficulty arises when there are numerous financial creditors. As per law existing upto 28-12-2019, even one single depositor, debenture holder or home buyer could initiate CIRP and harass corporate debtor.

Hence, three *provisos* have been added to section 7(1) of Insolvency Code, 2016, *vide* IBC (Amendment) Ordinance, 2019 w.e.f. 28-12-2019. These provide as follows.

6.1 *Application for CIRP action by minimum number when numerous financial creditors*

For the financial creditors, referred to in section 21(6A)(*a*) and 21(6A)(*b*), an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than 10% of the total number of such creditors in the same class, *whichever is less* – first *proviso* to section 7(1) of Insolvency Code, inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019.

Section 21 of Insolvency Code makes provisions in respect of constitution of Committee of Creditors. Section 21(6) makes provisions where single agent or trustee is appointed for consortium arrangement of financing.

In some cases, the financial debt is owed to numerous persons (like in case of public deposits, debentures or home buyers in real estate project), or is controlled by agent or trustee or guardian or administrator or executor.

In such cases, as per section 21(6A) of Insolvency Code, trustee or authorized representative can attend meeting and vote where debt is in control of agent or trustee or owned by huge number of persons. The provision is as follows.

Where a financial debt—

(*a*) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors

(*b*) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (*a*) (above)or section 21(6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors,

(*c*) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (*a*) or clause (*b*) or clause (*c*) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share – section 21(6A) of Insolvency Code as inserted w.e.f. 6-6-2018.

Thus, after the amendment w.e.f. 28-12-2019, in case of numerous holders of financial debt (like public deposits, debentures), application for CIRP can be filed only jointly by 100 such creditors or

10% of total number of creditors, whichever is less.

6.2 *Application for CIRP only by minimum number of home buyers*

For financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project, *whichever is less* – second *proviso* to section 7(1) of Insolvency Code, inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019.

6.3 *Provision of minimum number of applicants for CIRP will apply to existing applications also*

Where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second *provisos* and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance (*i.e.* before 28-12-2019), such application shall be modified to comply with the requirements of the first or second provisos as the case may be, within thirty days of the commencement of the said Ordinance (i.e. within 30 days from 28-12-2019), failing which the application shall be deemed to be withdrawn before its admission – third *proviso* to section 7(1) of Insolvency Code, inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019.

Thus, the provision of minimum number of applicants would apply even to existing applications which are pending before NCLT, if the application was not admitted by NCLT before 28-12-2019.

Corporate Debtor can file CIRP against another Corporate Debtor

7. Section 11 of Insolvency Code provides that corporate debtor himself cannot file CIRP in specified cases.

The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process (section 11 of Insolvency Code, 2016).

(*a*) a corporate debtor (which includes a corporate applicant in respect of such corporate debtor) undergoing a corporate insolvency resolution process; or

(*b*) a corporate debtor (which includes a corporate applicant in respect of such corporate debtor) having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(*c*) a corporate debtor (which includes a corporate applicant in respect of such corporate debtor) or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(*d*) a corporate debtor (which includes a corporate applicant in respect of such corporate debtor) in respect of whom a liquidation order has been made.

The intention is that the corporate debtor himself cannot initiate CIRP under section 10 of Insolvency Code.

However, it is possible the corporate debtor himself may be operational creditor or financial creditor to a corporate person who is in default.

Hence, *Explanation* II has been added to section 11 of Insolvency Code *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019, to the effect that nothing in section 11 of Insolvency Code shall prevent a corporate debtor referred to in clauses (*a*) to (*d*) from initiating corporate insolvency resolution process against another corporate debtor.

Licenses, quotas, essential supplies cannot be cut during period of moratorium

8. Section 14 of Insolvency Code provides for moratorium during CIRP. This protection has been extended w.e.f. 28-12-2019 to licenses, quotas, essential supplies etc. so long as current dues are paid. The basic idea is to ensure running of corporate debtor as a going concern. The provisions are as follows.

8.1 *License, quota, registration shall not be suspended or cancelled for past dues during moratorium, if current dues are paid*

For the purposes of this sub-section (*i.e.* section 14(1) of Insolvency Code providing moratorium), it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period – *Explanation* to section 14(1) of Insolvency Code, inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019.

Immunity from cancellation or suspension of licenses, permissions etc. for past dues is also a sound idea. In fact it is also legally correct as all these dues are of 'operational creditors' and should get same treatment as applicable to other operational creditors.

However, the immunity is only during moratorium. Further, the immunity is only against termination 'on the grounds of insolvency'. Thus, if cancellation or suspension of license, permit, registration, quota, concession, clearances or a similar grant or right is for any other reason (e.g. violation of conditions of license, permit, registration, quota, concession, clearances or a similar grant or right), there is no immunity during moratorium period.

However, section 32A of Insolvency Code, as inserted w.e.f. 28-12-2019, does provide protection from such cancellation, if it is against property of corporate debtor.

Essential supplies must continue during moratorium so long as current dues are paid

9. Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified – section 14(2A) of Insolvency Code inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019.

Inapplicability of moratorium to notified agreements or arrangements

10. The moratorium provisions shall not apply to such transactions, *agreements or other arrangements* as may be notified by the Central Government in consultation with any financial sector regulator *or any other authority* – section 14(3)(*a*) of Insolvency Code. Words in italics have been inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019.

This is only an enabling provision to avoid possible misuse of provision of moratorium.

Insolvency Resolution Professional to be appointed on Insolvency Commencement Date

11. Till 28-12-2019, section 16(1) of Insolvency Code stated that the Adjudicating Authority (NCLT) shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.

The words "within fourteen days from the insolvency commencement date" have been replaced by the words "on the insolvency commencement date", *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019.

Thus, IRP appointment date and insolvency commencement date would be same after 28-12-2019.

Financial Creditor can be related party to corporate debtor in specified cases

12. Financial creditor or the authorised representative of the financial creditor referred to in section 21(6), 21(6A) or 24(5), if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the Committee of Creditors (CoC) – first *proviso* to section 21(2) of Insolvency Code.

The first *proviso* to section 21(2) shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the

insolvency commencement date second *proviso* to section 21(2) of Insolvency Code.

In the second *proviso*, after the words "convertible into equity shares", the words "or completion of such transactions as may be prescribed", have been inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019.

Resolution Professional to continue to manage operations even after CIRP period expires

13. *Proviso* to section 23(1) of Insolvency Code, 2016 as existing upto 28-12-2019 stated that if the resolution plan under section 30(6) has been submitted, the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period until an order is passed by the Adjudicating Authority under section 31 of Insolvency Code (approval of resolution plan).

However, there can be situations where resolution plan is not submitted at all or not approved. Hence, following proviso has been substituted in place of existing *proviso*, *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019:

> "**Provided** that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under section 31(1) or appointing a liquidator under section 34 is passed by the Adjudicating Authority".

Person ineligible to be resolution applicant – section 29A

14. Section 29A of Insolvency Code makes provisions in respect of ineligible corporate applicants.

Section 29A(*c*) and 29A(*j*) of Insolvency Code state that a financial entity will not be 'related party' of corporate debtor simply because it holds instruments convertible into equity shares prior to insolvency commencement date.

These provisions have been amended *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019, to provide that after the words "convertible into equity shares", the words "or completion of such transactions as may be prescribed," shall be inserted.

This is to provide more flexibility in respect of relationship between corporate applicant and corporate debtor.

Immunity from prosecution of corporate debtor after approval of CIRP

15. Often, insolvency resolution involves change of management or control of corporate debtor. It is possible that some prosecution may be going on against corporate debtor. In such cases, the new management suffers though fault, if any, is of earlier management. Hence, immunity has been provided to corporate debtor w.e.f. 28-12-2019 in respect of prosecution for liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process.

Section 32A(1) of Insolvency Code inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019, states as follow –

Notwithstanding anything to the contrary contained in this Code (Insolvency Code) or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—

(*a*) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(*b*) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

15.1 ***Prosecution will be discharged if it was already launched***

If a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled - first *proviso* to section 32A(1) of Insolvency Code, inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019.

Prosecution of individual director or designated partner who was in charge of the corporate debtor at time of offence can continue

16. The immunity is only to corporate debtor and not to individual director or designated partner of LLP who is being prosecuted for personal vicarious liability, for offence committed when he was in-charge of affairs of corporate debtor.

The *second* proviso to section 32A of Insolvency Code inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019, states as follows - Every person who was a "designated partner" as defined in section 2(*j*) of the Limited Liability Partnership Act, 2008 or an "officer who is in default", as defined in section 2(60) of the Companies Act, 2013, or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under section 32A(1) of Insolvency Code.

Section 32A(2) of Insolvency Code inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019, provides immunity against any action in respect of property of corporate debtor for offence committed prior to commencement of CIRP, if there was change in management.

The section 32A(2) states that no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—

(*i*) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(*ii*) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation.—For the purposes of this sub-section (*i.e*. section 32A(2)), it is hereby clarified that,—

(*i*) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(*ii*) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under the Insolvency Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

Meaning of 'property'

17. 'Property' includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property – section 3(27) of Insolvency Code.

The term 'property' is very broad. The definition is 'inclusive' and not 'exhaustive'.

The term 'property' as defined, covers every possible interest which a person can have. Interest in property covers (*a*) right of ownership (title of property) (*b*) exclusive right to possess and (*c*) enjoy the property and right to alienate property. These rights are 'interest' in the property. Thus, 'property' covers not only physical objects but includes rights and interests in or derived out of physical objects.

Property can be movable or immovable. It can be tangible or intangible.

Lease is 'property' and cannot be cancelled or suspended for past offences

18. In *Municipal Corporation of Greater Mumbai (MCGM)* v. *Abhilash Lal* (2019) 111 taxmann.com 405 (SC 3 member

bench), certain property of Municipal Corporation was given on lease to one hospital (Sevenhills Healthcare P. Ltd.). The hospital did not abide by the conditions of lease. Hence, Corporation intended to cancel the lease as per conditions of lease. It was held that section 238 of Insolvency Code cannot not override MCGM's right. Section 238 of Insolvency Code could be of importance when properties and assets were of a debtor and not when property of third party like MCGM was involved.

After insertion of section 32A(2) of Insolvency Code w.e.f. 28-12-2019, this decision may not be applicable.

However, if the authority has already taken action (like cancellation of lease), that cannot be revived.

In *Embassy Property Development (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56 (SC), the Corporate Debtor had mining lease from Karnataka Government, The mining lease was pre-maturely terminated by State Government for violation of statutory rules and other terms and conditions of lease. The Resolution Professional applied to State Government, but the State Government refused to extend lease. The corporate debtor was under moratorium. Hence, NCLT asked the State Government to renew lease. In appeal, it was held by Supreme Court that the Insolvency Code does not override jurisdiction of other authorities. The purpose of moratorium is only to preserve status quo and not to create new rights.

The insolvency and liquidation proceedings for financial service providers or categories of financial service providers may be conducted with such modifications and in such manner as may be prescribed – *explanation* to section 227 of Insolvency Code inserted *vide* IBC (Amendment) Ordinance, 2019, w.e.f. 28-12-2019.

Conclusion

19. It is good that Government and IBBI are proactive in respect of Insolvency Code and corrective actions are being taken expeditiously as soon as difficulties are noticed in implementation of Insolvency Code.

Taking over of an ailing (and probably mismanaged) company is always a challenge. Giving immunity from prosecution after change of management in respect of misdeeds of earlier management will encourage many entrepreneurs to take over the ailing companies.

