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At a Glance

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Section 31, read with sections 12A and 62, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Petition for initiation of corporate insolvency resolution process against corpo-

rate debtor was admitted by NCLT - Settlement proposal of appellant under section 12A for withdrawal of corporate insolvency resolution process was rejected by members of Committee of Creditors by 99.68 per cent voting shares - On appeal, NCLAT held that NCLT and NCLAT could not sit in appeal on commercial wisdom of Committee of creditors - Whether on facts matter was not to be inferred and appeal was to be dismissed - Held, yes (Para 11)

- **Saurabh Jain v. Union of India**
  (2020) 119 taxmann.com 97 (SC) • P170

Section 38 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Power of Central Government to make Rules - Petitioners alleged that despite circular issued by Ministry of Finance directing personal guarantees issued by promoters/managerial personnel to be invoked, public sector undertakings continued not to invoke such guarantees resulting in huge loss not only to public exchequer but also to common man - Whether petitioners were to be allowed to approach Ministry of Finance with a representation and Ministry of Finance was to be directed to reply to said representation - Held, yes (Para 1)

- **CA.Venkata Siva Kumar v. Insolvency and Bankruptcy Board of India (IBBI)** (2020) 118 taxmann.com 134 (Madras)
  • P-171

Section 196 of the Insolvency and Bankruptcy Code, 2016, read with regulations 7 and 13, of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 - Board - Powers and functions of - Whether Insolvency and Bankruptcy Board of India (IBBI) has powers to frame regulations with regard to fee payable by Insolvency Professionals (IPs) and insolvency professional agencies - Held, yes - Whether fee making power of IBBI is not subject to any fetters except that it should be for carrying out purposes of IBC - Held, yes - Whether IBBI is duly empowered under sections 196 and 207 of IBC to levy a fee on IP, including as a percentage of annual remuneration as an IP in preceding financial year - Held, yes - Whether IBBI provides significant services, including in relation to IPs and there is broad correlation between fees and services - Held, yes - Whether in view of fact that direct or arithmetical correlation as between fee received and service rendered is not necessary especially in context of regulatory fees, it is viewed that regulation 7(2)(ca) of IP Regulations does not suffer from any constitutional infirmity on account of absence of quid pro quo - Held, yes - Whether IBC contains adequate safeguards to ensure that Parliament effectively supervises all rules and regulations with power to modify or even annul same, likewise, adequate safeguards are in place to ensure that funds of IBBI are utilized for purposes of fulfilling role of IBBI under IBC - Held, yes - Whether conferment of power to charge a fee and charging of such fee by using annual remuneration as a measure does not amount to delegation of an essential legislative function and therefore, it cannot be said that there is excessive delegation to IBBI - Held, yes (Paras 11 to 14)

- **Euro Pratik Ispat (India) (P.) Ltd. v. Ramesh Shetty** (2020) 119 taxmann.com 95 (NCLAT - New Delhi) • P-183

Section 12A, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Withdrawal of application - Whether where appellant was aggrieved by order of withdrawal of company petition passed by Adjudicating Authority due to fraud played upon it, such issue could only be raised before Adjudicating Authority, and instant appeal against order of withdrawal was not maintainable - Held, yes (Para 1)

- **Rakesh Wadhwan v. Bank of India**
  (2020) 119 taxmann.com 180 (NCLAT - New Delhi)
  • P-184

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Financial debt - Respondent No. 1 Bank (Financial creditor) filed

an application under section 7 for initiation of CIRP against corporate debtor on ground that it committed default in repayment of facilities granted to extent of Rs. 522 crores - However, during pendency of petition, corporate debtor proposed to settle matter by submitting One Time Settlement (OTS) - Resultantly, petition was withdrawn - After that, corporate debtor again committed default in making payment as per terms of OTS - In compliance of OTS, corporate debtor had issued post-dated cheques which were all also dishonoured - Therefore, respondent-bank revoked OTS and called upon corporate debtor to pay off Rs. 522 crores - After that, respondent filed second petition, which was admitted by impugned Order - Corporate debtor stated that impugned order had been passed without affording an opportunity to corporate debtor to file reply and Adjudicating Authority had not given any finding of debt and default, and order had been passed even though application was not complete - However, even though statutory provisions under IBC do not permit to provide several opportunities to corporate debtor in hope of settlement, Adjudicating Authority had tried its best to afford ample opportunity to both parties to settle matter amicably - But, despite that, corporate debtor failed to make payment or arrive at a settlement - Further, debt in instant case was of more than Rupees One Lakh and default in repayment of such debt was admitted and application in Form-1 was also complete - Whether therefore, no interference was called for in impugned order of Adjudicating Authority admitting petition - Held, yes (Paras 15, 16 and 17)

- **V Nagarajan Resolution Professional v. SKS Ispat and Power Ltd.**
  (2020) 119 taxmann.com 182 (NCLAT - New Delhi)
  • P-192

Section 61 of the Insolvency and Bankruptcy Code, 2016, read with rule 22 of the National Company Law Appellant Tribunal Rules, 2016 - Corporate person's Adjudicating Authorities - Appeals and Appellate Authority - Whether as per section 61 an appeal filed before Appellate Tribunal against Order of Adjudicating Authority can be filed within 30 days - Held, yes - Whether however, proviso to section 61 provides that Appellate Tribunal may allow an appeal to be filed after expiry of statutory period of 30 days and this extension of 15 days depends upon satisfaction of Appellate Tribunal, on being shown sufficient cause for not filing Appeal within time limit - Held, yes - Whether where appellant had neither filed any application for condonation of delay nor filed any evidence to prove that certified/free copy was not supplied to appellant on date of order, time limit of filing of appeal without any application for condonation of delay could not have been extended - Held, yes (Paras 9 and 11).

- **Committee of Creditors of Educomp Solutions Ltd. v. Ebix Singapore Pte. Ltd.**
  • P-204

Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Successful resolution applicant filed application seeking withdrawal of its resolution plan already approved by Committee of Creditors (CoC) of corporate debtor before NCLT, due to investigations by Special Frauds Investigation Office and other governmental agencies against corporate debtor company - Adjudicating Authority by means of Impugned Order allowed successful resolution applicant to withdraw its approved 'Resolution Plan' which was approved by a majority of 75.36 per cent of CoC and pending approval before Authority as per section 31 - Whether Adjudicating Authority, in law cannot enter into arena of majority decision of 'Committee of Creditors' other than grounds mentioned in section 32(a to e) - Held, yes - Whether once resolution plan is approved by CoC and thereafter submitted to NCLT for its approval, then NCLT is to apply its judicial mind to 'Resolution Plan' so presented and after being subjectively satisfied that plan meets or does not meet requirements mentioned in section 34 may either approve or reject such plan - Held, yes - Whether where resolution applicant

had accepted conditions of 'Resolution Plan' keeping in mind that no change or supplementary information to 'Resolution Plan' shall be accepted after submission date of 'Resolution Plans' applicant could not have been allowed to withdraw approved 'Resolution Plan' - Held, yes - Whether NCLT after approval of Resolution Plan by CoC has no jurisdiction to entertain or to permit withdrawal of Resolution Plan - Held, yes (Paras 94, 95 and 97)

- **Vijay Kumar V Iyer v. Bharti Airtel Ltd.** (2020) 119 taxmann.com 178 (NCLAT - New Delhi) • P-205

Section 238, read with section 14, of the Insolvency and Bankruptcy Code, 2016 - Overriding effect of Code - Aircel Limited and Dishnet Wireless Limited (Aircel entities) had entered into Spectrum Trade Agreement with Respondent Nos. 1 and 2 in April, 2016 - Corporate Insolvency Resolution Process of Aircel entities (corporate debtor) commenced from 19-3-2018 pursuant to admission of case under section 10 - Adjudicating Authority *vide* its order allowed set-off while making payment of amount out of total consideration of Rs. 453 crores settled as per Spectrum Trade Agreement - Resolution professional submitted that Adjudicating Authority by permitting present set-off had granted respondents a preferential payment over other Operational Creditors and it was also against objective of I &B Code and article 14 of Constitution - Respondent Nos.1 & 2 submitted that right of a party to apply set-off is a well-known and recognised concept in Accounting - Whether, in light of express provisions of specific law on subject, provisions of Code will prevail over accounting conventions - Held, yes - Whether further, since I&B Code provides mechanism of Moratorium during CIRP till Resolution Plan is approved or Liquidation order is passed, even if there are some such provisions in any other law, I&B Code will prevail over that - Held, yes - Whether therefore, order passed by Adjudicating Authority was to be set aside and Respondent Nos.1 & 2 were to be directed to pay amount whatever had been set-off by them to Aircel Entities - Held, yes (Paras 14 and 15)

- **Pradeep M.R v. Ravindra Beleyur** (2020) 119 taxmann.com 92 (NCLAT - New Delhi) • P-208

Section 5(13), read with section 31, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Insolvency resolution process costs - Ex-employee of corporate debtor triggered CIRP against corporate debtor - Adjudicating Authority approved resolution plan of resolution applicant and made it effective - Appellant, absolute owner of corporate debtor's factory, was aggrieved that licence fee for CIRP period formed part of IRP costs and should have been paid in full and same had not been considered - Appellant further insisted that resolution applicant handed over building and other apartments but his dues of Rs. 82.65 lakhs along with additional 5 months licence fee was yet to be paid - Resolution professional however stated that figures of rent etc. were invariance with income tax return filed by appellant and hence they were not entitled to claim - Whether payment of licence fee was to be made to building owner for period till CIRP was continued or they had handed over building to building owner whichever was earlier, and same was to be restricted to his income tax return so far filed and that cost needed to be included in CIRP cost - Held, yes (Para 7)

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Resolution plan submitted by resolution applicant was approved by Adjudicating Authority - Appellant, promoter/director of corporate debtor contended that resolution applicant sought several concession and exemption like allowing setting up off of brought forwarded losses and unabsorbed depreciation for computation of taxable profits as per Income-tax Act, 1961, directing to provide reasonable opportunity to jurisdiction Principal Commissioner for allowing that set-off and also claiming certain other benefits apart from

exemption under Stamp Duty Act - It appeared that accumulated losses was over 121 crores apart from unabsorbed depreciation, however those figures were as per financial statement and would require adjustment under Income-tax Act, 1961 to determine exact carry forward of losses for setting up off - Whether approved resolution plan should not be in contravention of provision of any law for time being in force apart from other criterial as specified by IBBI - Held, yes - Whether setting up of losses under Income-tax Act was subject to scrutiny by Income-tax department, therefore, there was a need for getting an affidavit from resolution applicant that he would be successfully completing resolution plan whether he got that set-off under Income-tax Act or not - Held, yes (Para 7)

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

From Chairman's Desk

A Bird sitting on a tree is never afraid of the branch breaking because her trust is not on the branch but its own wings. Always believe in yourself

Dear Professional Members,

I hope you all are keeping safe. While life seems to be gradually on its way back to normalcy, *albeit* slowly, we have a fair share of the road ahead to travel. As a nation, we have already started working in the direction of building a better future. Our resolve has to be to continuously work in the direction of becoming a self-reliant nation.

The Government of India had earlier announced a major package taking into account the impact that pandemic had on different sectors of the Indian economy. The package involves not only some relief measures but also different fiscal policy initiatives as well. The emphasis has been *inter alia* on the MSME sector whose importance and contribution towards national economy can neither be underestimated nor be understated. The change brought about in the definitions

of Micro, Small, and Medium scale industries itself is aimed in the direction of extending relief measures to a large section of industry and thus facilitates in their revival process. While under the erstwhile definitions, classification of an enterprise was based on parameters like an investment in plant and machinery or equipment etc., under the revised definitions the classification is based on investments and turnover. Accordingly, an enterprise which has been established with an investment of up to rupee one crore, and has a turnover of up to rupees five crores shall fall in the category of a micro-enterprise; for small enterprises the new upper limit prescribed is an investment of rupees ten crores and turnover of rupees fifty crores and for medium enterprises investment of rupees twenty–five crores and turnover is rupees 250 crores. The attempt is to nurture and encourage MSMEs to grow in size.

The other steps included in the Atmanirbhar Bharat scheme are collateral-free automatic loans for MSMEs, equity infusion through MSME Funds, subordinate debts for MSMEs, an extension of registration and completion date for real estate projects under RERA et al. To protect the indigenous industry from foreign competition and to boost the idea of "Make in India", steps have been taken by disallowing global tenders in certain government procurement. The required amendments in General Financial Rules, 2017 relating to Global tenders have also been introduced by the Department of Expenditure. Some relief measures to ameliorate the financial position of industry and their workers which are more aimed at preserving the job sector have been provided for under the scheme. Concessions in the area of indirect taxes have also been introduced. TDS rates in case of non-salaried payments have been reduced by 25%. A directive has also been issued to all Central Government Agencies to provide for an extension of up to 6 months to all the contractors for the completion of their contractual obligations. The directive includes invocation of force majeure clause to provide for the relief of extension without penalty or costs on contractors. The value of performance security proportionate to the supplies already made or contract work executed, submitted by the contractors has been directed to be returned to the contractors. With a view to strengthening the financial position of State Governments which are also stressed on account of revenue losses due to lockdown, the Ministry of Finance has

raised their borrowing limits by 2 per cent of their Gross State Domestic Product (GSDP). It will provide them with more funds to revive the domestic industry.

The month of July also saw a note of caution being sounded by the RBI in its Financial Stability Report (FSR) wherein projected figure of Gross NPAs (GNPAs) ratio of Scheduled Commercial Banks (SCBs) is expected to rise to 12.5% in March 2021 from the current 8.5% in March 2020. The news of RBI informing on the positives of relief measures in the form of loan moratorium provided by the government in order to tackle the impact of lockdown in terms of the facility being availed by 50% of the bank customers puts beyond all reasonable doubts the utility and justification of these measures.

I have a strong belief and faith in the resilience of the Indian economy. While experience has made us wiser and stronger, we certainly are looking forward to a bright future!

Take care. Stay safe and healthy.

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

Managing Director's Message

Do not look back;
you are not going that way!