Immunity to property of corporate debtor for past offences will remove a big hurdle in taking over corporate debtor by new management.

Immunity from cancellation or suspension of licenses, permissions etc. for past dues is also a sound idea. In fact it is also legally correct as all these dues are of 'operational creditors' and should get same treatment as applicable to other operational creditors.

Immunity from cancellation of licenses, permits etc. for past offences is also good idea. However, if license, permit etc. was already cancelled prior to insolvency resolution, it may not be revived.

The initial results of Insolvency Code are encouraging. NPAs of Banks are reducing. Some ailing units have been taken over by new managements. However, lot of things are required to be done to make the Code a success. Apart from changes in law, it is necessary to change mind set of borrowers who feel that nothing is going to happen to them if loans are not repaid.

Mind set of Adjudicating Authorities in NCLT and even in Courts also needs change as at least some of them are not yet tuned to the fact that in commercial world, speed is the essence.

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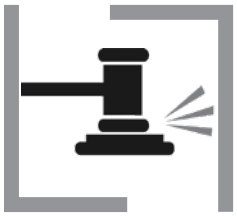


SUPREME COURT OF INDIA

Jaiprakash Associates Ltd.

v.

IDBI Bank Ltd.

A.M. KHANWILKAR AND DINESH MAHESHWARI JJ.
CIVIL APPEAL NOS. D. NOS. 27229 AND 6486 OF 2019

NOVEMBER 6, 2019

Section 30, read with section 12, of the Insolvency and Bankruptcy Code, 2016 and regulation 36B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution plan - Submission of - NCLAT by order held that in Corporate Insolvency Resolution Process (CIRP) of corporate debtor, period during which matter remained pending for adjudication as to how voting share of allottees (financial creditors) would be counted for purpose of counting 270 days, was to be excluded for purpose of counting 270 days of CIRP - Above judgment was assailed before Supreme Court, questioning power of NCLT/NCLAT, as the case may be, to exclude any period from statutory period in exercise of inherent powers sans any express provision in I & B Code in that regard - It was found that recent amendment to I & B Code had come into effect, thereby amending section 12 to freeze or peg maximum period of CIRP to 330 days from insolvency commencement date - Further, recently inserted section 12A enabled adjudicating authority to allow withdrawal of an application filed under section 7 or section 9 or section 10, on an application made by applicant with approval of 90 per cent voting share of CoC - Similarly, sub-clause (7) of regulation 36B inserted with effect from 4-7-2018, dealing with request for resolution plans unambiguously postulates that resolution professional may, with approval of Committee, reissue request for resolution plans, if resolution plans received in response to earlier request are not satisfactory, subject to condition that request is made to all prospective resolution applicants in final list - Whether therefore, in view of legislative changes which have expanded scope of resolution plan, IRP of corporate debtor is to be allowed to invite revised resolution plan from final bidders who had submitted resolution plan on earlier occasion with a view to revive corporate debtor - Held, yes (Paras 16, 18 and 21)

FACTS

- The IDBI bank (resolution professional) had filed an application under section 7 against JIL (Jaypee Infratech Limited) (corporate debtor) before the NCLT as JIL had turned NPA.
- During pendency of said application, writ petitions were filed in the instant court by homebuyers concerning project of JIL which came to be disposed of on 9-8-2018, in the case of *Chitra Sharma* v. *Union of India* (2018) 96 taxmann.com 216/148 SCL 833. Consequent thereto the matter proceeded before the NCLT being the Adjudicating Authority. One of the homebuyers Association preferred an application before the Adjudicating Authority (NCLT), Allahabad Bench on 17-9-2018, seeking clarification as to what will be the manner in which the voting percentage of allottees (financial creditors) had to be calculated. An order was passed by the Third Member on 24-5-2019.
- The order of NCLT, dated 24-5-2019, regarding computation of voting share was under challenge in company appeal preferred by Jaypee Green Krescent House Buyers Welfare Associations before the NCLAT.
- In the meantime, the IDBI Bank filed an application before the NCLT for excluding the period of pendency of the application for clarification regarding the manner of counting votes of the concerned financial creditors from the period of 270 days of Corporate Insolvency Resolution Process (CIRP).
- While the said application was pending, NCLT by order, dated 6-5-2019, called upon the authorities, representatives of the allottees and others to file their reply on the necessity to proceed further with the CIRP in accordance with law, for considering the resolution plan received from the concerned bidder, subject to the outcome of the pending application.
- The IDBI Bank, feeling aggrieved by the opinion expressed by the NCLT to proceed further with the CIRP despite pending clarificatory motions before the NCLT/NCLAT respectively, including the application to exclude the period during the clarificatory application from the total period of 270 days of the CIRP, assailed the order passed by the NCLT before the NCLAT.
- The NCLAT by order granted relief as sought for by the IDBI Bank to exclude period from 17-9-2018 till 4-6-2019, for the purpose of counting 270 days Corporate Resolution Process period and issued consequential directions.
- The above judgment was assailed by Jaiprakash Associates Ltd. (JAL), the holding company of JIL and one of the homebuyers' Association before the Supreme Court questioning the power of the NCLT or NCLAT, as the case maybe, to exclude any period from the statutory period in exercise of inherent powers sans any express

provision in the I & B Code, in that regard.

HELD

- The inevitable fallout of accepting the stand taken by the appellants would be to set aside the impugned judgment and relegate the parties to a situation where the only option would be to proceed with the liquidation process concerning JIL under Chapter III of Part II of the I & B Code, on the premise that no resolution plan has been received before the expiry of the Insolvency Resolution Process under section 12 of the I & B Code or being a case of rejection of the resolution plan under section 31 of the I & B Code. However, during the arguments, there has been complete unanimity between all the stakeholders including the appellants before this Court that the liquidation of JIL must be eschewed as it would do more harm to the interests of the stakeholders, in particular the large number of homebuyers, who aspire to have their home at the earliest. (Para 10)

- Considering the position taken by the stakeholders before this Court and the pendency of other writ petitions and miscellaneous applications filed by the homebuyers and also by JAL to issue directions and pass orders and, if necessary, in exercise of power under article 142 of the Constitution of India to salvage the situation and provide for a wholesome solution which will subserve the interests of all concerned and in particular of large number of homebuyers who have voting share of 62.3 per cent (as mentioned in the report submitted by IRP) being constituent of CoC, it may not be appropriate nor necessary to dilate on the submissions made across the Bar by the concerned parties and to answer the questions of law urged by the appellants noted hitherto. Instead, plenary powers under article 142 of the Constitution of India maybe exercised to effectuate the exposition in *Chitra Sharma's* case (*supra*) and to do substantial justice to the parties. In doing so, the same course as noted in the impugned judgment maybe adopted with some modulation thereto. (Para 11)

- The Court is conscious of the fact that a section of the homebuyers have come up in appeal against the impugned judgment as they entertain *bona fide* apprehension that the entire process would get delayed further due to inviting fresh offers from eligible persons. However, it must be immediately noted that that the Court is not in favour of inviting fresh resolution plans from other eligible persons, as noted by the NCLAT, for being considered by the CoC afresh. (Para 12)

- The Court also takes note of the suggestion given by the homebuyers Association, appellants before this Court, that the entire process be kept outside the I & B Code, dispensation and to be monitored directly by this Court. The temptation of accepting the said submission, however, is fraught with being in conflict with the opinion

expressed by the three Judge Bench of this Court in *Chitra Sharma's* case (*supra*).The revival of CIRP in relation to JIL is on account of this decision in *Chitra Sharma's* case (*supra*) and would, therefore, be binding on all concerned. It is between the same parties. (Para 13)

- The Court is conscious of the fact that adopting the course indicated in the impugned judgment as a direction, may also have the effect of modifying the directions given in *Chitra Sharma's* case (*supra*) reproduced above, namely, that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of the order, *i.e.*, 9-8-2018 and the further extension could be only for 90 days. However, it is one thing to accept the stand of the stakeholders to provide mechanism outside the I & B Code, than to say that the mechanism provided by I & B Code, be modulated in some respect whilst ensuring that such modulation does not do any violence to the legislative intent and at the same time, subserve the cause of justice and provide a window to find out a viable solution to all the stakeholders. (Para 14)

- The Court is also conscious of the fact that the recent amendment to the I & B Code has come into effect, thereby amending section 12 to freeze or peg the maximum period of CIRP to 330 days from the insolvency commencement date which in this case must be taken as 9-8-2018, in light of the direction given in *Chitra Sharma's* case (*supra*). It is, however, noticed from several amendments made to the I & B Code from time to time that the Legislature has also continually worked upon introducing changes to the I & B Code, so as to address the problems faced in implementation of the new legislation introduced as recently as in 2016. The case on hand is a classic example of how the entire process has got embroiled in litigation initially before this Court and now before the NCLT and NCLAT respectively, because of confusion or lack of clarity in respect of foundational processes to be followed by the CoC. That becomes evident from the time consumed by IRP or the adjudicating and appellate authority to remove the doubts on matter such as how the vote share of CoC be computed on account of inclusion of allottees/homebuyers as financial creditors. The homebuyers have also expressed some doubt about their status as secured creditors. All these issues are being ironed out by the adjudicating authority. It is also a matter of record that NCLT was functioning only on two days of the week and when it took decision on the application for clarification, there was difference of opinion between the members which was then required to be resolved by the President of the NCLT. It is not a case where one party was trying to march over the other by resorting to unnecessary or avoidable litigation. The fact remains

that the application for clarification made by the homebuyers on 17-9-2018, at the earliest opportunity after commencement of the resolution process pursuant to the order, dated 9-8-2018, passed by this Court in *Chitra Sharma's* case (*supra*), remained pending for quite some time. That delay is attributable to the law's delay. Neither the homebuyers nor the other financial creditors can be blamed for the pendency of the proceedings before the NCLT and later on before the NCLAT. The NCLT realizing the uncertainty in resolving the said issue, wanted to proceed with the resolution plan subject to the outcome of the pending IA as is manifest from its order, dated 6-5-2019. Even that became subject matter of challenge in the appeal filed by the IDBI before the NCLAT which was finally disposed of *vide* the impugned judgment. (Para 15)

- Suffice it to note that an extraordinary situation had arisen because of the constant experimentation which went about at different level due to lack of clarity on matters crucial to the decision making process of CoC. Besides that, in view of the recent legislative changes, the scope of resolution plan stands expanded which may now include provision for restructuring the corporate debtor including by way of merger, amalgamation and demerger and more so the power bestowed on the CoC to consider not only the feasibility and viability of the resolution plan but also the manner of distribution proposed, which may take into account the order of priority amongst the creditors. Additionally, the recently inserted section 12A enables the adjudicating authority to allow the withdrawal of an application filed under section 7 or section 9 or section 10, on an application made by the applicant with the approval of 90 per cent voting share of the CoC. Similarly, sub-clause (7) of regulation 36B inserted with effect from 4-7-2018, dealing with the request for resolution plans unambiguously postulates that the resolution professional may, with the approval of the Committee, reissue request for resolution plans, if the resolution plans received in response to earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list. In the instant case, finally only two bidders had participated and submitted their resolution plan which was placed before the CoC and stated to have been rejected. However, applying the principle underlying regulation 36B(7), it is deemed appropriate to permit the IRP to reissue request for resolution plans to the two bidders (Suraksha Realty and NBCC) and/or to call upon them to submit revised resolution plan(s), which can be then placed before the CoC for its due consideration. (Para 16)

- In the instant case, as aforementioned, there is unanimity amongst all the parties appearing before this Court including the resolution applicant that

liquidation of JIL must be eschewed and instead an attempt be made to salvage the situation by finding out some viable arrangement which would subserve the interests of all concerned.(Para 17)

- In view of the legislative changes referred to above, it is opined that the Court needs to and must exercise its plenary powers to make an attempt to revive the corporate debtor (JIL), lest it is exposed to liquidation process under Chapter III of Part II of the I & B Code. This is to be done so because the project has been implemented in part and out of over 20,000 homebuyers, a substantial number of them have been put in possession and the remaining work is in progress and in some cases at an advanced stage of completion. In this backdrop, it would be in the interest of all concerned to accept a viable plan reflecting the recent legislative changes. (Para 18)
- Indeed, the third proviso to section 12(3) predicates time limit for completion of Insolvency Resolution Process, which has come into effect from 16-8-2019.Taking an overall view of the matter, it is deemed just, proper and expedient to issue directions under article 142 of the Constitution of India to all concerned to reckon 90 days extended period from the date of this order instead of the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019. That means, in terms of this order, the CIRP concerning JIL shall be completed within a period of 90 days from today. (Para 19)
- It is not deemed necessary to dilate on the arguments of the respective parties for the nature of order that is to be passed, including about the *locus standi* of JAL which is opined, already stands answered against JAL by virtue of section 29A as expounded in *Chitra Sharma's* case (*supra*). (Para 20)
- Accordingly, the following order is passed to do substantial and complete justice to the parties and in the interest of all the stakeholders of JIL:

  (*i*) The IRP is directed to complete the CIRP within 90 days from today. In the first 45 days, it will be open to the IRP to invite revised resolution plan only from Suraksha Realty and NBCC respectively, who were the final bidders and had submitted resolution plan on the earlier occasion and place the revised plan(s) before the CoC, if so required, after negotiations and submit report to the adjudicating authority NCLT within such time. In the second phase of 45 days commencing from 21-12-2019, margin is provided for removing any difficulty and to pass appropriate orders thereon by the Adjudicating Authority.

  (*ii*) The pendency of any other application before the NCLT or NCLAT, as the case may be,

including any interim direction given therein shall be no impediment for the IRP to receive and process the revised resolution plan from the above named two bidders and take it to its logical end as per the provisions of the I & B Code, within the extended timeline prescribed in terms of this order.

(*iii*) It is directed that the IRP shall not entertain any expression of interest (improved) resolution plan individually or jointly or in concert with any other person, much less ineligible in terms of section 29A of the I & B Code.

(*iv*) These directions are issued in exceptional situation in the facts of the instant case and shall not be treated as a precedent.

(*v*) This order may not be construed as having answered the questions of law raised in both the appeals, including as recognition of the power of the NCLT/NCLAT to issue direction or order not consistent with the statutory timelines and stipulations specified in the I & B Code and Regulations framed thereunder. (Para 21)

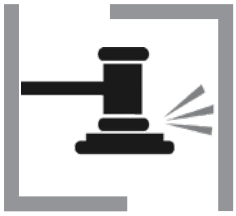
- Both the appeals are disposed of in terms of this order with no order as to costs. Along with the appeals, applications filed therein also stand disposed of. (Para 22)

CASE REVIEW

Chitra Sharma v. *Union of India* (2018) 96 taxmann.com 216/148 SCL 833 (SC) (para 20) *followed*.

CASES REFERRED TO

Chitra Sharma v. *Union of India* (2018) 96 taxmann.com 216/148 SCL 833 (SC) (para 3).



SUPREME COURT OF INDIA

Embassy Property Developments (P.) Ltd.

v.

State of Karnataka

ROHINTON FALI NARIMAN, ANIRUDDHA BOSE AND V. RAMASUBRAMANIAN, JJ.

CIVIL APPEAL NOS. 9170, 9171 AND 9172 OF 2019

DECEMBER 3, 2019

Section 60, read with section 14, of the Insolvency and Bankruptcy Code, 2016 - Corporate person's adjudicating authorities - Adjudicating Authority - Whether wherever corporate debtor has to exercise a right that falls outside purview of IBC, 2016 especially in realm of public law, they cannot, through Resolution Professional, take a bypass and go before NCLT for enforcement of such a right - Held, yes - Corporate insolvency resolution process against corporate debtor had been initiated and Resolution Professional was appointed - A mining lease granted by Government of Karnataka under Mines and Minerals (Development and Regulation) Act, 1957 was terminated on allegation of violation of statutory rules and terms & conditions of lease deed - Resolution Professional filed application before NCLT for setting aside order of Government of Karnataka and same was allowed on ground that order of Government of Karnataka was in violation of moratorium declared in terms of section 14(1) - Government of Karnataka filed writ petition against order of NCLT and High Court by impugned order adjourned matter to 23-9-2019 and granted stay of operation of direction contained in order of NCLT - Whether NCLT did not have jurisdiction to entertain an application against Government of Karnataka for a direction to execute Supplemental Lease Deeds for extension of mining lease and since NCLT chose to exercise a jurisdiction not vested in it in law, High Court was justified in entertaining writ petition, on basis that NCLT was coram non judice - Held, yes - Whether however, NCLT and NCLAT would have jurisdiction to enquire into questions of fraud in initiation of corporate insolvency proceedings under IBC Code - Held, yes - Whether thus, though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957 and rules issued thereunder, especially when disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action and, hence, High Court was justified in entertaining writ petition - Held, yes (Paras 40, 48 and 52)

FACTS

- A company 'U' claiming to be a financial creditor, moved an application before the NCLT under section 7 against the corporate debtor.
- By an order dated 12-3-2018, NCLT admitted the application, ordered the commencement of the Corporate Insolvency Resolution Process and appointed an Interim Resolution Professional. Consequently, a Moratorium was also declared in terms of section 14.
- At that time, the corporate debtor held a mining lease granted by the Government of Karnataka, which was to expire by 25-5-2018. Though a notice for premature termination of the lease had already been issued on 9-8-2017, on the allegation of violation of statutory rules and the terms and conditions of the lease deed, no order of termination had been passed till the date of initiation of the Corporate Insolvency Resolution Process.
- The Interim Resolution Professional appointed by NCLT addressed a letter dated 14-3-2018 to the Chairman of the Monitoring Committee as well as the Director of Mines & Geology informing them of the commencement of CIRP. He also wrote a letter dated 21-4-2018 to the Director of Mines & Geology, seeking the benefit of deemed extension of the lease beyond 25-5-2018 upto 31-3-2020 in terms of section 8A(6) of the Mines & Minerals (Development and Regulation) Act, 1957 (MMDR Act, 1957).
- As there was no response, the Interim Resolution Professional filed a writ petition in the High Court of Karnataka, seeking a declaration that the mining lease should be deemed to be valid upto 31-3-2020 in terms of section 8A(6) of the MMDR Act, 1957.
- During the pendency of the writ petition, the Government of Karnataka passed an order dated 26-9-2018, rejecting the proposal for deemed extension, on the ground that the corporate debtor had contravened the terms and conditions of the Lease Deed.
- In view of the Order of rejection passed by the Government of Karnataka, the corporate debtor, withdrew the Writ Petition with liberty to file a fresh writ petition.
- However, instead of filing a fresh writ petition the Resolution Professional moved a Miscellaneous Application before the NCLT, praying for setting aside the Order of the Government of Karnataka, and seeking a declaration that the lease should be deemed to be valid upto 31-3-2020 and also a consequential direction to the Government of Karnataka to execute Supplement Lease Deeds for the period upto 31-3-2020.
- By an order dated 11-12-2018, NCLT, allowed the Miscellaneous Application setting aside the order

of the Government of Karnataka on the ground that the same was in violation of the moratorium declared on 12-3-2018 in terms of section 14(1). Consequently, the Tribunal directed the Government of Karnataka to execute Supplement Lease Deeds in favour of the corporate debtor for the period upto 31-3-2020.

- Aggrieved by the order of the NCLT, the Government of Karnataka moved writ petition before the High Court of Karnataka. When the writ petition came up for orders as to admission, the corporate debtor represented by the Resolution Professional appeared and took notice and sought time to get instructions. Therefore, the High Court, by an order dated 12-9-2019 adjourned the matter to 23-9-2019 and granted a stay of operation of the direction contained in the impugned order of the Tribunal. Interim Stay was necessitated in view of a Contempt Application moved by the Resolution Professional before the NCLT against the Government of Karnataka for their failure to execute Supplement Lease deeds.

- Against the said *ad Interim* Order granted by the High Court the Resolution Applicant, the Resolution Professional and the Committee of Creditors had filed instant appeals before the Supreme Court.

- Two seminal questions of importance namely : (*i*) whether the High Court ought to interfere, under Article 226/227 of the Constitution, with an order passed by the National Company Law Tribunal in a proceeding under the Insolvency and Bankruptcy Code, 2016, ignoring the availability of a statutory remedy of appeal to the National Company Law Appellate Tribunal and if so, under what circumstances; and (ii) whether questions of fraud can be inquired into by the NCLT/ NCLAT in the proceedings initiated under the Insolvency and Bankruptcy Code, 2016, arose for consideration in the appeals.

HELD

- In the backdrop of the facts narrated and in the light of the rival contentions the first question that arises for consideration, is as to whether the High Court ought to interfere, under Article 226/227 of the Constitution, with an order passed by NCLT in a proceeding under the IBC, 2016, despite the availability of a statutory alternative remedy of appeal to NCLAT. (Para 10)

Jurisdiction and the powers of the High Court under Article 226

- What is recognized by Article 226 (1) is the power of every High Court to issue (*i*) directions, (*ii*) orders or (*iii*) writs. They can be issued to (*i*) any person or (*ii*) authority including the Government. They may be issued (i) for the enforcement of any of the rights conferred by Part III and (ii) for any other purpose. But the exercise of the power recognized by Clause (1) of Article 226, is restricted

by the territorial jurisdiction of the High Court, determined either by its geographical location or by the place where the cause of action, in whole or in part, arose. While the nature of the power exercised by the High Court is delineated in Clause (1) of Article 226, the jurisdiction of the High Court for the exercise of such power, is spelt out in both clauses (1) and (2) of Article 226. (Para 13)

- Traditionally, the jurisdiction under Article 226 was considered as limited to ensuring that the judicial or quasi-judicial tribunals or administrative bodies do not exercise their powers in excess of their statutory limits. But in view of the use of the expression *'any person'* in Article 226(1), Courts recognized that the jurisdiction of the High Court extended even over private individuals, provided the nature of the duties performed by such private individuals, are public in nature. Therefore, the remedies provided under Article 226 are public law remedies, which stand in contrast to the remedies available in private law. (Para 14)

- One of the well recognized exceptions to the self-imposed restraint of the High Courts, in cases where a statutory alternative remedy of appeal is available, is the lack of jurisdiction on the part of the statutory/quasi-judicial authority, against whose order a judicial review is sought. Traditionally, English Courts maintained a distinction between cases where a statutory/ quasi-judicial authority exercised a jurisdiction not vested in it in law and cases where there was a wrongful exercise of the available jurisdiction. (Para 15)

- The question whether the error committed by an administrative authority/Tribunal or a Court of law went to jurisdiction or whether it was within jurisdiction may still be relevant to test whether a statutory alternative remedy should be allowed to be bypassed or not. (Para 22)

- The distinction between the lack of jurisdiction and the wrongful exercise of the available jurisdiction, should certainly be taken into account by High Courts, when Article 226 is sought to be invoked bypassing a statutory alternative remedy provided by a special statute. (Para 24)