Dear Professional Members,

We all are witnessing a period which is marked by a large number of seminal changes taking place. A departure from the past is perhaps highlight of the present-day world, and standing at this inflection point, we must prepare ourselves for a very bright future ahead!

In the Insolvency and Bankruptcy law space, ever since introduction of this reformative legislation (IBC, 2016), the pace at which the reforms have been introduced/ undertaken goes on to adds to our admiration for the resolve that the nation has taken to streamline the system. The approach has also been to take the problems head-on, and not scuttle or prevaricate or even assume that the issues shall settled on their own. At the same time, the approach of establishing a transparent and efficient system (with inputs from all key

stakeholders) has been the hall-mark of the present system, and the Regulator.

The works in the direction of introducing a special insolvency resolution process for the MSMEs are at a very advance stage now, and deliberations are also going on for introducing the prepack resolution framework system wherein a restructuring plan will be agreed upon between the company and its directors, and which will help in fast-track processing of cases under the IBC. While institution of fresh proceedings under the IBC is currently being suspended, different innovative ways for resolution are being worked out simultaneously. The attempt is to recognize all genuine business failures and encourage persons with entrepreneurial instincts who can act as the engine drivers of the growth.

While the decision of the Government to suspend IBC for a period of 6 months (on account of an unprecedented situation created by the pandemic) was hailed by all key stakeholders as a much needed step in the present circumstances, there were some eyebrows raised since the assumption was it shall to deliberate defaults by the CDs. While the suspicion may not be completely unfounded, we must keep in mind that a short period of window has been opened considering the impact of this pandemic on the cash flows of businesses, and thus, in the interest of the industry and the economy, a firms have been insulated from an IBC action for defaults committed under the COVID period. *Secondly*, the fear of intentional defaults are allayed since CD's liability to repay has not been dispensed with, and remedies under other legal instruments are still open for the creditors. Therefore, firms which have the capacity to repay and discharge their liabilities are not likely to default.

We have seen different challenges being thrown (time and again) in the way of this legislation which have been dealt with by a very strong determination to consistently and persistently pursue the objectives of the legislation. Despite all such challenges, the legislation has not only survived, but survived well and kept on its pace of introducing the reform. Analysing the journey of this legislation so-far makes one draw an analogy with the life of a human being, and therefore, while *infancy* is the first stage which a legislation initially goes through, it acquires maturity and greater strength as it survives and crosses the hurdles that come in its way. We must remember that in the Indian legislative

history there are very few legislations which have shown so much strength and vigor and being backed with this great amount of determination to withstand all the great challenges.

As a part of its consultative process, the IBBI has circulated a discussion paper dealing with the issue of limiting number of assignments to be handled by an IP (at any given point of time) pertaining to CIRP and Liquidation processes under IBC. The need to prescribe a limit on number of assignments is connected not only with the object of the legislation which is to maximize value of assets of the CD by avoiding factors which lead to delay in carrying out the process, but the persuasion has also come from some leading judgments of Hon'ble Supreme Court of India, and Hon'ble Adjudicating Authorities. Given the expansive and intense responsibilities of an IP coupled with the fact that no two CIRPs are same and they involve diverse businesses, complex corporate structures and varied stakeholders, a restriction on an IP from taking too many assignments (which ultimately results in breach of time-lines fixed by the Code) is bound to bring in desired results.

I also want to thank you all for showing increasing interest in the webinars and other learning activities organised by ICSI IIP, and I look forward to your continuous support in all our future activities.

I reiterate my request to all of you to keep following the safety norms such as physical distancing, masking and proper hand hygiene. Be safe and stay healthy!

"FRAUDULENT TRANSACTIONS"– A perspective under Corporation Insolvency

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An essential feature of a business activity and the continuation of the business is the availability of credit. Every enterprise is resilient upon the financial assistance, credit facilities and transactions on credit. In the said content, the creditor was always placed in a high pedestal and the interest of the creditor is to be protected. The Corporate and the persons associated with it, namely Directors, Partners, Employees, etc. are required to exercise due diligence in carrying on the business activity. The Director or Partner who knowingly incurs debt on behalf of the Corporate without any reasonable or probable ground of paying off such debt, are made to face penal and civil consequences for such conduct, terming the same as fraudulent transactions.

Any failure of business, restructuring to be done, etc. has implications to the creditors and therefore the creditors say became paramount. The transactions, in the nature of trading activities, alienations, availing of credit, securing such debt by providing for repayment, etc. are examined in the context as to whether the insolvency situation could have been avoided by prudent acts and as to whether

such transactions are to defeat the rights of the Creditors and qualify to be termed as "Fraudulent Transactions". On such fraudulent transactions being identified the law provides for nullifying the same, recovery, recompense, penal actions,etc.

"*Fraud*" is defined in Black's Law Dictionary as, "*A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment*". Any kind of artifice by which a person is deceived would qualify to be a fraud. Transactions may involve transfer of interest in immovable properties, movable properties, trading activities, etc. Under Section 25 of the Indian Penal Code, the term "*fraudulently*" is stated to be "*when a thing is done by a person with the intention to defraud the other, he is said to have done that thing fraudulently*". The term defraud was explained by the Hon'ble Supreme Court of India, in Dr. Vimla Vs Delhi Administration, reported in AIR 1963 SC 1952, as an act involving two elements, namely, deceit and injury to the person deceived. It is also pertinent to recall the standard principles derived in law, "Once a fraud always a fraud", "Fraud vitiates all actions".

1. Fraudulent transactions under "Transfer of Property Act, 1882"

The Transfer of Property Act, 1882, while dealing with immovable properties, provided for Section 53, which is of some importance for the present discussion. Section 53 is with the caption, "*Fraudulent Transfer*", which signifies a transfer that takes place in order to deceive or defraud a creditor. This section recognizes the need to protect the interest of the creditors. The rule of equity, justice, and good conscience has been incorporated in this section and it prevents a person from defeating the legitimate claims of his creditors. According to the said section a transfer made with an intent to defeat or delay the creditors of the transferor, shall be voidable at the option of any creditor so defeated or delayed. The section sets out the essentials and many decisions of the Hon'ble Courts have derived that. It also provides rights of transferee in good faith and for consideration. It is further made clear that nothing in the section shall affect any law for the time being in force relating to insolvency.

A creditor referred to in the section is a person to whom the transferor owes the financial liability. In order to apply Section 53, it is necessary for a creditor to exist, be it secured or unsecured. Even a subsequent creditor can move under this section, which would mean that it is not necessary for the transferor to be in debt at the time of the transfer. If the transfer is made prior to the debt transaction, with the intention that the transferor might take a loan in the future and wanted to take the property out of reach of the future creditors, it is equally fraudulent and can be set aside the at the option of the creditors.

2. The Companies Act, 1956

The Companies Act, 1956 provided for winding up of Companies on the grounds of inability to pay. A long drawn process

was laid down for the liquidation of the Company post winding up order, with powers vested with Official Liquidator to initiate various proceedings for invalidating the transactions carried out detrimental to the interest of the Company and for acts of misfeasance on the part of the Directors of the Company. Under Section 536 of the Act, the Company Court tested various transactions on the action brought before Court by the Liquidator or parties to the transaction.

The Company Court also used the provisions of Sections 542 and 543, where Courts have ordered for Directors to compensate for the consequences of their wrongful or fraudulent acts in various instances. It was held in Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (1973) 43 Comp Cas 382, (1973) 1 SCC 602:

> *"The director cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially. If he does so, he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the Company due to his neglect even if he is not shown guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the Company"*

In Official Liquidator Vs. Ram Swaroop reported in AIR 1997 All 72, charges of misfeasance and fraudulent trading were made out against the party under Section 542 of the Companies Act, 1956. The Court held that the Directors occupied a fiduciary position and the proceedings under Section 542 can be of civil nature and hence, they were liable to compensate the Company.

3. The Companies Act, 2013

The Companies Act, 2013 provides for Directors, Managers, Officers and Employees to exercise their powers in the interests of the Company, where a fiduciary duty is established towards the Company since they are in charge of its affairs under normal circumstances. Sections 339, 340 and 341 of the Companies Act, 2013 deal with the fraudulent conduct of business.

Section 339 provides that in case any Director, Manager, Officer or any persons knowingly carried on the business with the intent to defraud creditors or for any fraudulent purpose, the Tribunal may order that such persons will be personally responsible, without any limitation of liability, for all or any of the debts or liabilities as the Tribunal may direct. The Tribunal may also make provisions for the liability of such persons, to be a charge on any debt, obligation, mortgage or on any interest in any mortgage or charge on any assets. Sub-section (3) also states that every person who knowingly carried on business in the manner aforesaid shall be liable for action under Section 447, which is the prosecution for penal action for such acts, providing for punishment.

Section 340 confers powers on the Tribunal to inquire into and further order for the repayment or contribution to the assets by any Promoter, Director, Manager, Liquidator or Officer of the Company who had misapplied, retained, become liable or

accountable for money or property, or has been guilty of misfeasance or breach of trust. Section 340 imposes a criminal liability on such persons in cases of breach of trust or acts of misfeasance with reference to the affairs of the Company. Section 341 extends the liability under Sections 339 and 340 to Partners and Directors, who held such positions at the time of the fraudulent transaction.

4. Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code (shortly "Code") provides the scope of examination of the fraudulent transactions which involves examination, inquiry and initiation of proceedings of both civil and criminal consequences, of acts which had forced the Corporate Debtor to Corporate Insolvency Process and/or acts, which could have avoided the Corporate Debtor to result in insolvency situation.

The provisions of the Code as part of the CIRP postulates three sources of fund relief available to a Corporate Debtor, namely, the existing assets which can be realized, funds which would be made available as part of Resolution Plan and finally the disgorgement that comes by way of realization/compensation in the avoidance applications. On the contrary in Liquidation, there is no Resolution Plan and fund flow arising thereto and only source would be the flow from the realization. In the said context the Avoidance and Forensic review are embedded in the Code. It is widely accepted norm that as an entity tends to insolvency, the propensity for avoidance and fraudulent transactions identified by forensic audit stands enhanced and value losses to the Corporate Debtor must rightly flow back.

The Code under Section 45 provides for identification and for setting aside avoidance of undervalued transactions. Such transactions can be enquired into only for a look back period as provided in Section 46 and can result in particular relief, which is again spelt out in Section 48 of the Code. Interestingly Section 49 of the Code provides that such transactions if it had been to defeat the rights of the creditors the same would be a "*fraudulent transaction*". Therefore, at the first instance the fraudulent transactions are identified under Section 49 of the Code and remedy in the nature of compensation, bringing back the assets to the books of the Corporate Debtor is provided.

Another kind of fraudulent transactions are identified by the Code and a remedy is provided for the same in Section 66. This speaks about fraudulent and wrongful trading by the Corporate Debtor or persons incharge of the same. This concept is borrowed by the Indian law from the UK Insolvency Act, 1986. The said Section 66 is divided into two sub-sections. Section 66 (1) imposes a liability on any persons who were knowingly parties to the carrying on of business with a dishonest intent to defraud creditors, to make contributions to the assets of the Corporate debtor as per the order of the Adjudicating Authority.

As could be seen the provision only applies when the person 'knowingly' carries out fraudulent activities and speaks about

dishonest intent. It is not necessary that the person must believe that there is no reasonable prospect of ever paying the creditor, but it is sufficient to show that he believed that the debt could not be paid when it became due. A person would knowingly is a party to the business of a Corporate Debtor having been carried on with intent to defraud creditors if (a) at the time when debts were incurred he had no good reason for thinking that funds would be available to pay those debts when they become due and (b) there was dishonesty involving in the activities with reference to current notions of fair trading. The terminology used in the section clearly suggest that `outsiders' can also be liable for fraudulent trading, as long as they had a dishonest intention of fraudulently carrying on such trade. The provision is not only restricted to `insiders' like employees, directors or partners, but is wide enough to include fraud by third parties, like other corporate persons and even creditors.

The fraudulent transaction having been established, the Tribunal has the power to demand contribution to the assets of the Corporate Debtor, from the defrauding party. The parties would be personally responsible, without any limitation of liability, for the losses caused due to their fraudulent trading. On examination of the transactions of a Corporate Debtor, the Liquidator is empowered to seek appropriate remedy by holding the directors of the Corporate Debtor responsible for their actions even pre-liquidation. The Directors can be held liable for their actions usually within the `look-back period'. While a look-back period is specifically provided for undervalued transactions, there is no specified look-back period under Section 66 in respect of fraudulent transactions.

Section 66(2) imposes a liability on partners or directors of the Corporate Debtor if, (i) The Director knew or ought to have known that there was no reasonable prospect of avoiding the commencement of the Corporate Insolvency Resolution Process of the Company and (ii) The Director failed to exercise due diligence in minimizing the potential losses to be incurred.

The primary purpose of Section 66(2) is to ensure that Directors take action at the instant onset of any financial distress, with sufficient due diligence. Hence, Directors can be punished under this section even if they did not have a dishonest intention, but acted negligently and recklessly, hence exposing the Company to further risk due to such actions. While Section 66(2) provides for a broad spectrum of actions a Director could possibly take to mitigate losses, the Adjudicating Authority would ascertain whether Director has acted as a reasonable competent director would, based on the special skills he is required to possess. All these factors would constitute the due diligence to be exercised.

The Directors cannot plead ignorance or lack of knowledge in the charge under Section 66(2). The Directors have a two fold duty to ensure that the interests of the stakeholders are secured and to ensure that the Company does not incur any further debts once there is an onslaught of a financial distress, which period is referred to as "twilight period". Directors must also make an active effort in the rehabilitation and revival of the Company.

The section provides for penal action as an offence which is said to have been committed when a Director or Partner knowingly incurs debt on behalf of the Company without any reasonable or probable ground of paying off such debt. Section 66(2) imposes a liability on the Director or Partner of a Company, which result in civil remedy by way of compensation and also penal action. As such the sub-section (2) has a lower threshold for imposing liability, than sub-section (1), due to the specific fiduciary duty of the Director toward the Company. Directors are given immense powers in the management of the Company and hence they must not misuse their position of authority. They must not misappropriate the assets of the Corporate Debtor or subordinate the interests of the Company or shareholders for their personal interests.

Claims for wrongful trading also include the secret profits or benefits that the Directors may have earned in breach of their duties and the fiduciary capacity with that of the Corporate Debtor. The civil liability claims are for the purpose of benefitting the Corporate Debtor and not the creditors. However, the creditors benefit out of it indirectly. Another important aspect is that all Avoidance and Fraudulent transactions impact the waterfall under Section 53 and would deny the rightful creditors of their priority status as determined bylaw.

A pertinent difference has to be noted between the two sub-sections of Section 66. While sub-section (1) imposes a liability on any person including outsiders, sub-section (2) imposes a liability only on the Director or Partner of the Corporate Debtor. Like-wise while sub-section (1) deals with fraudulent trading in the time period when the business is functioning normally, sub-section (2) deals specifically with the duties of a Director in the period to avoid insolvency. Although not specifically differentiated, Section 66(1) deals with fraudulent trading since there is a mandatory requirement of knowledge, while Section 66(2), deals with wrongful trading since it includes an element of negligence.

The remedy which flows on the adjudication under Section 66 is set out in Section 67 and specifically deals with proceedings under Section 66, where the Adjudicating Authority may provide for the liability of any person responsible, to be a charge on any debt or obligation due from the Corporate Debtor to him and make further directions which may be necessary for the enforcement of any such charge mentioned under this section.

In cases where the Code is read with Companies Act, 2013, criminal liability can be imposed as well, as the definition of `winding up' as per Section 2(94A) of the Companies Act, 2013 is applicable to the Code. As such the Code can be read with Companies Act to impose liabilities on the persons responsible for fraudulent trading.

5. Distinctions to be drawn between Sections 49, 66 and Section 69 of the Code

Section 49 of the Code deals with undervalued transactions entered into with the purpose of defrauding and affecting the interests of the creditors, while Section 69 provides for punishment for the transactions defrauding creditors.

The similarity between Section 49 and Section 66 is that both Section 49 and Section 66 (1) include acts which are carried on with the intent to defraud creditors. However, while Section 49 requires the deliberate intention to defraud creditors by entering into such transactions, sub-section (2) of Section 66 also punishes negligent acts which affect the interests of the creditors as well. Section 49 also deals specifically with the Corporate Debtor itself entering into fraudulent transactions while Section 66 punishes any person responsible sub-section (1) or Director/Partner sub-section (2) specifically by imposing personal liability. Section 69 provides for the punishment of an officer of the Corporate Debtor or the Corporate Debtor itself, for carrying transactions defrauding creditors. However, there are primarily three differences between these sections:

a. An application under Section 66 can be made only during the corporate insolvency resolution process or liquidation process, by the resolution professional. However, the Insolvency and Bankruptcy Code (Amendment) Bill, 2018 brought about a change in Section 69, which now allows an application to be filed at any time when such transactions occur.

b. The consequence of acts committed under Section 66 is the contribution by the Director or any person responsible, to the assets of the Corporate Debtor. There is no criminal liability imposed under this section. However, the consequence under Section 69 is both civil as well as criminal.

c. The punishment under Section 69 shall be either imprisonment for a term which shall not be less than one year but which may extend to five years, or with fine which shall not be less than one lakh rupees but may extend to one crore rupees, or both.

d. One of the defences under Section 69 is that the acts mentioned under this section were committed more than 5 years prior to the insolvency commencement date and that such acts were committed with no intent to defraud the creditors of the Corporate Debtor. One of the defences for the transactions provided under Section 66(1) is that there was no dishonest intention or that due diligence was exercised in reference to the offence under Section 66(2).

6. Conclusion

The main objective of the Code is maximization of the assets for ensuring the sustainability of the insolvency entity (referred to as "Corporate Debtor"). The Code has been enacted towards consolidation of the laws relating to the Insolvency proceedings. Corporate Insolvency Resolution forms part of the Code, removing such jurisdiction from the ambit of the Company Court under the provisions of the Companies Act.

One such action towards maximization of the assets of the Corporate Debtor would be to bring back the assets involved in fraudulent transactions, make the persons in-charge and involved, including third

parties, to compensate the Corporate Debtor. Such actions and remedies by adjudication process can be achieved by aggressive actions on the part of the Resolution Applicant guided by the Committee of Creditors. These can be established by mandatory forensic audit of the affairs of the Corporate Debtor.

Principles on determination of Avoidance transactions are well enshrined in the UNCITRAL guidelines as well as in the Code in terms of the look back period as well as the nature of such transactions as Preferential, Extortionate or Undervalued. A significant point in this aspect being that there is really no look back period for Fraudulent transactions. These transactions ought to be reviewed from their genesis, where possibilities of Fraud exist.

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Implications of The Increase in Threshold Limit Under IBC on Operational Creditors

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1. Introduction

Government of India through Ministry of Corporate Affairs, *vide* a Notification bearing No. S.O. 1205(E) dated 24.03.2020 ("**Notification**"), increased the threshold limit under the Insolvency & Bankruptcy Code, 2016 ("**Code, 2016**") from Rs. 1 lakh to Rs. 1 crore for the purpose of initiating a Corporate Insolvency Resolution Process ("**CIRP**"). The said Notification reads as follows:

> *"In exercise of the powers conferred by the proviso to section 4 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby specifies one crore rupees as the minimum amount of default for the purposes of the said section."*

In addition to the aforesaid, the Finance Minister of India, Ms.Nirmala Sitharaman, in a press release on 24.03.2020 announced that the aforesaid increase in threshold is being done to prevent initiation/triggering of CIRP against Small and Medium Enterprises ("**SMEs**") during the present pandemic situation *i.e.*, the outbreak of Covid-19, which has caused disruptions in various business across the country.

Many concerns were raised regarding the applicability of the Notification *i.e.*, whether it is applicable retrospectively or prospectively? Simply put, the concerns were mainly with respect to the effect of the Notification on the pending

applications before the National Company Law Tribunals ("**NCLTs**").On perusal of the language of the Notification as well as the intent with which it has been enforced, it appears that the Notification shall be made applicable prospectively. At this stage, it is imperative to state herein that the law with respect to applicability of legislation is no longer *res integra* and the Hon'ble Supreme Court of India in plethora of its judgment has categorically and unequivocally laid down that every statute shall be prospective in nature, unless it is expressly or by necessary implication made to have retrospective effect[1].

The aforesaid concern has also recently been addressed and put to rest by the Hon'ble National Company Law Tribunal, Kolkata Bench in the matter of *Foseco India Limited* v. *Om Boseco Rail Products Limited*[2], wherein the Hon'ble Tribunal while observing the aforesaid settled position of law, held the following:

> *"It is a well settled law that a statute is presumed to be prospective unless it is held to be retrospective, either expressly or by necessary implication. When the amendment to Section 4 of the Code was, inserted a proviso enhancing the pecuniary jurisdiction for filing applications as against small and medium scale industries, nowhere in the notification mentioned that its application will be retrospective. Therefore, it appears to me that the amendment shall be considered as prospective and not retrospective."*

While the abovementioned judgment, as on date, holds the field, it also appears that the same is premised on the correct position of law and shall continue to hold the field. Let us now discuss the concerns with respect to implications of the said Notification specifically on Operational Creditors.

2. Implications of the Notification on Operational Creditors

The increase in the threshold limit from Rs. 1 lakh to Rs. 1 crore may not have any implications on the initiation of CIRP by Financial Creditors, but may affect initiation of CIRP by Operational Creditors. Unlike Financial Creditors, Operational Creditors do not have an option to file an application jointly with other Operational Creditors in respect of a debt, which may not only include debt of the Applicant but may also include debt of other Operational Creditors. Thus, Operation Creditor will have to meet the threshold of Rs. 1 crore individually, which in most likelihood would be a challenging affair, as most of the Operational Creditors do not have an outstanding debt of Rs. 1 crore or more and hence, may not be able to take recourse under the provisions of the Code, 2016.

Further, the enforcement of the Notifications appears to be a debtor's paradise, as with the increase of the threshold limit,

the immediate threat of insolvency due to the low threshold of default amount of Rs. 1 lakh seems to disappear. As a result, the debtors might take undue advantage of the same and delay or deny paying the admitted and undisputed claims of the Operational Creditors.

Apart from the aforesaid implications, there exist other serious concerns with respect to filing of fresh Applications under Section 9 of the Code, 2016 on behalf of the Operational Creditors, which shall be discussed hereinafter with the help of following illustrations:

Illustration 1: A Corporate Debtor owes an amount of Rs. 10 lakhs as of January, 2020 to an Operational Creditor. Demand Notice under Section 8 of the Code, 2016 has not been served. Is the application initiating CIRP under the Code, 2016 maintainable in view of the Notification?

Illustration 2: A Corporate Debtor owes an amount of Rs. 10 lakhs as of January, 2020 to an Operational Creditor. Demand Notice under Section 8 of the Code, 2016 has been served prior to the Notification. Is the application initiating CIRP under the Code, 2016 maintainable in view of the Notification?

Illustration 3: A Corporate Debtor owes an amount of Rs. 1.50 crore as of 15.03.2020. Demand Notice under Section 8 of the Code, 2016 has been served upon the Corporate Debtor, in lieu of which a part payment of Rs. 60 lakhs on 25.03.2020 and promise to pay the rest of the outstanding dues were made to the Operational Creditor by way of a Reply to the said Demand Notice. Thereafter, the Corporate Debtor defaults in making the rest of the payment. Is the application initiating CIRP under the Code, 2016 maintainable in view of the Notification?

Illustration 4: A Corporate Debtor owes an amount of Rs. 1.50 crore as of 30.03.2020. Demand Notice under Section 8 of the Code, 2016 has been served upon the Corporate Debtor, in lieu of which a part payment of Rs. 60 lakhs on 12.04.2020 and promise to pay the rest of the outstanding dues were made to the Operational Creditor by way of a Reply to the said Demand Notice. Thereafter, the Corporate Debtor defaults in making the rest of the payment. Is the application initiating CIRP under the Code, 2016 maintainable in view of the Notification?

Considering the abovementioned illustrations, it is first apposite to understand the fate and importance of the Notification in light of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 ("**Ordinance**"), which was promulgated on June 05, 2020, *inter alia*, suspending the provisions of Sections 7, 9 and 10 of the Code, 2016 for any default arising on or after March 25, 2020, for a period of six (6) months or such further period, not exceeding one (1) year from such date. It is imperative to state herein that the Ordinance was promulgated in furtherance to the same objective as of the Notification *i.e.,* to safeguard the SMEs during the present pandemic situation from being dragged into insolvency proceedings. However, the Notification, unlike the Ordinance, does not mention the date of default from which the increase in threshold limit shall be made applicable to and hence, creates confusion amongst the creditors.

To wither away such a confusion, the Notification should only be made applicable to defaults arising after March 24, 2020 *i.e.*, Covid-19 defaults, as has been done in the case of the aforesaid Ordinance. It is also apposite to mention herein that the intention behind both the enactments are to safeguard the SMEs from being dragged into insolvency proceedings during the present pandemic crisis and thus, the Notification should only be made applicable to Covid-19 defaults and thereafter, as the case may be. In this context, let us now examine the aforesaid illustrations.

Having said that the Notification should only be made applicable to Covid-19 defaults, it is undisputed that the Application under Section 9 of the Code, 2016 is maintainable given the illustrations 1, 2 and 3. As the default having occurred prior to March 24, 2020, Operational Creditor is not required to meet the threshold limit of Rs. 1 crore to initiate CIRP under the Code, 2016.

In illustration 4, the default amount as on the date of filing the Application under Section 9 of the Code, 2016 does not meet the threshold limit, as a part payment of Rs. 60 lakhs was made to the Operational Creditor with a promise to make further payment, thereby lowering the default amount from Rs. 1.50 crore to Rs. 90 lakhs. Thus, the immediate question for consideration is whether the Operational Creditor is required to maintain the minimum threshold limit of Rs. 1 crore as on the date of serving the Demand Notice under Section 8 of the Code, 2016 or as on the date of filing an application under Section 9 of the Code, 2016.

To answer the aforesaid, it is imperative to examine whether serving of a Demand Notice under Section 8, being a pre-requisite for filing a Section 9 application, would tantamount to initiation of CIRP under the Code, 2016 and in this regard, lets us first examine the provisions of Section 5 (11) and Explanation to Section 8 of the Code, 2016.

Section 5(11) reads as follows:

> *"**'initiation date'** means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process"*

Explanation to Section 8 of the Code, 2016, reads as follows:

> *"Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred."*

The necessary implication of the aforesaid provisions suggest that demand notice is merely a notice demanding repayment of debt and service of the same upon the debtor does not tantamount to initiation of CIRP. The initiation date of CIRP would be the date on which the creditor files an application under the Code, 2016 before the Adjudicating Authority *i.e.*, NCLT. Following the aforesaid, it is imperative for the Operational Creditor to meet the threshold limit of Rs. 1 crore as on the date of filing the Application under the Code, 2016.

This being the case, it is still open to the Operational Creditors to argue that as on the date of default, the outstanding debt was Rs. 1.5 crore *i.e.*, beyond the threshold limit of Rs. 1 crore, however, the part payment of Rs. 60 lakhs was made in order to lower down the default amount below the threshold limit (Rs. 1 crore) and prevent action under the Code, 2016. It may further be argued that such an act is to defraud the Operational Creditors and delay or deny paying the admitted and undisputed debt.

3. Concluding remarks

Undisputedly, the enforcement of the Notification gives relief to the SMEs from being dragged into insolvency proceedings and also seeks to prevent frivolous filing of cases by preventing misuse of the Code, 2016 as a recovery tool.Nonetheless,it appears that the enforcement of the Notification is a spontaneous and unplanned response to the present economic condition, which may have severe implications on the Operational Creditors, detailed hereinabove. It further appears that the Notification is beneficial only to the debtors, as it travels back to the debtor centric insolvency regime, and hence, does not seem to pass the muster of objective of the Code, 2016.