- On the basis of this principle, it is to seen as to whether the case of the State of Karnataka fell under the category of (1) lack of jurisdiction on the part of the NCLT to issue a direction in relation to a matter covered by MMDR Act, 1957 and the Statutory Rules issued thereunder or (2) mere wrongful exercise of a recognised jurisdiction, say for instance, asking a wrong question or applying a wrong test or granting a wrong relief. (Para 25)

- The MMDR Act, 1957 is a Parliamentary enactment traceable to Entry 54 of the Union List in Seventh Schedule of the Constitution. The object of the

Act as it stood originally, was the regulation of mines and development of minerals. (Para 26)

- In the instant case, the land which formed the subject matter of mining lease, belongs to the State of Karnataka. The liberties and privileges granted to the corporate debtor by the Government of Karnataka under the mining lease, are delineated in Part IV of the mining lease. The mining lease was issued in accordance with the statutory rules namely Mineral Concession Rules, 1960. Therefore, the relationship between the corporate debtor and the Government of Karnataka under the mining lease is not just contractual but also statutorily governed. As the MMDR Act, 1957 is a Parliamentary enactment traceable to Entry 54 in List I of the Seventh Schedule. This Entry 54 speaks about regulation of mines and development of minerals to the extent to which such regulation and development under the control of the Union, is declared by Parliament by law to be expedient in public interest. In fact the expression "public interest" is used only in 3 out of 97 Entries in List I, one of which is Entry 54, the other two being Entries 52 and 56. Interestingly, Entry 23 in List II does not use the expression "public interest", though it also deals with regulation of mines and mineral development, subject to the provisions of List I. It is this element of "public interest" that finds a place in section 2 of the MMDR Act, 1957, in the form of a declaration. (Para 27)
- Therefore, the decision of the Government of Karnataka to refuse the benefit of deemed extension of lease, is in the public law domain and, hence, the correctness of the said decision can be called into question only in a superior court which is vested with the power of judicial review over administrative action. The NCLT, being a creature of a special statute to discharge certain specific functions, cannot be elevated to the status of a superior court having the power of judicial review over administrative action. (Para 28)
- The NCLT is not even a Civil Court, which has jurisdiction by virtue of section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore, NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer. (Para 29)

Jurisdiction and powers of NCLT

- NCLT and NCLAT are constituted, not under the IBC, 2016 but under sections 408 and 410 of the Companies Act, 2013. Without specifically defining the powers and functions of the NCLT, section 408 of the Companies Act, 2013 simply states that the Central Government shall constitute a National Company Law Tribunal, to exercise and discharge such powers and functions as are or may be, conferred on it by or under the Companies Act or any

other law for the time being in force. Insofar as NCLAT is concerned, section 410 of the Companies Act merely states that the Central Government shall constitute an Appellate Tribunal for hearing appeals against the orders of the Tribunal. The matters that fall within the jurisdiction of the NCLT, under the Companies Act, 2013, lie scattered all over the Companies Act. Therefore, sections 420 and 424 of the Companies Act, 2013 indicate in broad terms, merely the procedure to be followed by the NCLT and NCLAT before passing orders. However, there are no separate provisions in the Companies Act, exclusively dealing with the jurisdiction and powers of NCLT. (Para 30)

- In contrast, sub-sections (4) and (5) of section 60 give an indication respectively about the powers and jurisdiction of the NCLT. (Para 31)
- Sub-section (4) of section 60 states that the NCLT will have all the powers of the DRT as contemplated under Part III of the Code for the purposes of sub-section (2). Sub-section (2) deals with a situation where the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of a corporate debtor is taken up, when CIRP or liquidation proceeding of such a corporate debtor is already pending before NCLT. The object of sub-section (2) is to group together (A) the CIRP or liquidation proceeding of a corporate debtor and (B) the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of the very same corporate debtor, so that a single Forum may deal with both. This is to ensure that the CIRP of a corporate debtor and the insolvency resolution of the individual guarantors of the very same corporate debtor do not proceed on different tracks, before different Fora, leading to conflict of interests, situations or decisions. (Para 32)
- If the object of sub-section (2) of section 60 is to ensure that the insolvency resolutions of the corporate debtor and its guarantors are dealt with together, then the question that arises is as to why there should be a reference to the powers of the DRT in sub-section (4). The answer to this question is to be found in section 179. Under section 179 (1), it is the DRT which is the Adjudicating Authority in relation to insolvency matters of individuals and firms. This is in contrast to section 60(1) which names the NCLT as the Adjudicating Authority in relation to insolvency resolution and liquidation of corporate persons including corporate debtors and personal guarantors. The expression "personal guarantor" is defined in section 5(22) to mean an individual who is the surety in a contract of guarantee to a corporate debtor. Therefore, the object of sub-section (2) of section 60 is to avoid any confusion that may arise on account of section 179(1) and to ensure that whenever a CIRP is initiated against a corporate debtor, NCLT will be the Adjudicating Authority not only

in respect of such corporate debtor but also in respect of the individual who stood as surety to such corporate debtor, notwithstanding the naming of the DRT under section 179(1) as the Adjudicating Authority for the insolvency resolution of individuals. This is also why sub-section (2) of section 60 uses the phrase "notwithstanding anything to the contrary contained in this Code". (Para 33)

- Sub-section (2) of section 179 confers jurisdiction upon DRT to entertain and dispose of (*i*) any suit or proceeding by or against the individual debtor (*ii*) any claim made by or against the individual debtor and (*iii*) any question of priorities or any other question whether of law or facts arising out of or in relation to insolvency and bankruptcy of the individual debtor. Clauses (*a*), (*b*) and (*c*) of sub-section (2) of section 179 are identical to clauses (*a*), (*b*) and (*c*) of sub-section (5) of section 60. Therefore the only reason why sub-section (4) is incorporated in section 60 is to ensure that NCLT will exercise jurisdiction - (1) not only to entertain and dispose of matters referred to in clauses (*a*), (*b*) and (*c*) of sub-section (5) of section 60 in relation to the corporate debtor, (2) but also to entertain and dispose of the matters specified in Clauses (*a*), (*b*) and (*c*) of sub-section (2) of section 179, whenever the contingency stated in section 60(2) arises. (Para 34)

- Interestingly there are separate provisions both in Part II and Part III of IBC, 2016 ousting the jurisdiction of civil courts. While section 63 contained in Part II bars the jurisdiction of a civil court in respect of any matter on which NCLT or NCLAT will have jurisdiction, section 180 contained in Part III bars the jurisdiction of civil courts in respect of any matter on which DRT or DRAT has jurisdiction. But curiously there is something more in section 180 than what is found in section 63, which can be appreciated if both are presented in a tabular column. Though what is found in sub-section (2) of section 180 is not found in the corresponding provision in Part II namely, section 63, a similar provision is incorporated in an unrelated provision namely section 64, which primarily deals with expeditious disposal of applications. Thus, there appears to be some mix-up. However, one is not concerned about the same in this case and a reference to the same has been made only because of sub-section (4) of section 60, vesting upon the NCLT, all the powers of the DRT. (Para 35)

- From a combined reading of sub-section (4) and sub-section (2) of section 60 with section 179, it is clear that none of them hold the key to the question as to whether NCLT would have jurisdiction over a decision taken by the government under the provisions of MMDR Act, 1957 and the Rules issued thereunder. The only provision which can probably throw light on this question would be sub-section (5) of section 60, as it speaks about the jurisdiction of the NCLT. Clause (*c*) of

sub-section (5) of section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution"appearing in Clause (c) of sub-section (5). Let one take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If section 60(5)(c) is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under section 260A of the Income-tax Act, 1961. Therefore, the jurisdiction of the NCLT delineated in section 60(5) cannot be stretched so far as to bring absurd results. (It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression "operational debt"under section 5(21), making the Government an "operational creditor" in terms of section 5(20). The moment the dues to the Government are crystalised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the Adjudicating Authority, namely the NCLT. (Para 36)

- It was argued by the appellants that an Interim Resolution Professional is duty bound under section 20(1) to preserve the value of the property of the corporate debtor and that the word `property' is interpreted in section 3(27) to include even actionable claims as well as every description of interest, present or future or vested or contingent interest arising out of or incidental to property and that therefore the Interim Resolution Professional is entitled to move the NCLT for appropriate orders, on the basis that lease is a property right and NCLT has jurisdiction under section 60(5) to entertain any claim by the corporate debtor. (Para 37)
- But the said argument cannot be sustained for the simple reason that the duties of a resolution professional are entirely different from the jurisdiction and powers of NCLT. In fact section 20(1) cannot be read in isolation, but has to be read in conjunction with section 18(f)(*vi*) together with the *Explanation* thereunder. (Para 38)
- If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, section 18(*f*)(*vi*) would not have made the task of the interim

resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is specifically kept out of the definition of the term 'assets' under the *Explanation* to section 18. This assumes significance in view of the language used in sections 18 and 25 in contrast to the language employed in section 20. Section 18 speaks about the duties of the interim resolution professional and section 25 speaks about the duties of resolution professional. These two provisions use the word 'assets', while section 20(1) uses the word 'property' together with the word 'value'. Sections 18 and 25 do not use the expression 'property'. Another important aspect is that under section 25 (2) (b), the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. Section 25 shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of section 60(5). (Para 39)

- Therefore, in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right. (Para 40)

- In fact the Resolution Professional in instant case appears to have understood this legal position correctly, in the initial stages. This is why when the Government of Karnataka did not grant the benefit of deemed extension, even after the expiry of the lease on 25-5-2018, the Resolution Professional moved the High Court by way of a writ petition. The prayer made in WP No. 23075 of 2018 was for a declaration that the mining lease should be deemed to be valid upto 31-3-2020. If NCLT was omnipotent, the Resolution Professional would have moved the NCLT itself for such a declaration. But he did not, as he understood the legal position correctly. (Para 41)

- After the filing of the first writ petition (WP No. 23075 of 2018), the Government of Karnataka passed an order dated 26-9-2018 rejecting the claim. Therefore the Resolution Professional, representing the Corporate Debtor filed a memo before the High Court seeking withdrawal of the writ petition "with liberty to file a fresh writ petition". However the High Court, while dismissing the writ petition

by order dated 28-9-2018 was little considerate and it disposed of the writ petition as withdrawn with liberty to take recourse to appropriate remedies in accordance with law. Perhaps taking advantage of this liberty, the Resolution Applicant moved the NCLT against the order of rejection passed by the Government of Karnataka. If NCLT was not considered by the Resolution Professional, in the first instance, to be empowered to issue a declaration of deemed extension of lease, one fails to understand how NCLT could be considered to have the power of judicial review over the order of rejection. (Para 42)

- The fact that the Government of Karnataka agreed in the second writ petition WP No. 5002 of 2019 to go back to the NCLT and contest the Miscellaneous Application filed by the Resolution Professional, would not tantamount to conceding the jurisdiction of NCLT. In any case a Tribunal which is the creature of a statute cannot be clothed with a jurisdiction, by any concession made by a party. (Para 43)