Having said the aforesaid, there is a possibility that the issues addressed hereinabove may be subject to different interpretations by different benches and creates unrest amongst creditors. Thus, it is the need of the hour that the legislature should step in and safeguards the interest of the Operational Creditors by way of a clarification or otherwise, as it may deem fit.

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1. *P. Mahendran* v. *State of Karnataka*, AIR 1990 SC 405, (1990) 1 SCC 411; *DG of Foreign Trade* v. *Kanak Exports*, (2016) 2 SCC 226; *CIT* v. *Vatika Township (P) Ltd.*, (2015) 1 SCC 1
2. C.P. (IB) No. 1735/KB/2019

Inspection of Service Providers - An Insight

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"The eye can't see itself, except by reflection in other surfaces."

Act I Scene II, Julius Caesar

1. The Need For Inspection

1.1 The purpose of inspection is to have an independent perspective of the activities undertaken by a service provider[1]. While the Code provides for inspection of all service providers, in this article, inspection is referred to only in the context of an insolvency professional (IP[2]) in a CIRP[3].

1.2 The BLRC Report[4] while describing the principles behind the design of the Code states that "The (Insolvency) professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process". The IP is the *de facto* CEO and also has the responsibility of insolvency resolution of the corporate debtor (CD).[5] Inspection ensures that his conduct is subject to scrutiny. Secondly, the Code[6] was uncharted territory for some time, and inspection provided some feedback to the IP about his compliance with the provisions of the Code and the

related regulations. For example, in one of the inspections conducted by the author, the IP, appreciated the observations in the inspection report and stated that, he would been happy if the inspection had happened even earlier, as he could have then applied the learnings to his earlier assignments. It is over time that jurisprudence has developed and interpretation of various provisions of the Code/regulations have been provided through decisions of the Adjudicating Authority and the Hon'ble Supreme Court. This aspect has always been taken into account while conducting inspection and when disciplinary action is contemplated or taken against an IP based on the findings in an inspection report.

1.3 The article below is based on the author's personal experience in inspection of IPs under the Code, including the first ever inspection, which was conducted of an IP under the Code.

2. Legal Provisions

2.1 The Provisions related to Inspection in the Code [7]

(*i*) Where the Board, on receipt of a complaint or has reasonable grounds to believe that a service provider has contravened any of the provisions of the Code or the rules or regulations made or directions issued by the Board thereunder, it may, at any time by an order in writing, direct any person or persons to act as an investigating authority to conduct an inspection or investigation of the insolvency professional agency or insolvency professional or an information utility.

(*ii*) The Code provides that inspection or investigation shall be conducted within such time and in such manner as may be specified by the Inspection Regulations[8].

2.2 Inspection by the Board.

The Inspection Regulations provide that the Board shall conduct inspection of such number of service providers every year, as may be decided by the Board from time to time. The Board may also conduct inspection of a service provider under the provisions of the Code. The Board may, by an order, direct an Inspecting Authority[9] (IA) to conduct an inspection of records of a service provider for the purposes which are specified in the order.

2.3 Purpose of Inspection

The purposes of inspection include[10]**:**

(*i*) to ensure that the records are being maintained by a service provider in the manner required under the relevant regulations;

(*ii*) to ascertain whether adequate internal control systems, procedures and safeguards have been established and are being followed by a service provider;

(*iii*) to fulfil its obligations under the relevant regulations;

(*iv*) to ascertain whether any circumstance exists which would render a service provider unfit or ineligible

(*v*) to ascertain whether the provisions of the Code, or the rules, regulations and guidelines made thereunder and the directions issued by the Board, if any, are being complied with;

(*vi*) to inquire into the complaints received from clients or any other person on any matter having a bearing on the activities of a service provider; and

(*vii*) such other purpose as may be deemed fit by the Board in furtherance of the objectives of the Code.

3 Types Of Inspection

3.1 Routine Inspection

This type of inspection is routine in nature and carried out as a sample on the basis of an Annual Inspection Plan, by shortlisting sample of IPs as per the Inspection Policy of the Board.

Routine inspections are planned in advance. They usually cover all processes handled by an IP during the relevant period.

3.2 Event-based Inspection

This is as per the provisions of section 218 of the Code. An event-based inspection may cover a specific process, or a specific part of a process, or any combination depending on the facts of the case. The Board may decide to conduct an inspection of an IP in the following circumstances:

(*a*) It has reasonable grounds to believe, based on the analysis of a complaint received under section 217 of the Code or otherwise, that the insolvency professional has contravened any of the provisions of the Code or the rules or regulations made, or directions issued by the Board;

(*b*) On receipt of any order of court or tribunal that directs inspection or makes adverse observations/remarks against the insolvency professional;

(*c*) Such other event as may be deemed fit by the Board.

3.3 Service of Notice

As provided in the Inspection Regulations, IA serves a notice of ten days on the IP before the commencement of inspection. However, in the case of event-based inspection, the IA may dispense with the notice of inspection if it is satisfied that the notice will cause undue delay in inspection or there is an apprehension that the records of the IP may be destroyed, mutilated, altered, falsified or secreted. The IA shall record the reasons for the dispensation in writing. Further, the IA may require the IP to submit such documents, records, statements etc. within such time as required by the IA.

4. Procedure for Carrying out Inspection

4.1 Notice of Inspection

On receipt of an order for inspection, the IA serves a notice of inspection to the IP at least ten days before the commencement of inspection, the notice can however be dispensed with, in exceptional circumstances, which are recorded therein.

The IA provides the following to the IP along with the notice of inspection:

(*i*) A control sheet in which the IP is required to give the details of assignments undertaken by him. The details of assignments could include corporate insolvency, liquidation, voluntary liquidation and fast track insolvency.

(*ii*) A check list comprising of the areas which the IA would examine during the course of inspection. This is to ensure that the IP can be prepared and organise his documents/information accordingly.

(*iii*) A comprehensive list of all documents to be submitted by the IP for the purposes of inspection, the intent of the IA is to give all the requirements at one instance, subsequent queries, if any to the IP would be, to the extent possible, based on the documents already submitted.

The scope of the inspection is specified in the notice.

4.2 Time provided to submitted documents

The IA provides a reasonable time period to the IP to provide the documents required for inspection. As inspection is a time bound exercise, the time provided by the IA would depend on the complexities of the case and the volume of documents. A flexible approach is adopted by the IA in this regard keeping in view the overall time available to the IA to submit the draft inspection report. However, if the inspection is under section 218 of the Code, the IA may require the IP to adhere to time lines as may be required to complete the inspection.

4.3 Feedback of IP on Observation of IA

The IA prepares a summary of findings based on the information provided by the IP, during the site visit, these findings are discussed with the IP and, if still necessary, these form part of the draft Inspection report submitted to the IP. The IA, wherever feasible, would incorporate the circumstances in which the IP took the necessary action and also gives the IP's perspective in the draft inspection report. The IP therefore has the opportunity to give his opinion on the observations of the IA at least at three stages. Firstly, during discussions with the IA and before submission of the draft inspection report. Secondly, when the IA sends him a copy of the draft inspection report, and he is required to give his comments within fifteen days. Finally, after submission of Inspection Report (Final) to the Board and, if the Board decides to take further action based on the inspection report, it will seek a response from the IP. Even subsequently, and if action is warranted based on the findings in the inspection report, the Disciplinary Committee (DC)[11] provides an opportunity of personal hearing to the IP and submit other relevant information, before issuance of an order. The IP is however encouraged to provide all the information at the first stage itself, unless some developments take place at a later stage.

4.4 'Faceless' Inspection

The inspection usually envisages scrutiny of relevant documents, accordingly, it has recently been decided to dispense with the onsite inspection unless it's absolutely necessary. Henceforth, inspection

would be a 'faceless' exercise based on examination of documents and other information submitted by the IP. This would ensure optimal utilisation of time and costs especially when an onsite inspection requires the IA to travel to an outstation location. Further there would be no scope for personal biases and egos to come in the way of an objective assessment during the inspection of the IP.

5. Obligations of the IA

5.1 Confidentiality and least burden:

(*i*) The information regarding inspection of an IP could easily be misinterpreted by stakeholders as a reflection on the competence or integrity of the IP. However, even in trigger based inspection, due procedure has to be followed in taking action against the IP based on the findings of the inspection and not all inspections lead to a disciplinary action against the IP. The IP also submits many documents to the IA which are sensitive in nature and could be put to wrong use if it comes in the possession of any third person. It is therefore important to keep the entire process confidential.

(*ii*) Inspection involves submission of multiple documents to the IA and is an addition to the routine work of the IP. Every effort is therefore made by the IA to cause the least disruption to the business of the IP under inspection. Further, to the extent feasible, inspection is scheduled as per the convenience of the IP and keeping in view his commitments especially vis-a-vis the Adjudicating Authority.

5.2 Professionalism: The relationship between IA and the IP should be that of mutual respect. The IA is the representative of the Board and an IP is an officer of the Court and takes important business and financial decisions that may have critical ramifications for the company and all its stakeholders. Hence the IA should be professional and business like, civil but firm in his dealings with the IP.

5.3 Cordial Relations: It is important that cooperation be obtained from the IP and his staff, and cordial working relations are established. This can best be accomplished by using diplomacy, tact and persuasion.

5.4 Transparency and fairness: The IA shall strive to conduct inspections in a fair, unbiased, impartial and transparent manner. The endeavour would be to have a dialogue with the IP to convey concerns, if any and understand the IP's point of view.

5.5 Knowledge: The IA is not expected to have a reservoir of extraordinary knowledge and skills. He brings an independent perspective, the experience of other inspections conducted and uses established jurisprudence and orders of the Disciplinary Committee of IBBI in similar situations, to frame his observations.

5.6 Follow procedures: Inspection constitutes the exercise of authority to step into private businesses and the IA shall therefore strive to ensure compliance with laid down procedures when conducting inspections and conduct verification in an efficient and effective manner.

5.7 Not to seek unnecessary information: The IA shall only seek information which is absolutely necessary for the purpose of inspection.

5.8 Original Documents: In general original documents shall be examined and returned to the IP. In exceptional circumstances if these need to be taken, an acknowledgement is provided by the IA.

6. Obligations of the IP

As provided in the Inspection Regulations, it is the duty of the IP is to produce before the IA such records in his custody or control and furnish to the IA such statements and information relating to its activities within such time as the IA may require.

It shall also be the duty of the IP and an associated person to give to the IA, all assistance which the IA may reasonably require in connection with the inspection.

7 Some of the Findings During the Inspection Conducted by the Board

7.1 Providing Information sought for by the Board/IA

As per the Code of Conduct[12], IP is duty bound to provide all information and records as may be required by the Board. As per the IBBI order dated 27th February, 2020[13], the Board sought clarifications from an IP along with necessary documents, which was provided. The Board thereafter sought certain additional documents but the IP failed to provide the documents to the Board within the stipulated time. A reminder was also sent to the IP, however, instead of providing documents, the IP advised the Board to close the case treating it as too old. The IA also sought certain documents from the same IP for inspection which was provided with delay. The IA requested the IP to submit certain documents, to which the IP replied that they were not available. The IP failed to explain why these documents were not available.

Similarly, in IBBI order dated 17th April, 2019[14], the DC observes that

> "2.3.1.1 The Inspecting Authority sought a copy of the term sheet in respect of YYY, Mr. XXX did not provide the same. Therefore, the Board held the view that Mr. XXX did not co-operate with the inspection.
>
> 2.3.1.2 Mr. XXX has admitted that he failed to submit it. He has now enclosed a copy of the term sheet.
>
> 2.3.1.3 The DC finds as under: (a) Admittedly, Mr. XXX failed to provide material called upon by the Inspecting Authority. This amounts to non-cooperation with the Authority and hindrance to the work of the Board."

7.2 Seeking postponement of Inspection

In an inspection conducted by the Board[15], the IP sought postponement of the inspection four times and this was agreed to by the IA. Finally, the IA informed the IP that further extension in date for the conduct of inspection will not be granted. In general, the IA will schedule the inspection keeping in view the commitment of the IP especially vis-a-vis the Adjudicating Authority or before any other judicial authority or if

the insolvency resolution process is nearing completion or any similar circumstances. However, if it's an inspection under section 218 of the Code, the IA takes a decision based on the circumstances of the case. As inspection is a time bound exercise, the IP should facilitate its completion at the earliest, unless force majeure prevails.

7.3 Comments on Draft Inspection Report

The Regulations provide that the IA shall send a copy of the draft inspection report to the service provider requiring comments of the service provider within fifteen days from the receipt of the draft inspection report. This is an opportunity for the IP to provide his opinion on the observations of the IA and should be made use off. The IA often receive requests for extension of time, unfortunately there is no such provision in the regulations. The IP should make use of the opportunity to give his view on all the observations of the IA and if the IA accepts all or some, these do not find a place in the Inspection Report (final) prepared by the IA and submitted to the Board.

7.4 Dealing with Complaints

The nature of job of the IP is such that, in many circumstances, complaints are unavoidable. During a recent visit to the UK, the author had discussions with RPBs (equivalent of IPAs), wherein the RPBs echoed a similar view and said that most complaints tend to be without substance. While it's not possible to satisfy every complainant, it is important to respond to him/her.

The IP must maintain a dossier of all complaints received and keep a record of the attempts which were made by him to resolve them. This is not just for the purposes of inspection but also to ensure that there is no escalation of such complaints to the Board/IPA. The complaints which are received from the Board or the IPA, must be investigated and a response provided within reasonable time. The usual trigger for the Board to order an inspection under section 218 of the Code is the analysis of the information provided in a complaint or based on any information that there is a contravention of the Code/Regulations.

7.5 Verification of Claims

Most of the complaints received from stakeholders are in respect of claims not being accepted. Accordingly, the IP must display the status of claims on the website of the CD along with other requirements, in the manner provided in the[16] regulations. In many cases the CD may not have a website, in such cases and especially if there a large number of creditors, it may be advisable to have a website for this purpose. This would go a long way in allaying the apprehensions of creditors and reduce the number of complaints.

The IP must follow a transparent manner of verification of claims. Claims should be verified wherever possible from the books of account, however where the books of account are not available, as is often the case, the IP has to rely on documents submitted by the creditor. In one case, a creditor submitted as proof of claim, copy of books of account of the CD, which gives rise to the question as to how the creditor had such access to such a document. Similarly in another case, the IP had completely outsourced

claim verification to an IPE to the extent that the minutes recorded the fact that "claims were verified by XYZ IPE".

Similarly, the IP should follow due diligence and avoid undue haste in admitting a claim, and reconstituting the COC, especially in case of large claims which may have an impact on voting share in the COC .

In NCLAT New Delhi Company Appeal (AT) (Insolvency) No. 633 of 2018, the order states

From the discussions as made above, while we hold that there is a dispute as to whether AAA comes within the meaning of 'Financial Creditor' or not, we hold that after constitution of the 'Committee of Creditors', without its permission, the 'Resolution Professional' was not competent to entertain more applications after three months to include one or other person as 'Financial Creditor'. Further, once a decision was taken by the 'Committee of Creditors' to call for a meeting for removal of Mr. AAA as an 'Resolution Professional', it was improper for him to include AAA as 'Financial Creditor' of the Member of the 'Committee of Creditors'.

7.6 Manner of dealing with preferential transactions.

The BLRC Report[17] while describing the insolvency resolution process states that

> "The IP makes sure that assets are not stolen from the company, and initiates a careful check of the transactions of the company for the last two years, to look for illegal diversion of assets. Such diversion of assets would induce criminal charges."

The Code provides for the IP to identify transactions which are preferential, undervalued, extortionate and fraudulent and make an application to the Adjudicating Authority for reversal of these transactions. During the inspection of IPs, the approach of some of the IPs was found lacking in many cases. The most common deficiency was not identifying or not taking steps to identify such transactions within reasonable time, as a result, in a few cases, the COC has given directions to the IP to take suitable action in respect of such transactions.

In IBBI order dated 23rd August, 2018[18], the DC observed as under

> "An IP is duty bound under Section 20 of the Code to protect and preserve the value of the assets of the Corporate debtor. He is also duty bound under section 25(2)(j) read with sections 43, 45, 50 and 66 of the Code to identify and recover the assets lost in irregular transactions. These are inherent powers of the RP and the Code does not envisage any role of the COC in irregular transactions."

Prior to Third Amendment to IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016(CIRP Regulations), no time was prescribed for filing an application before Adjudicating Authority for seeking appropriate relief. The provision on model timeline for CIRP prescribing a period of 135 days for filing such an application has been inserted *vide* Third Amendment w.e.f. 3rd July, 2018 which shall apply to CIRP commencing on or after 3rd July, 2018. With the insertion of these provisions, the IP has to form an opinion on preferential and other

transactions within seventy five days and file applications to Adjudicating Authority for appropriate relief within 135 days of commencement of CIRP. Accordingly, for CIRPs after 3rd July, 2018, these timelines would be considered for ascertaining compliance with the CIRP Regulations.

Another related issue is related to the appointment of forensic auditor. In IBBI order dated 23rd August, 2018 the DC has stated that

> "A forensic audit is conducted to detect and gather evidence of frauds, misappropriation, embezzlement or such other white collar crime and to recover the assets through irregular transactions. It is therefore necessary that a person appointed to conduct forensic audit has no conflict of interests whatsoever. It is not in the fitness of things that the RP engages a forensic auditor who has already been engaged by one of the stakeholders in the same matter. Such a an auditor may not be fair to all stakeholders, the submission that MR XXX appointed the auditor who was already engaged by a financial creditor to save time and cost is not tenable as this can be at the very cost of vitiating the very purpose for which a forensic audit conduct is conducted."

The Code casts a duty on the IP to preserve and protect the assets of the CD and appoint professionals who do not have a conflict of interest. Further the role of the COC is limited to fix the expenses to be incurred or by the resolution professional. The role of the COC and the IP are clearly demarcated by the Code. The IP must not compromise his independence in favour of the COC by taking services of a professional, at the behest of the COC or who has already provided services to a member of the COC in the same matter.

7.7 Treatment of claims

As per IBBI order dated 14th November, 2011[19], the minutes of the COC recorded the opinion of lenders legal counsel that if the legal costs of the lenders are not included in insolvency resolution process cost and paid, the lenders would file additional claims against the company to the extent of such cost. The IP did not provide a clarification that all claims are as on the insolvency claim date as provided in Form C for submission of claim by Financial Creditors.

Similarly, in another case, payments to one financial creditor continued even after commencement of insolvency proceedings and the financial creditor (FC) was permitted to revise its claim to the extent of such payments. Section 14 prohibits transfer of the assets of the CD during the CIRP. However, the IP made the payments of EMIs out of the cash flow of CD to one of the FCs during CIRP period with the approval of the CoC. This is in violation of section 14 of the code and IP should have brought this to the notice of the CoC.

In a similar case, the FC accepted payments from the directors of the CD and filed revised claims with the IP which was accepted. In the meantime, the IM was prepared with the original claim and prospective resolution applicants filed their resolution plan in accordance with the IM. The resolution plan thus proposed payment to FC which was more than its claim amount

whereas significant haircuts were proposed for operational creditors and workmen.

7.8 Control and custody over assets

The duties of the interim resolution professional are provided in section of the Code. It provides, *inter alia* that, the IRP shall take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor.

In IBBI order[20] dated 23rd August, 2018 the DC states that

> "Mr XXX handed over custody of the assets of the CD to the members of the suspended board of directors ignoring his statutory duties."

The DC further states that

> "It is the duty of the IRP/RP under the code to take custody of all assets of the CD and preserve and protect their value. It is also the duty of the IRP/RP to exercise the powers of the board of directors. The Hon'ble Supreme Court in the matter of Innoventive Industries Ltd. vs ICICI Bank and Amr(2017) SCC 407 observed "According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors are no longer in management." Mr XXX did exactly what the law prohibits, allowed the suspended board of directors to regain control over the CD."

In a few cases the IP have given their opinion that Section 18(f)[21] places an inherent obligation on the Resolution Professional conferred by the Code. The same has to be adhered to by the resolution professional all times during his appointment as a resolution professional and the same is not recorded in the meeting of the CoC.

In general, the IA would treat the following as compliance with the above provisions of the Code:

a. The IP provides the details of all the locations at which the assets of the CD are located.

b. The IP confirms that security is adequate at all the places where the assets of the CD are located, if the existing security arrangement is seen to be inadequate, he may engage security agency as per the provisions of the Code.

c. Finally, he ensures and confirms that the management of the CD is reporting to him and accountable for their actions and suspended Board of Directors have no role in the activities of the CD.

d. All the above are recorded in the minutes of the COC or in any other manner evidencing that the same has been done.

7.9 Fees and other issues in relation to appointment of IRP/RP/Professionals.

The Board has not specified an indicative table of fees linked to any parameter, which would determine the fees payable to IP for a corporate insolvency resolution process. However, the Board has, through the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations)[22], circulars[23] and orders, provided guidance in the matter of fixation of remuneration of IP and other professionals appointed by him. It broadly provides

that the fees and costs charged by an IP must be transparent and a reasonable reflection of the work necessarily and properly undertaken.

The experience of the IA is that in a few cases, the fees are disproportionate in relation to work involved and hence cannot be described as reasonable as provided in the regulations. The usual defence taken in such cases is that no fees are prescribed in the Code/Regulations. However, this cannot be accepted as an IP is a professional and has to apply the test of, `remuneration to be charged as a reasonable reflection of the work necessarily and properly undertaken', as provided in the IP Regulations.

In the IBBI order[24] dated 3rd May, the DC states that

> "Ms. XXX has very emphatically claimed that the legislature has not limited the fee payable to an IRP/RP. It is difficult to appreciate that any amount of fee can be charged by a professional just because the law does not limit it. The law (Clause 25 of the Code of Conduct for Insolvency Professionals under the First Schedule to the IBBI (Insolvency Professionals) Regulations, 2016) clearly specifies `remuneration to be charged as a reasonable reflection of the work necessarily and properly undertaken' by an IP.
>
> It is neither feasible nor desirable to define what is `reasonable'. At least an IP, who exercises the powers of the Board of Directors, cannot feign inability that she does not understand what is `reasonable' in the circumstances."

Similarly in the matter of ICICI Bank vs Geetanjali Gems Limited the Adjudicating authority has stated *vide* its order[25]

> "In my *Prima facie* opinion, it appears that the claimed amount as Corporate Insolvency Resolution Process cost of ₹ 3,57,47,494/- is an exorbitant claim considering the totality of the circumstances. This view is in conformity with two orders passed by IBBI, New Delhi bearing Ref. No.: IBBI/DC/15/2019 and IBBI/DC/16/2019 dated 21.02.2019 and 17.04.2019 respectively, wherein on the ground of unrealistic and exorbitant fees/expenses demanded by the RP their licenses were suspended to act as RP. Since a regulatory authority is keeping an eye and watching the conduct of Resolution Professionals, therefore, it is expected that before making such type of submission due care and professional ethics ought to be observed".

Another usually taken by an IP, when the fees are perceived to be high by the IA is that the fees have been approved by the COC. In the IBBI order[26] dated 14th November, 2019 the DC has stated that

> "It is important to note that the CoC or its members do not own the assets of the company rather they hold the assets as trustees for the benefit of all stakeholders. The gain or pain emanating from the resolution, therefore, need to be shared by the stakeholders within a framework of fairness and equity."

Similarly In the matter of *Punjab National Bank* v. *Divya Jyoti Sponge Iron Private*

Limited (CP(IB) No. 363/KB/2017), Adjudicating authority stated that

> "22. However, before parting with, it is time to take judicial notice of fixation of exaggerated insolvency resolution cost inclusive of fixation of fees of resolution professional in a lump sum manner by the CoC applying its mind in regards the fate of corporate debtor, the volume, nature and complexity of CIRP. In many cases I have taken note of fixation of cost and fees without looking into the volume nature and complexity of the CIRP of a dying corporate debtor"

Accordingly, approval of COC does not justify the fees, which do not pass the test of being reasonable, as provided in the IP Regulations. The CoC has a statutory role. It discharges a public function. It must, therefore, apply the highest standards of duty of care. It must not only follow the due process, but also be fair towards all stakeholders and transparent in discharge of its responsibilities for maximising the value of the assets of the company.

The other issue is the appointment of related parties as professionals by the IP in a manner which compromises his independence and is also a violation of various provisions of the Code of Conduct[27] for insolvency professional.

In the DC order dated 17th April, 2019 the DC states that

> "In terms of section 17 of the Code, the management of the affairs of the CD vests in the IRP and the powers of the Board of Directors of the CD is exercised by the IRP. For all practical purposes, the IRP is the alter ego of the CD undergoing CIRP. Every decision of the CD and in respect of the CD is taken by the IRP. Mr. XXX, on behalf of the CD, dealt with Ms. XXX, his spouse. It requires no rocket science to figure out why Mr. XXX assigned CIRPs of 15 CDs to one IP, namely, Ms. XXX, when 2000+ IPs were competing for an assignment in the market. It is not a coincidence that 15 assignments from one source landed on the table of Ms. XXX, when she did not have a single assignment otherwise. 15 assignments at one go from one source for an IP having absolutely zero experience establishes that the considerations were something other than merits and there was a deep-rooted conspiracy to bleed the ailing CDs for the benefit of XXX family. If the conspiracy had materialised, the family would have acted as IRP/RP of CIRPs of 15 CDs. Further, as IRP/RP of these 15 CDs, they would initiate CIRP of their debtors and appoint themselves as IRP/RP of those debtor and so on. When relationship triumphs over merits in professional matters, there is no place for independence, integrity and impartiality."

The amendment to the Code of Conduct[28] now provides that an insolvency professional shall not engage or appoint any of his relatives or related parties for or in connection with any work relating to any of his assignment.

8. Positive Experiences Emerging out of Inspection

8.1 There have been instances of IPs proposing or charging exorbitant amount of

fees, which has prompted the Adjudicating Authority to take notice. IBBI had also initiated disciplinary action against an IP on account of such transgression. The IA was however pleasantly surprised to notice during the course of an inspection the extraordinary lengths to which an IP went to reduce the insolvency resolution process costs. He claimed hotel fees of only Rs. 500 in one case. On further examination, it came to light that in order to reduce costs, the IP travelled by an overnight train to his destination, used the hotel facilities @ Rs. 500 for just having a bath and change of clothes before proceeding to his destination for the proposed meeting. Further, the IP incurred a cost of only Rs. 10000 for issuance of public announcement in two newspapers. While this was not found acceptable as it did not comply with the regulatory requirement of publication of the public announcement in newspapers with wide circulation, the intent of the IP to minimise costs was noted.

8.2 The author, as the IA tried to take a feedback from the IP on every observation even before submitting the draft report. It has been observed that IPs have been forthcoming in explaining the circumstances of the case along with providing supporting documents. Most IPs have also cooperated with the IA in submission of documents within the agreed and in general IPs have been punctual during meetings which helps in optimum utilisation of available time. The discussions have also been cordial with mutual understanding of the requirement of inspection. The IA has tried to incorporate, wherever feasible, the submissions of the IP in the draft report to give a perspective as to the circumstances in which the stated non compliances took place.

8.3 During the inspection of an IP of a large CD, the IA came to know of the enormous challenges which the IP had to overcome and the extraordinary application and efforts made by the IP and his team to keep CD as a going concern and eventual submission of resolution plan by the RA and approval by the Adjudicating Authority. The IA felt that this experience should be disseminated so that the profession could benefit from such an experience and requested the IP and the IPA to take this forward. Subsequently, this was published as a case study by an IPA.

8.4 The IA did the inspection of two large CDs which were similar in every respect including the line of activity. Both were running businesses with positive cash flows. In one case resolution took place followed by change in management and smooth transition to new promoters. In the second case, there were reports of various irregularities during CIRP, numerous complaints were received and ultimately an inspection under section 218 of the Code was conducted. Subsequent to the inspection, a show-cause notice was issued to the IP and disciplinary action followed. While the allegations were regarding a wide variety of issues, the DC found that only some of these allegations could be substantiated. This CD has still not seen resolution. The learning from this experience is that IP has not only to be fair, but should also be seen to be fair to all stakeholders. If stakeholders lose their trust in the IP, they would be compelled to take legal course, which could drag on for years, causing erosion of value for all concerned. The IP might benefit by way of continued remuneration if proceedings

continue, however there is reputation loss and of course there is the opportunity cost. The IP should rather focus on concluding proceedings, enhance his reputation and get more assignments with the experience garnered.