- A lot of stress was made on the effect of section 14 on the deemed extension of lease. But the moratorium provided for in section 14 could have any impact upon the right of the Government to refuse the extension of lease. The purpose of moratorium is only to preserve the *status quo* and not to create a new right. Therefore nothing turns on section 14. Even section 14 (1) (*d*), of IBC, 2016, which prohibits, during the period of moratorium, the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor, will not go to the rescue of the corporate debtor, since what is prohibited therein, is only the right not to be dispossessed, but not the right to have renewal of the lease of such property. In fact the right not to be dispossessed, found in section 14 (1) (d), will have nothing to do with the rights conferred by a mining lease especially on a government land. What is granted under the deed of mining lease in ML 2293 dated 4-1-2001, by the Government of Karnataka, to the corporate debtor, was the right to mine, excavate and recover iron ore and red oxide for a specified period of time. The Deed of Lease contains a Schedule divided into several parts. Part I of the Schedule describes the location and area of the lease. Part II indicates the liberties and privileges of the lessee. The restrictions and conditions subject to which the grant can be enjoyed are found in Part III of the Schedule. The liberties, powers and privileges reserved to the Government, despite the grant, are indicated in Part IV. This Part IV entitles the Government to work on other minerals (other than iron ore and red oxide) on the same land, even during the subsistence of the lease. Therefore, what was granted to the corporate debtor was not an exclusive possession of the area in question, so as to enable the Resolution Professional to invoke section 14(1)(d). Section 14(1)(d) may

have no application to situations of this nature. (Para 44)

- Therefore, NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease and since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, on the basis that NCLT was *coram non judice*. (Para 45)

- The second question that arises for consideration is as to whether NCLT is competent to enquire into allegations of fraud, especially in the matter of the very initiation of CIRP. (Para 46)

- This question has arisen, in view of the stand taken by the Government of Karnataka before the High Court that they chose to challenge the order of the NCLT before the High Court, instead of before NCLAT, due to the fraudulent and collusive manner in which the CIRP was initiated by one of the related parties of the corporate debtor themselves. In the writ petition filed by the Government of Karnataka before the High Court, it was specifically pleaded (*i*) that the Managing Director of the corporate debtor entered into an agreement on 6-2-2011 with one 'D', for carrying out mining operations on behalf of the corporate debtor and also for managing its affairs and selling 100 per cent of the extracted iron ore; (*ii*) that the said 'D' was a partnership firm of which one 'M' and his wife were partners; (*iii*) that another agreement dated 11-12-2012 was entered into between the Corporate Debtor and a proprietary concern by name 'P', of which the very same person namely, 'M' was the sole proprietor; (*iv*) that the said agreement was for hiring of machinery and equipment; (*v*) that a finance agreement was also entered into on 12-12-2012 between the corporate debtor and a company by name 'U', represented by its authorized signatory 'M'; (*vi*) that there were a few communications sent by the said 'M' to various authorities, claiming himself to be the authorized signatory of the corporate debtor; (*vii*) that an MOU was entered into on 16-4-2016 between the corporate debtor and 'U', represented by the said 'M', whereby the corporate debtor agreed to pay Rs. 11.5 crores; (*viii*) that the said agreement was purportedly executed at Florida, but witnessed at Chennai; (*ix*) that 'M' even communicated to the Director, Department of Mines & Geology as well as the Monitoring Committee, taking up the cause of the corporate debtor as its authorized signatory; (*x*) that the CIRP was initiated by 'U' represented by its authorized signatory, 'M'; (*xi*) that the Resolution Applicant namely, 'E' as well as the financial creditor who initiated CIRP namely, 'U' are all related parties and (*xii*) that 'M' had not only acted on behalf of the corporate debtor before the statutory authorities, but also happened to be the authorized

signatory of the financial creditor who initiated the CIRP, eventually for the benefit of the Resolution Applicant which is a related party of the financial creditor. (Para 47)

- In the light of the above averments, the Government of Karnataka thought fit to invoke the jurisdiction of the High Court under Article 226 without taking recourse to the statutory alternative remedy of appeal before the NCLAT. But the contention of the appellants is that allegations of fraud and collusion can also be inquired into by NCLT and NCLAT and that, therefore, the Government could not have bypassed the statutory remedy. (Para 48)
- The objection of the appellants in this regard is well founded. Section 65 specifically deals with fraudulent or malicious initiation of proceedings. (Para 49)
- Even fraudulent tradings carried on by the corporate debtor during the insolvency resolution, can be inquired into by the Adjudicating Authority under section 66. Section 69 makes an officer of the corporate debtor and the corporate debtor liable for punishment, for carrying on transactions with a view to defraud creditors. Therefore, NCLT is vested with the power to inquire into (i) fraudulent initiation of proceedings as well as (ii) fraudulent transactions. It is significant to note that section 65(1) deals with a situation where CIRP is initiated fraudulently `for any purpose other than for the resolution of insolvency or liquidation'. (Para 50)
- Therefore, if, as contended by the Government of Karnataka, the CIRP had been initiated by one and the same person taking different avatars, not for the genuine purpose of resolution of insolvency or liquidation, but for the collateral purpose of cornering the mine and the mining lease, the same would fall squarely within the mischief addressed by section 65(1). Therefore, it is clear that NCLT has jurisdiction to enquire into allegations of fraud. As a corollary, NCLAT will also have jurisdiction. Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in section 61. (Para 51)

Conclusion

- Thus, though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957 and the rules issued thereunder, especially when the disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the High Court was justified in entertaining the writ petition and there is no reason to interfere with the decision of the High Court. Therefore, the appeals are dismissed. (Para 52)

CASE REVIEW

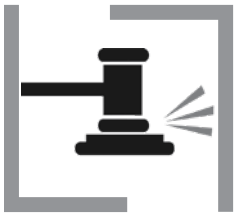
Anisminic Ltd. v. *Foreign Compensation Commission* (1969) 2 WLR 163 (para 24) *distinguished*.

CASES REFERRED TO

Barnard v. *National Dock Labour Board* (1983) 2 WLR 995 (para 9), *State of Uttar Pradesh* v. *Mohammad Noon* (1958) 1 SCR 595 (para 9), *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 11), *Smt. Nilabati Behera Alieas Behera* v. *State of Orissa* (1993) 2 SCC 746 (para 14), *Anisminic Ltd.* v. *Foreign Compensation Commission* (1969) 2 WLR 163 (para 15), *Reg.* v. *Governor of Brixton Prison, Ex parte Armah* (1968) AC 192 (para 15), *Re Racal Communications Ltd.*, In re (1981) AC 374 (para 16), *O'Reilly* v. *Mackman* (1983) 2 AC 237 (para 16), *Official Trustee, West Bengal* v. *Sachindra Nath Chatterjee* (1969) 3 SCR 92 (para 18), *Hirday Nath Roy* v. *Ramachandra Barna Sarma* ILR Lxviii Cal. 138 (para 18), *Indian Farmers Fertiliser Co-operative Ltd.* v. *Bhadra Products* (2018) 2 SCC 534 (para 18), *Mafatlal Industries* v. *Union of India* (1997) 5 SCC 536 (para 19), *Union of India* v. *Tarachand Gupta* (1971) 1 SCC 486 (para 19), *A.R. Antulay* v. *R.S. Nayak* (1988) 2 SCC 602 (para 19), *R.B. Shreeram Durga Prasad & Fatehchand Nursing Das* v. *Settlement Commission (IT & WT)* (1989) (1989) 43 Taxman 34, *Associated Engg. Co.* v. *Govt. of Andhra Pradesh* (1991) 4 SCC 93 (para 19), *Shiv Kumar Chadha* v. *Municipal Corpn. of Delhi* (1993) 3 SCC 161 (para 19), *M.L. Sethi* v. *R.P. Kapur* (1972) 2 SCC 427 (para 20), *Hari Prasad Mulshankar Trivedi* v. *V.B Raju* (1974) 3 SCC 415 (para 21), *Smith* v. *East Elloe Rural District Council* (1956) AC 736 (para 22), *Regina* v. *Secretary of State for the Environment, Ex p. Ostler* (1977) 1 QB 122 (para 22), *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859) 6 CB(NS) 336 (para 23), *Union Bank of India* v. *Satyawati Tandon* (2010) 8 SCC 110 (para 23), *Sadhana Lodh* v. *National Insurance Co. Ltd.* (2003) 3 SCC 524 (para 23), *Nivedita Sharma* v. *Cellular Operators Association of India* (2011) 14 SCC 337 (para 23), *Cicily Kallarackal* v. *Vehicle Factory* (2012) 8 SCC 524 (para 23), *Thressiamma Jacob* v. *Deptt. of Mining & Geology* (2013) 9 SCC 725 (para 27) and *Sub-Committee on Judicial Accountability* v. *Union of India* (1991) 4 SCC 699 (para 28).

Ms. Pinky Behera, **Ms. Madhusmita Bora** and **Charudatta Vijayrao Mahindrakar**, AOR's *for the Petitioner.* **V.N. Raghupathy**, AOR *for the Respondent.*

For Full Text of the Judgment see
[2019] 112 taxmann.com 56/(2020) 157 SCL 445 (SC)



SUPREME COURT OF INDIA

Rahul Jain

v.

Rave Scans (P.) Ltd.

ARUN MISHRA AND S. RAVINDRA BHAT, JJ.

CIVIL APPEAL NO. 7940 OF 2019

NOVEMBER 8, 2019

Section 30 of the Insolvency and Bankruptcy Code, 2016, read with Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution plan - Submission of - Corporate Insolvency Resolution Process was initiated against respondent company - Resolution plan submitted by appellant was approved by NCLT - Second respondent *i.e.* one of financial creditors dissented with resolution plan contending that it had been provided with 32.34 per cent of its admitted claim, whereas other financial creditors had been provided with 45 per cent of their admitted claims - Appellate authority i.e. NCLAT set aside Tribunal's directions and required appellant to increase liquidation value of offer to second respondent - According to appellate authority, resolution plan approved by Tribunal did not conform to test in section 30(2)(e), and was discriminatory against similarly situated 'secured creditors' - Whether since resolution process began well before amended regulation 38 of 2016 Regulations came into force in January 2017, and, moreover, resolution plan was prepared and approved before that event, impugned directions of appellate authority, requiring appellant to match pay-out offered to other financial creditors with second respondent, was not justified - Held, yes - Whether, therefore, impugned order was to be set aside and order passed by Tribunal was to be restored - Held, yes (Para 13)

CASES REFERRED TO

Central Bank of India v. *Resolution Professional of the Sirpur Paper Mills Ltd.* (Company Appeal (AT) (Insolvency) No. 526 of 2018, dated 12-9-2018) (para 3), *Binani Industries Ltd.* v. *Bank of Baroda* (2018) 99 taxmann.com 164/150 SCL 703 (NCL-AT) (para 3) and *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 3).

Saurabh Mishra, AOR *for the Appellant.*

Practical Questions

Q.1. Can an uninvoked corporate guarantee given by the CD be considered as a 'debt' due and payable under the IBC?

Ans. No, a '*debt*' is different from a '*claim*', and an uninvoked corporate guarantee is in the nature of contingent liability which may or may not arise.

(NCLT Kolkata judgment dt. 20th December 2019 passed in the matter of *Esspee Sarees (P.) Ltd.* v. *Skipper Textiles (P.) Ltd.*, CA (IB) No. 1328/KB/2019 in CP(IB) No. 1702/KB/2019. Order available at https://ibbi.gov.in//uploads/order/d00cace67245c58b802b68d300d2f4b2.pdf) – (2020) 115 taxmann.com 299.

Q.2. Can a CD challenge the maintainability of a section 7 application on the grounds that by invoking pledge of shares agreement, the FC and other lenders have become 95% shareholder of CD, thus discharging CD from the liability?

Ans. No, mere invocation of pledge of shares will not result in automatic conversion of debt into equity and repayment of debt.