9. Learnings for IA

9.1 In the initial years jurisprudence had not developed and certain provisions of the Code/regulations were open to interpretation. The IA had to understand every situation and correlate to the provisions of the Code/regulations. For example Section 25(2)(d)[29] of the Code was sometimes interpreted to mean that the IP could only appoint professionals to preserve and protect the assets of the CD and not to facilitate CIRP. However, now the IA is guided by available jurisprudence or decisions taken by the DC of IBBI in similar situations. Thus the process of inspection is progressively become more objective and predictable.

9.2 IA comes to know of the ground realities only through inspection. For example, the ICD[30] cannot be used strictly for assessing compliance with timelines provided in the Code, as there is always a time lag between ICD and the actual receipt of the Order, which could even be a month.

9.3 Inspection must be thorough and must cover all aspects of the CIRP and other processes of the IP. Ongoing CIRPs and other processes like liquidation etc. also come under scrutiny of the Adjudicating Authority, usually, based on a petition filed by a stakeholder. On one occasion, the Adjudicating Authority has detected irregularities and made adverse observation in respect of the CIRP proceedings, subsequent to the conduct of inspection. The IA had of course commented on these issues in his inspection report, but the IA has to be alert so that so all non-compliances are brought out, so that the objectives of conducting an inspection are achieved.

10. Advice for Insolvency Professionals

10.1 Positive Approach to Inspection An inspection provides an independent and impartial feedback on the compliances by the IP with the provisions of the Code, or the rules or the regulations or the directives given by the board thereunder, while undertaking CIRP/Liquidation processes, etc. If the CIRP/Liquidation processes are ongoing, the IP can take immediate remedial action. Even otherwise, he can apply the learning to future assignments and ensure compliance with Code and regulations. He can thus avoid complaints or adverse comments by the Adjudicating Authority and achieve the desired outcomes of the Code. Accordingly, he should welcome an inspection, even if it involves some extra efforts in the short term.

10.2 Provide documents and support to the IA

Inspection is a time bound process, so all possible support should be provided by the IP to facilitate the inspection. An inspection process once initiated has to be completed and therefore unavoidable. Accordingly, it is always advisable to cooperate, by way of provision of information or documents required by the IA within the timelines provided by the IA, so that inspection

can be conducted in a smooth and timely manner. The sooner the inspection is completed, the IP can go on with his normal functioning. Moreover, if the IA feels that there is non-cooperation on the part of the IP, this will be a violation of the Code, and this will be an additional issue to respond to, if the Board decides to issue a Show-Cause Notice (SCN), based on the findings in the inspection report.

10.3 Provide for all information at first instance

There is often a tendency of the IPs to not take the inspection seriously in the initial stages and not submit all documents required to justify ones action. It is always advisable to submit all documents at the initial stage itself, even before submission of the draft inspection report, because, if the IA is satisfied, these issues do not appear in the draft inspection report. Similarly, the responses to the draft inspection report should be based on all documents available with IP at the relevant time. While the IP also has an opportunity to give his response later, if the Board decides to issue a SCN, based on the findings of the inspection report, this takes up time of all concerned and issue of a SCN means commencement of disciplinary proceedings, which has its attendant implications.

10.4 Keep supporting documents/evidence for decisions taken

In respect of routine inspection, in general all assignments since inception are examined by the IA, it may not be possible for any person to remember details of all such transactions. Accordingly it useful to keep a record of all decisions taken, as also the rationale for taking such decisions. One way this can be achieved to record decisions and the justification behind them, wherever feasible, in the minutes of the COC. The minutes of COC can be easily traced and can be produced when sought for, say by the IA.

10.5 Maintaining channels of Communication with all stakeholders

An IP is seen to be the care giver, he addresses stress of distressed persons. He is the beacon of hope for the person in financial distress and its stakeholders. Accordingly when stakeholders do not get appropriate response, desperation sets in and the matter gets escalated. If a creditor does not get an appropriate response he will approach the Board or even the Adjudicating Authority. If the Board or the IPA do not get a response or based on the response provided, it is of the opinion that there is a contravention of provisions of the Code or the rule or regulations or directions issued by the Board thereunder, it may order an inspection. Accordingly, the IP should be prompt in responding to issues raised by all stakeholders, whether it is a complainant, a creditor who has filed claims, the IPA or the Board. If the information is not available or the IP feels that it would take some time to compile the same, then an interim reply can be sent, which reassures all concerned that necessary action has been initiated. Any information which is of interest to all stakeholders, like the status of claims can be put up on the website of the CD.

(This article reflects the personal views of the author and not that of IBBI)

1. As per regulation 2(*j*) of IBBI(inspection and investigation) Regulations, 2017, service provider means Insolvency professional, insolvency professional agency or information utility
2. Section 3(19) of the Insolvency and Bankruptcy Code, 2016 provides that insolvency professional means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under Section 207
3. Corporate insolvency resolution process as defined under Regulation 2(1)(*e*) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
4. The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, November 2015
5. As per Section 3(8) of the Insolvency and Bankruptcy Code, 2016, corporate debtor means a corporate person who owes a debt to any person
6. Insolvency and Bankruptcy Code, 2016
7. Section 218 of Insolvency and Bankruptcy Code, 2016
8. IBBI (inspection and investigation) Regulations, 2017
9. Regulation 2(*f*) of the IBBI (Inspection and Investigation) Regulations, 2017.
10. Regulation 3(4) of the IBBI (Inspection and Investigation) Regulations, 2017
11. Section 220(1) of the Code provides that the board shall constitute a disciplinary committee to consider the reports of the investigating authority submitted under sub-section (6) of section 218
12. Clause 19 of Code of Conduct provided in first schedule of the IBBI (Insolvency Professional) Regulations, 2016
13. IBBI DC order No. IBBI/DC/18/2020 dated 27th February, 2020
14. IBBI DC order No. IBBI/DC/16/2019 dated 17th April, 2019
15. IBBI/Ref-Disc.Comm./03/2018 dated 18th April, 2018
16. Regulation 13 of IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016
17. The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, November 2015
18. IBBI DC order No IBBI/DC/07/2018 dated 23rd August, 2018
19. IBBI DC order No. IBBI/DC/15/2019-20 dated 14th November, 2019
20. IBBI DC/07/2018 dated 23rd August, 2018
21. Section 18(*f*) of the Code
22. Paragraphs 25, 26 and 27 of Code of Conduct in the First Schedule of IP Regulations
23. Circular No. IP/005/2018 dated 16th January, 2018, on "Fees payable to an insolvency professional and to other professionals appointed by an insolvency professional and Circular No. IBBI/IP/013/2018 dated 12th June, 2018 on "Fee and other Expenses incurred for Corporate Insolvency Resolution Process"
24. IBBI/DC/04/2018 dated 3rd May, 2018
25. National Company Law Tribunal, Mumbai bench MA 1520/2019 in MA 254/2019 in CP. 3585(MB)/2018 5
26. IBBI DC order No. IBBI/DC/15/2019-20 dated 14th November, 2019
27. Clauses 5 to 9 of the Code of conduct for Insolvency Professionals provided in the First Schedule of the IBBI (Insolvency Professionals), 2016
28. Clause 23B of the Code of Conduct provided in the First Schedule of the IBBI (Insolvency professionals) Regulations, 2016
29. Section 25(2) states that For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:-
    ...
    (d) Appoint accountants, legal or other professional in the manner as specified by the Board.
    ...
30. As per Section 5(12) of the Code, Insolvency Commencement Date (ICD) means the date of admission of an application for initiating corporate insolvency process by the Adjudicating Authority under sections 7, 9 and 10 as the case may be

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SUPREME COURT OF INDIA

Vishal Vijay Kalantri

v.

DBM Geotechnics & Constructions (P.) Ltd.

UDAY UMESH LALIT AND VINEET SARAN, JJ.

CIVIL APPEAL NO. 2730 OF 2020

JULY 20, 2020

Section 31, read with sections 12A and 62, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Petition for initiation of corporate insolvency resolution process against corporate debtor was admitted by NCLT - Settlement proposal of appellant under section 12A for withdrawal of corporate insolvency resolution process was rejected by members of Committee of Creditors by 99.68 per cent voting shares - On appeal, NCLAT held that NCLT and NCLAT could not sit in appeal on commercial wisdom of Committee of creditors - Whether on facts matter was not to be inferred and appeal was to be dismissed - Held, yes (Para 11)

CASE REVIEW

Vishal Vijay Kalantri v. *DBM Geotechnics & Construction (P.) Ltd.* (2020) 117 taxmann.com 462 (NCL-AT) (Para 12) *affirmed*.

Mobilox Innovations (P.) Ltd. v. *Kirusa Software (P.) Ltd.* (2018) 1 SCC 353 (Para 11) *followed*.

P. Chidambaram and **Darius Khambatta**, Advs., **Amit Naik**, **Ms. Neha Nagpal**, **Ms. Pallavi Langer**, **Abhishek Kale**, **Ms. Nisha Kaba** and **Vishvendra Tomar**, Advs.

and **Malak Manish Bhatt**, AOR *for the Appellant.* **Vikram Nankani**, Sr. Adv., **Mahesh Agarwal**, Adv. and **E.C. Agrawala**, AOR *for the Respondent.*

ORDER

1. This appeal under section 62 of the Insolvency and Bankruptcy Code, 2016 (I.B. code, for short) is directed against the order dated 12-3-2020 passed by the National Company Law Appellate Tribunal, New Delhi (for short "NCLAT") in Company Appeal (AT) (Insolvency) No. 139 of 2018.

2. During the course of its order, the NCLAT observed as under:

"11. The voting on the resolution for approval of Settlement Proposal under section 12A of the I&B Code proposed at the `Committee of Creditors' Meeting held on 13th September, 2019 was concluded on 17th September, 2019. From the results of the voting, it was noted that the resolution for withdrawal of `corporate insolvency resolution process' under section 12A of the I&B Code was rejected by the members of the `Committee of Creditors' by 99.68% voting shares and `Committee of Creditors' members having the remaining 0.3% voting shares abstained from voting. As such, it is unequivocally clear that the resolution for withdrawal of `corporate insolvency resolution process' under section 12A of the I&B Code came to be rejected by the members of the `Committee of Creditors' as the same could not muster the requisite 90% voting share.

12. It is pertinent to mention that the said Resolution Plan of the `APSEZ' was found to be in compliance with Section 30(2) of the I&B Code and Regulation 38 of the CIRP Regulations. Since, the withdrawal resolution under section 12A of the I&B Code stood rejected by the members of the `Committee of Creditors', as per the instructions of the `Committee of Creditors' in its 22nd Meeting, the Resolution Professional put the Resolution Plan submitted by `APSEZ' for voting by the members of the `Committee of Creditors'. The voting on the same commenced on 17th September, 2019 and concluded on 19th September, 2019.

13. On 19th September, 2019, the voting results were received which revealed that the Resolution Plan submitted by APSEZ was approved by the members of the `Committee of Creditors' with 99.68% votes."

3. It was also recorded that the Settlement Proposal of the appellant under section 12A of the I.B. Code was rejected by 99.68% votes of the Committee of Creditors (CoC, for short).

4. The facts on record indicate that a notice invoking arbitration was issued on 29-7-2016 by respondent No. 1 in relation to Contract No. 2 whereafter an application under section 11(6) of the Arbitration & Conciliation Act, 1996 was filed in the High Court of Bombay on 15-12-2016. A notice was also issued on 23-3-2017 invoking arbitration in relation to Contract

No. 1. Thereafter, Consent Terms dated 29-3-2017 were entered into, in terms whereof, the Notice dated 23-3-2017 stood withdrawn. It appears that Consent Terms did not fructify and completely failed.

5. On 16-6-2017 a Notice under section 8 of the Code was issued. In its response dated 29-6-2017, respondent No. 2 submitted *inter alia* that the Terms of Consent were void and unenforceable.

6. Thereafter, the application under section 11(6) as aforesaid was withdrawn on 14-9-2017.

7. The Adjudicating Authority admitted the petition under section 9 of the I.B. Code *vide* Order dated 25-3-2018 against which an appeal was preferred. The appeal was dismissed by the NCLAT with above quoted observations.

8. Mr. P. Chidambaram, learned Senior Advocate for the appellant submitted that the issue which got crystallized in the orders dated 18-4-2018 and 23-5-2018, whereafter the matter was adjourned on dated 12-7-2018 and 17-10-2019, was not decided by the NCLAT while disposing of the appeal.

9. Mr. Mukul Rohatgi, learned Senior Advocate for the respondent-original applicant submitted that as against the claims amounting to Rs. 30 crores which were subject matter of the arbitration notice, the claims received by the CoC are to the tune of Rs. 3000 crores and the voting pattern referred to in the above quoted paragraphs from the order of NCLAT discloses near unanimity amongst the claimants.

10. Though the issue as framed in the orders dated 18-4-2018 and 23-5-2018 was not decided by the NCLAT, in our view, in keeping with the law laid down by this Court in *Mobilox Innovations (P.) Ltd.* v. *Kirusa Software (P.) Ltd.*, (2018) 1 SCC 353, a dispute must truly exist in the facts and should not be spurious, hypothetical and illusory.

11. In the light of the facts adverted to in paragraphs 11 to 13 as quoted above, the NCLAT was right in not considering the issue framed in the Orders dated 18-4-2018 and 23-5-2018

12. In the circumstances, we see no reason to interfere in the matter. The appeal is, accordingly, dismissed. No costs.

13. In view of the dismissal of the appeal, no separate orders are called for in I.A. No. 62152/2020.

ORDER

The Appeal is dismissed, in terms of the Signed Order. Pending application(s), if any, also stand disposed of.