(NCLT Hyderabad judgment dt. 7th November 2019 passed in the matter of *State Bank of India* v. *Meenakshi Energy Ltd.*, CP (IB) No. 184/7/HDB/2019. *Order* available at https://ibbi.gov.in//uploads/order/064b3fe917ef435483076e02e58cb5c6.pdf) – (2020) 115 taxmann.com 176.

Q.3. Can the NCLT direct Central Government to get an investigation carried out by SFIO into allegations of fraud or siphoning of funds by the CD?

Ans. No, s. 212, Companies Act, 2013 does not empower NCLT to refer a matter to the Central Government for investigation by SFIO.

(NCLAT judgment dt. 2nd December 2019 passed in the matter of *Union of India, Through Serious Fraud Investigation Office (SFIO) v. Maharashtra Tourism Development Corporation & Anr., CA (AT) (Ins) No. 964-965 of 2019 Order* available at https://ibbi.gov.in//uploads/order/e9375bcc30cdadb7c1a140e7462b0ad9.pdf) – (2020) 113 taxmann.com 413/157 SCL 684.

Q.4. What is the nature of the requirement u/s 31(4), IBC for CCI's prior approval in respect of a resolution plan?

Ans. The provision is directory (and not mandatory) in nature, and therefore, the CoC can always approve a resolution plan subject to CCI's approval.

(NCLAT judgment dt. 16th December 2019 passed in the matter of *Arcelormittal India Pvt. Ltd. v. Abhijit Guhathakurta,* CA (AT) (Ins) No. 524 of 2019. Order available at https://ibbi.gov.in//uploads/order/a837f2e782ce6394d290d435712df45d.pdf) – (2020) 114 taxmann.com 246.

Q.5. Can a secured financial creditor, while opting out of liquidation process to realise the secured assets u/s. 52(1)(b), IBC, sell the secured assets to the persons who are ineligible in terms of section 29A, IBC.

Ans. No, such a sale to persons who are ineligible u/s. 29A, IBC, is not permitted under IBC.

(NCLAT judgment dt, 18th November 2019 passed in the matter of *State Bank of India v. Anuj Bajpai (Liquidator),*

CA (AT) (Ins.) No. 509 of 2019. Order available at https://ibbi.gov.in//uploads/order/8f41b4cb1bbf257974543312c-284dc40.pdf) – (2020) 115 taxmann.com 15.

Q6. Can a promoter who is ineligible u/s 29A, IBC submit a scheme for compromise or arrangement u/s 230-232, Companies Act, 2013?

Ans. No, a person who is ineligible u/s 29A, IBC cannot submit such a scheme in respect of the CD.

(NCLAT judgment dt. 24th October 2019 passed in the matter of *Jindal Steel and Power Limited v. Arun Kumar Jagatramka & Anr.,* CA (AT) No. 221/ 2018. Order available at https://ibbi.gov.in//uploads/order/7e01c1b8d22611331b432ac-cc96b16be.pdf) – (2020) 114 taxmann.com 133.

Q.7. What is the jurisdiction of Directorate of Enforcement (DoE) to attach CD's property (or part thereof) which is undergoing CIRP?

Ans. During the CIRP, DoE cannot attach CD's property.

(NCLAT judgment dt. 14th October 2019 passed in the matter of *JSW Steel Ltd. v. Mahender Kumar Khandelwal & Ors.,* CA (AT) (Ins.) No. 957/2019. Order available at https://ibbi.gov.in//uploads/order/eb655b79aa6e04ecf4af2d6c353cfb7e.pdf) – (2020) 115 taxmann.com 30.

Q.8. Can a question of 'fraud' be inquired into by the NCLT/NCLAT in the proceedings initiated under the Code?

Ans. Yes, NCLT has jurisdiction to enquire into allegations of fraud.

(Hon'ble Supreme Court judgment dt. 3rd December 2019 passed in the matter of *Embassy Property Developments Private Ltd. v. State of Karnataka & Ors.,* Civil Appeal No. 9170-9172 of 2019. Order available at https://ibbi.gov.in//uploads/order/b30ab5f506b119e8450ad06818d82814.pdf) – (2019) 112 taxmann.com 56/57 SCL 445.

Q.9. Does the IBC confer any adjudicatory powers upon the IRP/RP?

Ans. No, IBC confers only administrative and not adjudicatory powers upon the IRP/RP.

(Hon'ble Supreme Court judgment dt. 15th November 2019 passed in the matter of *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.,* Civil Appeal No. 8766-67 of 2019 Diary No. 24417 of 2019. Order available at https://ibbi.gov.in//uploads/order/d46a64719856fa6a-2805d731a0edaaa7.pdf) – (2019) 111 taxmann.com 234.

Q.10. What is the maintainability of CIRP proceedings in respect of a CD which is a tea unit and whose management is taken over by the Central Government u/s. 16G(1)(c) of the Tea Act, 1953, and against whom winding up proceedings cannot be initiated without the consent of the Central Government?

Ans. By virtue of s. 238, IBC, the Code would have an over-riding effect over the Tea Act, 1953, and thus, no prior consent of the Central Government would be required before initiation of CIRP in respect of such CD.

(Hon'ble Supreme Court judgment dt. 4th October, 2019 passed in the matter of *Duncans Industries Ltd. v. A. J. Agrochem, Civil Appeal No. 5120/2019.* Order available at https://ibbi.gov.in//uploads/order/e28afc56033ed5b324a-7f49ad62e3049.pdf) – (2019) 110 taxmann.com 131/156 SCL 478.

Learning Curves

An 'Acknowledgement' in writing within expiration of prescribed period will mark a new commencement period for limitation to base a claim and the same will not create a new contract. It only extends the limitation period.

(NCLAT Order dated 13th January 2020 in the matter of *Vivek Jha* v. *Daimler Financial Services India (P.) Ltd. & Anr.*) – (2020) 115 taxmann.com 309.

After the liquidation the Committee of Creditors has no role to play and they are simply claimants whose matters are to be determined by the Liquidator.

(NCLAT Order dated 21st January 2020 in the matter of *Punjab National Bank* v. *Kiran Shah, Liquidator of ORG Informatics Ltd.*) – (2020) 115 taxmann.com 304.

When the Resolution Plan is approved and has reached finality, all the dues stand cleared in terms of the plan and no issue can be raised before any Court of Law or Tribunal.

(NCLAT Order dated 22nd January, 2020 in the Matter of *S.A. Pharmachem (P.) Ltd.* v. *Alok Industries Ltd. & Ors.*) – (2020) 115 taxmann.com 307.

There is no provision in the Code or Regulations under which the bid of any Resolution Applicant has to match liquidation value.

(SC Judgment dated 22nd January 2020 in the matter of *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh & Ors.*) – (2020) 113 taxmann.com 421.

The period from date of notice under section 13(2) of SARFEASI Act to date of order passed by the court will be excluded for calculating limitation period for a section 7 application.

(NCLAT Order dated 22nd November, 2019 in the matter of *Sesh Nath Singh* v. *Baidyabati Sheoraphuli Co-operative Bank Ltd.*) – (2020) 114 taxmann.com 282.

DEPOSIT OF UNCLAIMED DIVIDEND AND/OR UNDISTRIBUTED PROCEEDS OF LIQUIDATION PROCESS IN ACCORDANCE WITH REGULATION 46 OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016

CIRCULAR NO. IBBI/LIQ/027/2020, DATED 9-1-2020

The Insolvency and Bankruptcy Board of India (IBBI), *vide* the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020, *inter alia*, amended regulation 46 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Regulations).

2. The amended regulation 46 of the Regulations provides that the IBBI shall operate and maintain an Account to be called the Corporate Liquidation Account in the Public Accounts of India. It further provides that until the Corporate Liquidation Account is operated as part of the Public Accounts of India, the IBBI shall open a separate bank account with a scheduled bank for deposit of the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in a liquidation process.

3. In terms of proviso to sub-regulation (1) of regulation 46 of the Regulations, the IBBI has opened a separate bank account for deposit of unclaimed dividends and/or undistributed proceeds of liquidation processes. The particulars of this account are as under:

Name of the Account	IBBI-Corporate Liquidation Account
Account Number	2254005800000015
Nature of Account	Current
Name of the Bank	Punjab National Bank
IFSC Code	PUNB0225400
Name of the Branch	Barakhamba Road Branch, New Delhi

4. The liquidators are, therefore, advised to deposit any unclaimed dividends and/or undistributed proceeds of liquidation processes into the aforesaid account in accordance with regulation 46 of the Regulations. They are further advised to provide the particulars of the amount deposited into the account as per Form-I of the Schedule II to the Regulations and send a scanned signed copy of the said Form-I electronically to liq.cirp@ibbi.gov.in.

5. This Circular is issued in exercise of the powers under section 196 of the Insolvency and Bankruptcy Code, 2016.

INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2019

No. 16 of 2019

Promulgated by the President in the Seventieth Year of the Republic of India.

An Ordinance further to amend the Insolvency and Bankruptcy Code, 2016.

WHEREAS a need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency in case the company goes into corporate insolvency resolution process or liquidation, to provide immunity against prosecution of the corporate debtor, to prevent action against the property of such corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions and to fill the critical gaps in the corporate insolvency framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code, 2016;

AND whereas the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 has been introduced in the House of the People on the 12th day of December, 2019;

AND whereas the aforesaid Bill could not be taken up for consideration and passing in the House of the People;

AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

Now, Therefore, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:—

Short title and commencement

1. (1) This Ordinance may be called the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.

(2) It shall come into force at once.

Amendment of section 5

2. In section 5 of the Insolvency and Bankruptcy Code, 2016, (31 of 2016) (hereinafter referred to as the principal Act),—

(*i*) in clause (12), the proviso shall be omitted;

(*ii*) in clause (15), after the words "during the insolvency resolution process period" occurring at the end, the words "and such other debt as may be notified" shall be inserted.

Amendment of section 7

3. In section 7 of the principal Act, in sub-section (1), before the *Explanation,* the following provisos shall be inserted, namely:—

"Provided that for the financial creditors, referred to in clauses (*a*) and (*b*) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent, of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent, of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Ordinance, failing which the application shall be deemed to be withdrawn before its admission.".

Amendment of section 11

4. In section 11 of the principal Act, the *Explanation* shall be numbered as *Explanation* I and after *Explanation* I as so re-numbered, the following *Explanation* shall be inserted, namely:—

"*Explanation* II.—For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (*a*) to (*d*) from initiating corporate insolvency resolution process against another corporate debtor.".

Amendment of section 14

5. In section 14 of the principal Act,—

(*a*) in sub-section (1), the following *Explanation* shall be inserted, namely:—

"*Explanation*.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or

a similar grant or right during the moratorium period;

(*b*) after sub-section (2), the following sub-secnon shall be inserted, namely:—

"(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.";

(*c*) in sub-section (3), for clause (*a*), the following clause shall be substituted, namely:-—

"(*a*) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;".

Amendment of section 16

6. In section 16 of the principal Act, in sub-section (1), for the words "within fourteen days from the insolvency commencement date", the words "on the insolvency commencement date" shall be substituted.

Amendment of section 21

7. In section 21 of the principal Act, in sub-section (2), in the second proviso, after the words "convertible into equity shares", the words "or completion of such transactions as may be prescribed," shall be inserted.

Amendment of section 23

8. In section 23 of the principal Act, in sub-section (1), for the proviso, the following proviso shall be substituted, namely:—

"Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority.".