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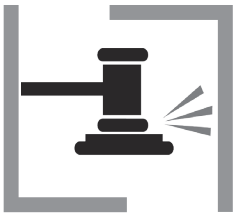

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SUPREME COURT OF INDIA

Saurabh Jain
v.
Union of India

ROHINTON FALI NARIMAN AND NAVIN SINHA, JJ.
WRIT PETITION(S) CIVIL NO. 679 OF 2020
JULY 20, 2020

Section 38 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Power of Central Government to make Rules - Petitioners alleged that despite circular issued by Ministry of Finance directing personal guarantees issued by promoters/ managerial personnel to be invoked, public sector undertakings continued not to invoke such guarantees resulting in huge loss not only to public exchequer but also to common man - Whether petitioners were to be allowed to approach Ministry of Finance with a representation and Ministry of Finance was to be directed to reply to said representation - Held, yes (Para 1)

Manan Kumar Mishra, Sr. Adv., **Durga Dutt**, AOR., **Ms. Anjul Dwivedi** and **Kousik Ghosh**, Adv. *for the Petitioner.*

ORDER

1. Having heard Mr. Manan Kumar Mishra, learned Senior Counsel for the petitioners for sometime, we are of the view that at page 115 of the Writ Petition it has been made clear that the Ministry of Finance itself has, by a Circular, directed personal guarantees issued by promoters/managerial personnel to be invoked. According to the petitioners, despite this Circular, Public Sector Undertakings continue not to invoke such guarantees resulting in huge loss not only to the public exchequer but also to the common.

2. We allow the petitioners, at this stage, to withdraw this writ Petition and approach the Ministry of Finance with a representation in this behalf. The representation will be made within a period of two weeks from today. The Ministry of Finance is directed to reply to the said representation within a period of four weeks after receiving such representation.

3. With these observations, the petition is allowed to be withdrawn to do the needful.

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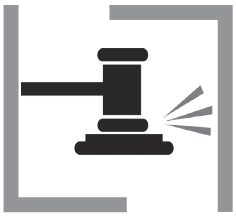

(2020) 118 taxmann.com 134 (Madras)

HIGH COURT OF MADRAS

CA.Venkata Siva Kumar

v.

Insolvency and Bankruptcy Board of India (IBBI)

A.P. SAHI, CJ. AND SENTHILKUMAR RAMAMOORTHY, J.

W.P.NO.9132 OF 2020 AND W.M.P.NO.11134 OF 2020

JULY 28, 2020

Section 196 of the Insolvency and Bankruptcy Code, 2016, read with regulations 7 and 13, of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 - Board - Powers and functions of - Whether Insolvency and Bankruptcy Board of India (IBBI) has powers to frame regulations with regard to fee payable by Insolvency Professionals (IPs) and insolvency professional agencies - Held, yes - Whether fee making power of IBBI is not subject to any fetters except that it should be for carrying out purposes of IBC - Held, yes - Whether IBBI is duly empowered under sections 196 and 207 of IBC to levy a fee on IP, including as a percentage of annual remuneration as an IP in preceding financial year - Held, yes - Whether IBBI provides significant services, including in relation to IPs and there is broad correlation between fees and services - Held, yes - Whether in view of fact that direct or arithmetical correlation as between fee received and service rendered is not necessary especially in context of regulatory fees, it is viewed that regulation 7(2)(ca) of IP Regulations does not suffer from any constitutional infirmity on account of absence of quid pro quo - Held, yes - Whether IBC contains adequate safeguards to ensure that Parliament effectively supervises all rules and regulations with power to modify or even annul same, likewise, adequate safeguards are in place to ensure that funds of IBBI are utilized for purposes of fulfilling role of IBBI under IBC - Held, yes - Whether conferment of power to charge a fee and charging of such fee by using annual remuneration as a measure does not amount to delegation of an essential legislative function and therefore, it cannot be said that there is excessive delegation to IBBI - Held, yes (Paras 11 to 14)

CASE REVIEW

State of Tamil Nadu v. *K. Shyam Sunder,* AIR 2011 SC 3471 (Para 13) - *followed.*

Avinder Singh v. *State of Punjab,* AIR 1979 SC 321(Para 13) - *followed.*

V. Venkata Sivakumar *for the Petitioner.*
R. Sankaranarayanan and **K. Jaiganesh** *for the Respondent.*

ORDER

Senthil Kumar Ramamoorthy, J. - The Petitioner is a chartered accountant and

has registered himself as an insolvency professional (IP) with the Insolvency and Bankruptcy Board of India (IBBI). The Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (the IP Regulations), were framed by the IBBI under sections 196, 207 and 208 read with Section 240 of the Insolvency and Bankruptcy Code, 2016 (the IBC). Regulation 7 of the IP Regulations provides that the registration of the IP with the IBBI is subject to the conditions stipulated therein. Regulation 7(2)(*ca*) thereof stipulates the requirement that the IP should pay a fee calculated at 0.25% of the professional fee earned for services rendered as an IP in the preceding financial year to the IBBI. Regulation 12 of the IP Regulations provides for the recognition of a company, registered partnership firm or a limited liability partnership as an Insolvency Professional Entity (IPE) subject to the conditions set out therein. Regulation 13(2)(*ca*) stipulates payment of a fee at 0.25% of the turnover of the IPE in the preceding financial year to the IBBI. Both Regulations 7(2)(*ca*) and 13(2)(*ca*) are under challenge in this writ petition whereby the Petitioner seeks a declaration that the said IP Regulations violate Articles 14, 19 and 21 of the Constitution and are, therefore, liable to be struck down.

2. The power to levy fees on IPs is conferred on the IBBI under sections 196 and 207 of the IBC. In Section 196, Sub-section (1) (*a*), (aa) and (*c*) are relevant and are set out below:

"(1) The Board shall, subject to the general direction of the Central Government, perform all or any of the following functions, namely:-

(*a*) register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations;

(*aa*) promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code;

(*c*) levy fee or other charges for carrying out the purposes of this Code, including fee for registration and renewal of insolvency professional agencies, insolvency professionals and information utilities."

Section 207 of the IBC deals with the registration of IPs and for the payment of fees in respect thereof. The said provision is as under:

"207. *Registration of insolvency professionals.*—(1) Every insolvency professional shall, after obtaining the membership of any insolvency professional agency, register himself with the Board within such time, in such manner and on payment of such fee, as may be specified by regulations.

(2) The Board may specify the categories of professionals or persons possessing such qualifications and experience in the field of finance, law, management, insolvency or such other field, as it deems fit."

Section 208 deals with the broad functions and obligations of IPs and stipulates that an IP shall undertake such actions as may be necessary in respect of the different forms of insolvency resolution processes, bankruptcies and liquidation. Section 240 contains the general power to make regulations and reads, *inter alia*, as under:

> "240. *Power to make regulations.*—(1) The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code."

The IP Regulations were framed in the year 2016 and were amended subsequently with regard to the conditions for registration of an IP and IPE, respectively, by inserting clause (*ca*) in regulations 7(2) and 13(2). This amendment was made by Notification No. IBBI/2018-19/GN/REG036 dated 11-10-2018 with effect from even date and the provisos thereto were inserted by a subsequent amendment with effect from 28-3-2020. Regulation 7(2) (*ca*) is as under:

> "7(2) the registration shall be subject to the conditions that the insolvency professionals shall-
>
> (*ca*) pay to the Board, a fee calculated at the rate of 0.25 percent of the professional fee earned for the service rendered by him as an insolvency professional in the preceding financial year, on or before the 30th April every year, along with a statement in Form E of the Second Schedule:
>
> **Provided** that for the financial year 2019-2020, an insolvency professional shall pay the fee under this clause on or before the 30th June, 2020."

Regulation 13(2) (*ca*) is as under:

> "Recognition shall be subject to the conditions that the insolvency professional entity shall-
>
> (*ca*) pay to the Board, a fee calculated at the rate of 0.25 per cent of the turnover from the services rendered by it in the preceding financial year, on or before the 30th of April every year, along with a statement in Form G of the Second Schedule:
>
> **Provided** that for the financial year 2019-2020, an insolvency professional entity shall pay the fee under this clause on or before the 30th June, 2020."

3. By circular dated 12-4-2019, all registered IPs and all recognized IPEs were informed about the necessity to comply with the requirement of paying a fee calculated at the rate of 0.25 per cent of the professional fees/annual turnover of the IP or IPE, as the case may be, for services rendered in the preceding financial year. Such fee is required to be paid on or before 30th April of every year, other than financial year 2019-2020, by filing Form E, as regards IPs, and Forms G and H as regards IPEs. The Petitioner obtained a certificate of registration as an IP from the IBBI on 7-8-2017 and has been appointed as a resolution professional thereafter by the National Company Law Tribunal (NCLT). An IP who is appointed to conduct the corporate insolvency resolution process is defined as a resolution professional (RP) as per Section 5(27) of the IBC. Upon the

entry into force of the amendment and even prior to the circular dated 12-4-2019, by communication dated 13-10-2018 to the Chairperson of the IBBI, the Petitioner stated that the charging of fees based on a percentage of the RP's earnings is in violation of the principles of natural justice. He called upon the IBBI to withdraw the notification levying fees on the remuneration received by the IP/RP in the preceding financial year. He also made a request under the Right to Information Act, 2005 (the RTI Act) to the Central Public Information Officer, IBBI, on 13-1-2020, asking for information as to the basis for charging the fee of 0.25 per cent of the remuneration received by the IP and as to the manner in which such monies were utilized during the year 2018-2019. In response, a reply dated 25-2-2020 was received. On account of being dissatisfied with the response, the Petitioner filed the present writ petition.

4. We heard the Petitioner as a party-in-person and the learned Additional Solicitor General of India (ASGI), Mr. R. Sankaranarayanan, for the Respondents 1, 3 and 4.

5. The Petitioner raised the following contentions. His first contention was that the impugned regulations are *ultra vires* Section 196 of the IBC. According to him, Section 196 does not empower the IBBI to levy fees on the basis of the annual remuneration or the annual turnover of the IP or IPE, as the case may be, and that a registration fee of Rs. 10,000 is charged every five years after the certificate of registration is granted. His second contention, in this regard, was that there is excessive delegation and, therefore, the regulation is liable to be struck down. In support of this contention, he relied upon the judgments of the Hon'ble Supreme Court in the *State of Tamil Nadu* v. *K. Shyam Sunder*, AIR 2011 SC 3471 (Shyam Sunder), and *Avinder Singh* v. *State of Punjab*, AIR 1979 SC 321 (Avinder Singh), wherein it was held that conferring unfettered powers on the delegate would be an abdication of legislative responsibility, and that essential legislative functions cannot be delegated. His third contention was that the IBBI has not provided services to IPs and, therefore, there is no *quid pro quo* to justify the charging of fees as a percentage of the annual remuneration/turnover. In support of this submission, he referred to the request for information under the RTI Act. In specific, he pointed out that in response to the question as to the information/documents/legal opinion, if any, on the basis of which the decision was taken to charge a fee of 0.25 per cent of the remuneration received by the IP, the reply was as under:

> *"Please refer to the information available on the meetings of Governing Board of IBBI held on dated 15-3-2018, 26-6-2018 and 28-9-2018 as available on IBBI website"*

Similarly, in response to the question as to the purposes for which the fee would be utilized, the response was as follows:

"Please refer to the information available on the meetings of Governing Board of IBBI held on dated 15-3-2018, 26-6-2018 and 28-9-2018 as available on IBBI website"

In response to a question as to how the amounts that were received towards fees were utilized during the year 2018 - 2019, the reply was as follows:

"The Board treats the amount as revenue income and uses it accordingly."

According to the Petitioner, these responses are evasive and clearly indicate the complete absence of *quid pro quo*.

6. Consequently, the Petitioner contended that his rights under Articles 14, 19 and 21 of the Constitution are violated. He concluded his submissions by pointing out that IPs were functioning under extremely difficult conditions and that the impugned regulations are causing immense financial hardship to IPs.

7. In response, the learned ASGI submitted that Section 196 of the IBC expressly empowers the IBBI to levy fees or other charges for registration and renewal of registration of insolvency professional agencies, insolvency professionals and information utilities and that the only fetter is that such fee should be for carrying out the purposes of the Code. In addition, he pointed out that Section 207 provides for the registration of IPs with the IBBI and for the payment of fees, in connection therewith, as specified by regulations. Therefore, he submitted that the power to levy the fee is beyond question and that there are sufficient safeguards in the IBC. With regard to *quid pro quo*, he submitted that it is not necessary that there should be a direct correlation between the fee received and the services provided. Indeed, it is not even necessary that the Petitioner and other IPs should be direct beneficiaries of the services provided by the IBBI. As a matter of fact, he pointed out that the IBBI is entrusted with several functions under the IBC *qua* insolvency resolution, in general, and IPs in particular. By way of illustration, he referred to Section 16(3) and (4) of the IBC whereby the IBBI is empowered to recommend an IP in case no proposal is made by the operational creditor concerned.