Amendment of section 29A

9. In section 29A of the principal Act,—

(*i*) in clause (*c*), in the second proviso, in the *Explanation* I, after the words, "convertible into equity shares", the words "or completion of such transactions as may be prescribed," shall be inserted;

(*ii*) in clause (*j*), in *Explanation* I, in the second proviso, after the words "convertible into equity shares", the words "or completion of such transactions as may be prescribed," shall be inserted.

Insertion of new section 32A

10. After section 32 of the principal Act, the following section shall be inserted, namely:—

"32A. *Liability for prior offences, etc.*— (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—

(*a*) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(*b*) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (*j*) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009) or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—

(*i*) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(*ii*) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation.—For the purposes of this sub-section, it is hereby clarified that,—

(*i*) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(*ii*) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.".

Amendment of section 227

11. In section 227 of the principal Act,—

(*i*) for the words "examined in this Code", the words "contained in this Code" shall be substituted;

(*ii*) the following *Explanation* shall be inserted, namely:—

"*Explanation.—For* the removal of doubts, it is hereby clarified that the insolvency and liquidation proceedings for financial service providers or categories of financial service providers may be conducted with such modifications and in such manner as may be prescribed.".

Amendment of section 239

12. In section 239 of the principal Act, in sub-section (2), after clause (*f*), the following clauses shall be inserted, namely:—

"(*fa*)the transactions under the second proviso to sub-section (2) of section 21;

(*fb*) the transactions under the *Explanation* I to clause (*c*) of section 29A;

(*fc*) the transactions under the second proviso to clause (*j*) of section 29A;".

Amendment of section 240.

13. In section 240 of the principal Act, in sub-section (2), after clause (*i*), the following clause shall be inserted, namely:—

"(*ia*) circumstances in which supply of critical goods or services may be terminated, suspended or interrupted during the period of moratorium under sub-section (2A) of section 14;".

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) (AMENDMENT) REGULATIONS, 2020

NOTIFICATION NO. IBBI/2019-20/GN/REG053
DATED 6-1-2020

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 (Liquidation Process) Regulations, 2016, namely: —

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

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

2. In the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter referred to as the principal regulations), in regulation 2, in sub-regulation (1), after clause (*c*), the following clause shall be inserted, namely:—

`(*ca*) "Corporate Liquidation Account" means the Corporate Liquidation Account operated and maintained by the Board under regulation 46;'.

3. In the principal regulations, in regulation 2B, in sub-regulation (1), the following proviso shall be inserted, namely:—

"**Provided** that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.".

4. In the principal regulations, in regulation 6, in sub-regulation (2), for clause (*q*), the following clause shall be substituted, namely:—

"(*q*) Register of unclaimed dividends and undistributed proceeds; and".

5. In the principal regulations, in regulation 21A, for sub-regulation (2), the following sub-regulations shall be substituted, namely:—

"(2) Where a secured creditor proceeds to realise its security interest, it shall pay—

(*a*) as much towards the amount payable under clause (*a*) and sub-clause (*i*) of clause (*b*) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and

(*b*) the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date:

Provided that where the amount payable under this sub-regulation is not certain by the date the amount is payable under this sub-regulation, the secured creditor shall pay the amount, as estimated by the liquidator:

Provided further that any difference between the amount payable under this sub-regulation and the amount paid under the first proviso shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable under this sub-regulation is certain and so informed by the liquidator.

(3) Where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.".

6. In the principal regulations, in regulation 37, after sub-regulation (7), the following sub-regulation shall be inserted, namely:—

"(8) A secured creditor shall not sell or transfer an asset, which is subject to security interest, to any person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor.".

7. In the principal regulations, for regulation 46, the following regulation shall be substituted, namely:—

"46. *Corporate Liquidation Account.*— (1) The Board shall operate and maintain an Account to be called the Corporate Liquidation Account in the Public Accounts of India:

Provided that until the Corporate Liquidation Account is operated as part of the Public Accounts of India, the Board shall open a separate bank account with a scheduled bank for the purposes of this regulation.

(2) A liquidator shall deposit the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in a liquidation process along with any income earned thereon till the date of deposit into the Corporate Liquidation Account before he submits an application under sub-regulation (3) of regulation 45.

(3) A liquidator, who holds any amount of unclaimed dividends or undistributed proceeds in a liquidation process on the date of commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020, shall deposit the same within fifteen days of the date of such commencement, along with any income earned thereon till the date of deposit.

(4) A liquidator, who fails to deposit any amount into the Corporate Liquidation Account under this regulation, shall deposit the same along with interest thereon at the rate of twelve per cent per annum from the due date of deposit till the date of deposit.

(5) A liquidator shall submit to the authority with which the corporate debtor is registered and the Board, the evidence of deposit of the amount into the Corporate Liquidation Account under this regulation, and a statement in Form-I setting forth the nature of the amount deposited into the Corporate Liquidation Account, and the names and last known addresses of the stakeholders entitled to receive the unclaimed dividends or undistributed proceeds.

(6) The liquidator shall be entitled to a receipt from the Board for any amount deposited into the Corporate Liquidation Account under this regulation.

(7) A stakeholder, who claims to be entitled to any amount deposited into the Corporate Liquidation Account, may apply to the Board in Form J for an order for withdrawal of the amount:

Provided that if any other person other than the stakeholder claims to be entitled to any amount deposited into the Corporate Liquidation Account, he shall submit evidence to satisfy the Board that he is so entitled.

(8) The Board may, if satisfied that the stakeholder or any other person referred to under sub-regulation (7) is entitled to withdrawal of any amount from the Corporate Liquidation Account, make an order for the same in favour of that stakeholder or that other person.

(9) The Board shall maintain a corporate debtor-wise ledger of the amount deposited into and the amount withdrawn from the Corporate Liquidation Account under this regulation.

(10) The Board shall nominate an officer of the level of Executive Director of the Board as the custodian of the Corporate Liquidation Account and no proceeds shall be withdrawn without his approval.

(11) The Board shall maintain proper accounts of the Corporate Liquidation Account and get the same audited annually.

(12) The audit report along with the statement of accounts of the Corporate Liquidation Account referred to in sub-regulation (11) shall be placed before the Governing Board and shall be forwarded to the Central Government.

(13) Any amount deposited into the Corporate Liquidation Account in pursuance of this regulation, which remains unclaimed or undistributed for a period of fifteen years from the date of order of dissolution of the corporate debtor and any amount of income or interest received or earned in the Corporate Liquidation Account shall be transferred to the Consolidated Fund of India.".

8. In the principal regulations, in regulation 47, in the Table, for serial number 20 and the entries thereto, the following shall be substituted, namely:—

Sl. No.	*Section/ Regulation*	*Description of Task*	*Norm*	*Latest Time-line (Days)*
(1)	*(2)*	*(3)*	*(4)*	*(5)*
"20	Reg. 46	Deposit the amount of unclaimed dividends and undistributed proceeds	Before submission of application under sub-regulation (3) of regulation 45"	

9. In the principal regulations, in Schedule II,—

(*a*) in Form H, in paragraph 2, in the Table, for serial numbers 44, 45 and 46 and entries thereto, the following shall be substituted, namely:—

Sl. No.	*Particulars*	*Description*
(1)	*(2)*	*(3)*
"44	Date of deposit of unclaimed dividends or undistributed proceeds and income and interest thereon, if any, under sub-regulation (2), (3) or (4) of regulation 46	
45	Amount deposited into Corporate Liquidation Account: (*a*) Amount of unclaimed dividends (*b*) Amount of undistributed proceeds (*c*) Income referred to in sub-regulations (2) and (3) of regulation 46 (*d*) Interest referred to in sub-regulation (4) of regulation 46 **Total**	
46	Date of submission to the Board and the Authority under sub-regulation (5) of regulation 46;"	

(*b*) after Form H, the following forms shall be inserted, namely:—

"FORM-I

Deposit of Unclaimed Dividends and/or Undistributed Proceeds

(*Under Regulation 46(5) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016*)

A. Details of Liquidation Process

Sl. No.	*Description*	*Particulars*
(1)	*(2)*	*(3)*
1	Name of the Corporate Debtor	
2	Identification Number of CD (CIN/DIN)	
3	CIRP Commencement Date	
4	Liquidation Commencement Date	
5	Date of Deposit into the Corporate Liquidation Account	
6	Amount deposited into the Corporate Liquidation Account (Rs.)	
7	Bank Account from which the amount is transferred to Corporate Liquidation Account : (*a*) Account No: (*b*) Name of Bank: (*c*) IFSC: (*d*) MICR: (*e*) Address of Branch of the Bank:	
8	Details of the Amount (Rs.) deposited into Corporate Liquidation Account (*a*) Unclaimed dividends (*b*) Undistributed proceeds (*c*) Income earned till the due date of deposit (*d*) Interest at the rate of twelve per cent on the amount retained beyond due date (Please show computation of interest amount) **Total**	

B. Details of Stakeholders entitled to Unclaimed Dividends or Undistributed Proceeds

Sl. No.	*Name of stake-holder entitled to receive unclaimed dividends or undistributed proceeds*	*Address, phone number and email address of the stake-holder*	*Identification Number of the stakeholder (PAN, CIN, Aadhaar No.) (Please attach Identification proof.)*	*Amount due to the stakehold-er (Rs.)*	*Nature of Amount due*	*Remarks*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*	*(7)*
1						
2						
3						

C. Details of Deposit made into the Corporate Liquidation Account

I (*Name of Liquidator)* have deposited Rs..... (Rupees ....only) into the Corporate Liquidation Account on .... *vide* acknowledgement No.. ... dated .....

I (*Name of Liquidator)* hereby certify that the details provided in this Form are true and correct to the best of my knowledge and belief, and nothing material has been concealed.

(Signature)

Name of the Liquidator

IP Registration No :

Address as registered with the Board:

E-mail id as registered with the Board:

Date:

Place:

FORM J

Withdrawal from Corporate Liquidation Account

(*Under Regulation 46(7) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016*)

Sl. No.	*Description*	*Particulars*
(1)	*(2)*	*(3)*
1	Name of the Corporate Debtor	
2	Identification Number of CD (CIN/DIN)	
3	CIRP Commencement Date	
4	Liquidation Commencement Date	
5	Date of Dissolution Order	
6	Date of Deposit into the Corporate Liquidation Account	
7	Name of the Stakeholder seeking withdrawal	
8	Identification Number of the Stakeholder (*a*) PAN (*b*) CIN (*c*) Aadhaar No.	
9	Address and Email Address of Stakeholder	
10	Amount of Claim of the Stakeholder, admitted by the Liquidator	
11	Amount of unclaimed dividends/undistributed proceeds deposited by the liquidator in the Corporate Liquidation Account against the stakeholder	

Sl. No.	*Description*	*Particulars*
(1)	*(2)*	*(3)*
12	Amount of unclaimed dividends/undistributed proceeds the Stakeholder seeks to withdraw from the Corporate Liquidation Account	
13	Bank Account to which the amount is to be transferred from the Corporate Liquidation Account, if withdrawal is approved (*a*) Account No.: (*b*) Name of Bank: (*c*) IFSC: (*d*) MICR: (*e*) Address of Branch of the Bank:	
14	Reasons for not taking dividend or proceeds during the Liquidation Process	
15	Any legal disability in applying for withdrawal? (Yes/No), If yes, please provide details	

DECLARATION

I, (*Name of stakeholder*), currently residing at (*insert address*), hereby declare and state as follows:

1. I am entitled to receive a sum of Rs. (Rupees..... only) from the Corporate Liquidation Account, as presented above.

2. In respect of the said sum or any part thereof, neither I nor any person, by my order, to my knowledge or belief, for my use, has received any manner of satisfaction or security whatsoever, save and except the following:

3. I undertake to refund the entire amount with interest as decided by the Board, in case the Board finds that I am not entitled to this amount.

4. I authorise the Board to initiate appropriate legal action against me if my claim is found false at any time.

Date:

Place:

(Signature of the Stakeholder)

VERIFICATION

I, *(Name)* the stakeholder hereinabove, do hereby verify that the contents of this Form are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at ... on this ..... day of ....., 20...

(Signature of the Stakeholder)

(Note: In the case of a company or limited liability partnership, the declaration and verification shall be made by the director/ manager/secretary and in the case of other entities, an officer authorised for the purpose by the entity)".

10. In the principal regulations, in Schedule III,—

(*a*) in 'DISTRIBUTIONS REGISTER', under `*Instructions'* in serial number 4, for the words "Public Account of India", the words "Corporate Liquidation Account" shall be substituted.

(*b*) in `REGISTER OF UNCLAIMED DIVIDENDS AND UNDISTRIBUTED ASSETS DEPOSITED', for the word "ASSETS", the word "PROCEEDS" shall be substituted.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (VOLUNTARY LIQUIDATION PROCESS) (AMENDMENT) REGULATIONS, 2020

NOTIFICATION NO. IBBI/2019-20/GN/REG054, DATED 15-1-2020

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 (Voluntary Liquidation Process) Regulations, 2017, namely:—

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2020.

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

2. In the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 (hereinafter referred to as the principal regulations), in regulation 2, in sub-regulation (1), after clause (*b*), the following clause shall be inserted, namely: —

`(*ba*) "Corporate Voluntary Liquidation Account" means the Corporate Voluntary Liquidation Account operated and maintained by the Board under regulation 39;'.

3. In the principal regulations, in regulation 10, in sub-regulation (2), for clause (*q*), the following clause shall be substituted, namely:—

"(*q*) Register of unclaimed dividends and undistributed proceeds; and"

4. In the principal regulations, for regulation 39, the following regulation shall be substituted, namely: —

"**39. Corporate Voluntary Liquidation Account.**

(1) The Board shall operate and maintain an Account to be called the Corporate Voluntary Liquidation Account in the Public Accounts of India:

Provided that until the Corporate Voluntary Liquidation Account is operated as part of the Public Accounts of India, the Board shall open a separate bank account with a Scheduled bank for the purposes of this regulation.

(2) A liquidator shall deposit the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in a liquidation process along with any income earned thereon till the date of deposit, into the Corporate Voluntary Liquidation Account before he submits an application under sub-section (7) of section 59.

(3) A liquidator, who holds any amount of unclaimed dividends or undistributed proceeds in a liquidation process on the date of commencement of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2020, shall deposit the same within fifteen days of the date of such commencement, along with any income earned thereon till the date of deposit.

(4) A liquidator, who fails to deposit any amount into the Corporate Voluntary Liquidation Account under this regulation, shall deposit the same along with interest thereon at the rate of twelve per cent per annum from the due date of deposit till the date of deposit.

(5) A liquidator shall submit to the authority with which the corporate person is registered and the Board, the evidence of deposit of the amount into the Corporate Voluntary Liquidation Account under this regulation, and a statement in Form-G setting forth the nature of the amount deposited into the Corporate Voluntary Liquidation Account, and the names and last known addresses of the stakeholders entitled to receive the unclaimed dividends or undistributed proceeds.

(6) The liquidator shall be entitled to a receipt from the Board for any amount deposited into the Corporate Voluntary Liquidation Account under this regulation.

(7) A stakeholder, who claims to be entitled to any amount deposited into the Corporate Voluntary Liquidation Account, may apply to the Board in Form-H for an order for withdrawal of the amount:

Provided that if any other person other than the stakeholder claims to be entitled to any amount deposited to the Corporate Voluntary Liquidation Account, he shall submit evidence to satisfy the Board that he is so entitled.

(8) The Board may, if satisfied that the stakeholder or any other person referred to under sub-regulation (7) is entitled to withdrawal of any amount from the Corporate Voluntary Liquidation Account, make an order for the same in favour of that stakeholder or that other person.

(9) The Board shall maintain a corporate person-wise ledger of the amount deposited into and the amount withdrawn from the Corporate Voluntary Liquidation Account under this regulation.

(10) The Board shall nominate an officer of the level of Executive Director of the Board as the custodian of the Corporate Voluntary Liquidation Account and no proceeds shall be withdrawn without his approval.

(11) The Board shall maintain proper accounts of the Corporate Voluntary Liquidation Account and get the same audited annually.

(12) The audit report along with the statement of accounts of the Corporate Voluntary Liquidation Account referred to in sub-regulation (11) shall be placed before the Governing Board and shall be forwarded to the Central Government.

(13) Any amount deposited into the Corporate Voluntary Liquidation Account in pursuance of this regulation, which remains unclaimed or undistributed for a period of fifteen years from the date of order of dissolution of the corporate person and any amount of income or interest received or earned in the Corporate Voluntary Liquidation Account shall be transferred to the Consolidated Fund of India.".

5. In the principal regulations, in Schedule I, after Form F, the following Forms shall be inserted, namely:—

"FORM-G

Deposit of Unclaimed Dividends and/or Undistributed Proceeds

(*Under Regulation 39(5) of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017*)

A. Details of Voluntary Liquidation Process

Sl. No.	*Description*	*Particulars*
(1)	(2)	(3)
1	Name of the Corporate Person	
2	Identification Number of Corporate Person (CIN/LLPIN)	
3	Voluntary Liquidation Commencement Date	
4	Date of Deposit into the Corporate Voluntary Liquidation Account	
5	Amount deposited into the Corporate Voluntary Liquidation Account (Rs.)	
6	Bank Account from which the amount is transferred to Corporate Voluntary Liquidation Account *a.* Account No: *b.* Name of Bank: *c.* IFSC: *d.* MICR: *e.* Address of Branch of the Bank:	
7	Details of the Amount (Rs.) deposited into Corporate Voluntary Liquidation Account *a.* Unclaimed dividends *b.* Undistributed proceeds *c.* Income earned till the due date of deposit *d.* Interest at the rate of twelve per cent on the amount retained beyond due date (Please show computation of interest amount) **Total**	

B. Details of Stakeholders entitled to Unclaimed Dividends or Undistributed proceeds

Sl. No.	*Name of stake-holder entitled to receive unclaimed dividends or undistributed proceeds*	*Address, phone number and email ad-dress of the stakeholder*	*Identification Number of the stakeholder (PAN, CIN/LLPIN/DIN, Aadhaar No.) (Please attach Identification proof.)*	*Amount due to the stakeholder (Rs.)*	*Nature of Amount due*	*Remarks*
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1						
2						
3						

C. Details of Deposit made into the Corporate Voluntary Liquidation Account

I (*Name of Liquidator*) have deposited Rs..... (Rupees ....only) into the Corporate Voluntary Liquidation Account on .... *vide* acknowledgement No. .... dated .....

I (*Name of Liquidator)* hereby certify that the details provided in this Form are true and correct to the best of my knowledge and belief, and nothing material has been concealed.

(Signature)
Name of the Liquidator
IP Registration No:
Address as registered with the Board:
Email id as registered with the Board:

Date:……..
Place:……..

FORM-H

Withdrawal from Corporate Voluntary Liquidation Account

(*Under Regulation 39(7) of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017*)

Sl. No.	*Description*	*Particulars*
(1)	(2)	(3)
1	Name of the Corporate Person	
2	Identification Number of Corporate Person (CIN/LLPIN)	
3	Voluntary Liquidation Commencement Date	
4	Date of Dissolution Order	
5	Date of Deposit into the Corporate Voluntary Liquidation Account	
6	Name of the Stakeholder seeking withdrawal	
7	Identification Number of the Stakeholder *a.* PAN *b.* CIN/LLPIN/DIN *c.* Aadhaar No.	
8	Address and Email Address of Stakeholder	
9	Amount of Claim of the Stakeholder, admitted by the Liquidator	
10	Amount of unclaimed dividends/undistributed proceeds deposited by the Liquidator in the Corporate Voluntary Liquidation Account against the stakeholder	
11	Amount of unclaimed dividends/undistributed proceeds the Stakeholder seeks to withdraw from the Corporate Voluntary Liquidation Account	
12	Bank Account to which the amount is to be transferred from the Corporate Voluntary Liquidation Account, if withdrawal is approved (*a*) Account No.: (*b*) Name of Bank:	
	(*c*) IFSC: (*d*) MICR: (*e*) Address of Branch of the Bank:	
13	Reasons for not taking dividend or proceeds during the Voluntary Liquidation Process	

Sl. No.	*Description*	*Particulars*
(1)	(2)	(3)
14	Any legal disability in applying for withdrawal? (Yes/No), If yes, please provide details	

DECLARATION

I, (*Name of stakeholder*), currently residing at (*insert address*), hereby declare and state as follows:

1. I am entitled to receive a sum of Rs.... (Rupees ... only) from the Corporate Voluntary Liquidation Account, as presented above.

2. In respect of the said sum or any part thereof, neither I nor any person, by my order, to my knowledge or belief, for my use, has received any manner of satisfaction or security whatsoever, save and except the following: .....

3. I undertake to refund the entire amount with interest as decided by the Board, in case the Board finds that I am not entitled to this amount.

4. I authorise the Board to initiate appropriate legal action against me if my claim is found false at any time.

Date:

Place: (Signature of the Stakeholder)

VERIFICATION

I, *(Name)* the stakeholder hereinabove, do hereby verify that the contents of this Form are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at ... on this ..... day of ....., 20... (Signature of the Stakeholder)

(Note: In the case of a company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorised for the purpose by the entity)".

6. In the principal regulations, in Schedule II,—

(*a*) in 'DISTRIBUTIONS REGISTER', under '*Instructions'* in serial number 4, for the words "Public Account of India", the words "Corporate Voluntary Liquidation Account" shall be substituted.;

(*b*) in 'REGISTER OF UNCLAIMED DIVIDENDS AND UNDISTRIBUTED ASSETS DEPOSITED', for the word "ASSETS", the word "PROCEEDS" shall be substituted.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA AMENDS THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016

PRESS RELEASE NO. IBBI/PR/2020/01, DATED 6-1-2020

The Insolvency and Bankruptcy Board of India (IBBI) notified the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020 today.

2. The amendment clarifies that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to a compromise or arrangement of the corporate debtor under section 230 of the Companies Act, 2013. It also clarifies that a secured creditor cannot sell or transfer an asset, which is subject to security interest, to any person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor.

3. The amendment provides that a secured creditor, who proceeds to realise its security interest, shall contribute its share of the insolvency resolution process cost, liquidation process cost and workmen's dues, within 90 days of the liquidation commencement date. It shall also pay excess of realised value of the asset, which is subject to security interest, over the amount of its claims admitted, within 180 days of the liquidation commencement date. Where the secured creditor fails to pay such amounts to the Liquidator within 90 days or 180 days, as the case may be, the asset shall become part of Liquidation Estate.

4. The amendment provides that a Liquidator shall deposit the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in a liquidation process along with any income earned thereon into the Corporate Liquidation Account before he submits an application for dissolution of the corporate debtor. It also provides a process for a stakeholder to seek withdrawal from the Corporate Liquidation Account.

5. The amended regulations are effective from today. These are available at www.mca.gov.in and www.ibbi.gov.in.

●●●

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'ICSI House', 3rd Floor, 22, Insitutional Area,
Lodi Road, New Delhi - 110 003