8. He invited the attention of the Court to the Report of the Financial Sector Legislative Reforms Commission (the FSLRC Report), Volume - I dated 22-3-2013 and, in particular, to the fact that the FSLRC recommended that the regulator should be self-sufficient and funded through the collection of fees levied. For this purpose, he referred to page 26 of the said Report. He pointed out that the recommendations in the FSLRC Report, *inter alia*, formed the basis for providing for a regulator under the IBC, *i.e.* the IBBI, which is self sufficient at least with regard to operational expenses. He also referred to the Report in November 2015 of the

Bankruptcy Law Reforms Committee (the BLRC Report). In particular, he pointed out that paragraph 4.1.13 of this Report provides as follows:

> *"Insolvency and bankruptcy regulation, especially for individuals, is likely to be a resource intensive function. The Board should be equipped with the capability and the resources required to perform a wide range of function and is responsible for building and maintaining the credibility of the bankruptcy and insolvency resolution process. There is need for financial independence which allows the Board to have the required flexibility and human resources that are more difficult to achieve within a traditional Government set-up."*

The draft insolvency and bankruptcy bill was drafted by the aforesaid BLRC and the IBBI was therefore designed to be self-sufficient. The learned ASGI submitted that the fixation of fees as a percentage of the annual remuneration/turnover should be viewed against this backdrop. The question as to whether a fee could be charged as a percentage of the turnover is no longer *res integra* and is settled by the judgment of the Hon'ble Supreme Court in *BSE Brokers' Forum, Bombay* v. *Securities and Exchange Board* of India (SEBI) (2001) 3 SCC 482 (the BSE Brokers' Forum). The Hon'ble Supreme Court was dealing with the levy of fees by the SEBI under the SEBI (Stockbrokers and Sub-brokers) Regulations, 1992. In that context, the Hon'ble Supreme Court concluded that *quid pro quo* is not a condition precedent for the levy of regulatory fees. The specific question as to whether the fee could be imposed on the basis of the annual turnover of the brokers was considered in this case and the Hon'ble Supreme Court concluded that the annual turnover is not the subject matter of the levy but is only a measure of the levy. Consequently, it does not amount to a turnover tax or a tax on income. The learned ASGI also referred to the judgment of the Hon'ble Supreme Court in *Shri H.H. Sudhindra Thirtha Swamiar* v. *Commissioner* for Hindu Religious and Charitable Endowments, Mysore, AIR 1963 SC 966, wherein, at paragraph 18, it was held that "it is not necessary that the fee must have direct relation to the actual services rendered by the authority to each individual who obtained the benefit of the service." In addition, he relied upon the judgment of the Hon'ble Supreme Court in *State of Punjab* v. *Devans Modern Breweries Ltd.* (2004) 11 SCC 26, wherein it was held that the import fee on alcohol was fully authorized by the Punjab Excise Act, 1914, and delegated legislation thereunder and it is clearly *intra vires*.

9. We considered the submissions of the party-in-person and the learned ASGI and examined the records.

10. At the outset, we note that the Petitioner has not pleaded or established that he is a partner or director of an IPE, as defined in Regulation 12 of the IP Regulations. Therefore, he does not

have the *locus standi* to challenge Regulation 13(2)(*ca*). Consequently, we decline to exercise the discretion to examine the constitutional and statutory challenge to Regulation 13(2)(*ca*) at the instance of the Petitioner. However, as an IP, he has the *locus standi* to challenge Regulation 7(2)(*ca*) and, therefore, we propose to examine the constitutional and statutory challenge to Regulation 7(2)(*ca*). Although Regulations 7(2)(*ca*) and 13(2)(*ca*) are substantially in pari materia, different considerations could arise as regards Regulation 13(2)(*ca*) and we do not propose to examine the same in this proceeding.

11. The first question to be examined is whether Regulation 7(2)(*ca*) is *ultra vires* Sections 196 and 207 of the IBC. On examining the IBC, we find that Section 196(1)(*a*) expressly confers power on the IBBI to register insolvency professional agencies and IPs, and to renew, withdraw, suspend and cancel such registration. Section 196(*aa*) expressly empowers the IBBI to regulate the working of IPs, insolvency professional agencies and information utilities and Section 196(*c*) thereof expressly empowers the IBBI to levy fees or other charges including for registration of insolvency professional agencies and IPs and for the renewal of such registration. In addition, we find that Section 207(1) mandates that every IP should register himself with the IBBI within such time, in such manner, and on payment of such fee as may be specified by regulations. Moreover, Section 240 is the general regulation making power of the IBBI and Section 240(1) does not impose any restraints on the powers of the IBBI, except that regulations should be consistent with the IBC and the rules thereunder and should be for the purposes of carrying out the provisions of the IBC. From the above, we find that there can be no question whatsoever with regard to the powers of the IBBI to frame regulations with regard to the fee payable by IPs and insolvency professional agencies. As regards the charging of fees as a percentage of remuneration, we note that the fee making power is not subject to any fetters except that it should be for carrying out the purposes of the IBC. Given this statutory framework, we conclude that the IBBI is duly empowered under sections 196 and 207 of the IBC to levy a fee on IPs, including as a percentage of the annual remuneration as an IP in the preceding financial year.

11. The next issue to be considered is whether *quid pro quo* is absent in the levy of fees as a percentage of the annual remuneration/turnover and whether Regulation 7(2)(*ca*) is liable to be *set aside* for such reason. The law, in this regard, has evolved significantly and the classical clear-cut distinction between a tax and fee no longer holds the field, particularly in the context of a regulatory fee. In BSE Brokers' Forum, the Hon'ble Supreme Court held categorically, at paragraph 38, that *quid pro quo* is not a condition precedent for the

levy of regulatory fees and that it is sufficient if there is a broad correlation as between services provided and the fee charged. Paragraph 38 is as under :

> *38. As noticed in the City Corpn. of Calicut ((1985) 2 SCC 112 : 1985 SCC (Tax) 211) the traditional concept of* quid pro quo *in a fee has undergone considerable transformation. From a conspectus of the ratio of the above judgments, we find that so far as the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not lose the character of a fee provided the fee so charged is not excessive. It is also not necessary that the services to be rendered by the collecting authority should be confined to the contributories alone. As held in Sirsilk Ltd. (1989 Supp. (1) SCC 168 : 1989 SCC (Tax) 219 : AIR 1989 SC 317) if the levy is for the benefit of the entire industry, there is sufficient* quid pro quo *between the levy recovered and services rendered to the industry as a whole. If we apply the test as laid down by this Court in the abovesaid judgments to the facts of the case in hand, it can be seen that the statute under section 11 of the Act requires the Board to undertake various activities to regulate the business of the securities market which requires constant and continuing supervision including investigation and instituting legal proceedings against the offending traders, wherever necessary. Such activities are clearly regulatory activities and the Board is empowered under section 11(2)(k) to charge the required fee for the said purpose, and once it is held that the fee levied is also regulatory in nature then the requirement of* quid pro quo *recedes to the background and the same need not be confined to the contributories alone."*

By applying the said standard, in the context of the charging of a regulatory fee on stockbrokers as a percentage of annual turnover, the Hon'ble Supreme Court concluded that the amount collected under the impugned levy is being used by the SEBI on various activities relating to the securities market, with which the Petitioners therein were concerned. On that basis, it was held that the levy is valid although the entire benefits of the levy do not accrue to the contributors. More importantly, with regard to the levy of fee on the basis of the annual turnover of the brokers, the Hon'ble Supreme Court concluded that the annual turnover is not the subject matter of the levy but is only a measure of the levy. Therefore, it does not amount to a turnover tax or tax on income. Paragraph 45 is relevant, in this regard, and is as under:

> *"45. It cannot be disputed that the "annual turnover" of a broker is not the subject-matter of the levy but is only a measure of the*

levy. In other words, the fee is not being levied on the turnover as such but the fee is being levied on the brokers making their annual turnover as a measure of the levy which is a fee for regulating the activities of the securities market and for registration of the brokers and other intermediaries in the said market. Therefore, it is futile to contend that such levy would be either a tax or a fee on the turnover. It is a settled principle in law that if the State has the authority to impose a levy then it has a wide discretion in choosing the measure of levy, provided of course, it withstands the test of reasonableness. Many levies may have a similar measure but by such similarity in the measure, the levies do not become the same. Therefore, if the impugned levy adopts a measure which is either similar to the one adopted while levying turnover tax or income tax, the impugned levy ipso facto by *adoption of such measure, would not become either an income tax or a turnover tax or even a fee on income or a fee on turnover. This Court in the case of Goodricke Group Ltd. v. State of W.B. (1995 Supp. (1) SCC 707) while upholding a cess on tea estate which is a tax on land by the measure of yield by quantum of tea leaves produced in the tea estate held: (SCC Headnote).*

"A tax imposed on land measured with reference to or on the basis of its yield, is certainly a tax directly on the land. Apart from income, yield or produce, there can perhaps be no other basis for levy. `A tax on land is assessed on the actual or potential productivity of the land sought to be taxed'. Merely because a tax on land or building is imposed with reference to its income or yield, it does not cease to be a tax on land or building. The income or yield of the land/building is taken merely as a measure of the tax; it does not alter the nature or character of the levy. It still remains a tax on land or building. There is no set pattern of levy of tax on lands and buildings — indeed there can be no such standardisation. There cannot be uniform levy unrelated to the quality, character or income/yield of the land. Any such levy has been held to be arbitrary and discriminatory. No one can say that a tax under a particular entry must be levied only in a particular manner, which may have been adopted hitherto. The legislature is free to adopt such method of levy as it chooses and so long as the character of levy remains the same, *i.e.*, within the four corners of the particular entry, no objection can be taken to the method adopted."

The above judgment was cited and followed subsequently in *State of Tamil Nadu* v. *Tvl. South Indian Sugar Mills Association* (2015) 13 SCC 748.

12. In this case, it is evident that Parliament enacted the IBC by drawing on the BLRC Report and the bill prepared by the BLRC. In both the FSLRC and BLRC Reports, it was recommended that the regulator should be self-sufficient at least with regard to operational expenses by collecting fees to finance its activities. When viewed in this context, it is clear that Sections 196(1)(*c*) and 207 of the IBC and the IP Regulations are intended to fulfil the object and purpose of the IBC as regards the functioning of the IBBI. On examining the IBC, it is also clear that the IBBI plays a significant role as the principal regulator as regards insolvency and liquidation. Even with specific reference to IPs, as pointed out by the learned ASGI, under section 16(3) and (4) of the IBC, the IBBI is entrusted with the responsibility of recommending a RP if the operational creditor concerned fails to do so. In addition, by way of illustration, under section 22(4) and (5) and Section 27(4) and (5), respectively, the IBBI is required to confirm the proposal of the Committee of Creditors (the CoC) with regard to the appointment of the RP or the replacement RP, respectively. Under Section 25(*d*), (*h*) and (*k*), the RP is required, in the discharge of duties, to act in the manner specified by the IBBI. Under Section 28(4) and (5), if the RP acts without seeking the approval of the CoC, the CoC is entitled to report the matter to the IBBI for taking necessary action against the RP. Even with regard to proposing the name of an IP as a liquidator, the IBBI plays a role under section 34. Furthermore, we find that the IBBI has been tasked with several responsibilities under the IBC as is evident from the fact that the IBC is replete with references to the IBBI. Thus, we conclude that the IBBI does provide significant services, including in relation to IPs and that there is broad correlation between fees and services. Given the fact that direct or arithmetical correlation as between the fee received and service rendered is not necessary especially in the context of regulatory fees, we are of the view that Regulation 7(2)(*ca*) of the IP Regulations does not suffer from any constitutional infirmity on account of the absence of *quid pro quo*.

13. This leads to the question as to whether Regulation 7(2)(*ca*) suffers from excessive delegation. Section 241 of the IBC provides for the laying of all rules and regulations made thereunder before each House of Parliament and further provides for either modification or annulment thereof by Parliament. With regard to the utilization of fees and other financial resources by the IBBI, we find that Section 222 of the IBC mandates that the IBBI shall credit all grants, fees and charges received by it into the fund of the IBBI. The said section 222 reads as follows:

> *"222. Board's Fund.—(1) There shall be constituted a Fund to be called the Fund of the Insolvency and Bankruptcy Board and there shall be credited thereto-*

(*a*) all grants, fees and charges received by the Board under this Code;

(*b*) all sums received by the Board from such other sources as may be decided upon by the Central Government;

(*c*) such other funds as may be specified by the Board or prescribed by the Central Government.

(2) The Fund shall be applied for meeting-

(*a*) the salaries, allowances and other remuneration of the members, officers and other employees of the Board;

(*b*) the expenses of the Board in the discharge of its functions under section 196;

(*c*) the expenses on objects and for purposes authorised by this code;

(*d*) such other purposes as maybe prescribed."

Moreover, Section 223 provides for the maintenance of accounts by the IBBI and for the audit thereof by the Comptroller and Auditor-General of India. Section 223 is as under:

> *"223. Accounts and audit.—(1) The Board shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.*

(2) The accounts of the Board shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Board to the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Board shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Board.

(4) The accounts of the Board as certified by the Comptroller and Auditor General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament."

In light of the above safeguards, we have no hesitation in concluding that the IBC contains adequate safeguards to ensure that the Parliament effectively supervises all rules and regulations with the power to modify or even annul the same. Likewise, adequate safeguards are in place to ensure that the funds of the IBBI are utilized for the purposes of fulfilling the role of the IBBI under the IBC. Thus, the delegate has not been vested with unfettered power and the standard prescribed in *Shyam Sunder* (cited *supra*) is satisfied. Besides, the conferment of the power to charge a fee and the charging of such

fee by using the annual remuneration as a measure does not amount to delegation of an essential legislative function as per the ratio in *Avinder Singh* (cited *supra*). Therefore, it cannot be said that there is excessive delegation to the IBBI.

14. In fine, the writ petition fails and is dismissed. Consequently, the connected miscellaneous petition is closed.

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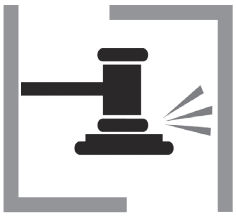

(2020) 119 taxmann.com 95 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Euro Pratik Ispat (India) (P.) Ltd.

v.

Ramesh Shetty

BANSILAL BHAT, ACTG. CHAIRPERSON AND JARAT KUMAR JAIN, JUDICIAL MEMBER & DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT)(INSOLVENCY) NO. 643 OF 2020

JULY 29, 2020

Section 12A, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Withdrawal of application - Whether where appellant was aggrieved by order of withdrawal of company petition passed by Adjudicating Authority due to fraud played upon it, such issue could only be raised before Adjudicating Authority, and instant appeal against order of withdrawal was not maintainable - Held, yes (Para 1)

Jayant Mehta, **Udit Krishan** and **Udit Gupta**, Advs. *for the Applicant.* **Ms. Rubina Khan**, Adv. *for the Respondent.*

ORDER

1. Mr. Jayant Mehta, Advocate representing the Appellant submits that fraud has been played upon the Adjudicating Authority in passing the impugned order of withdrawal within the ambit of Section 12(4) of the I&B Code. This appeal having been preferred against the order of withdrawal of company petition is not maintainable. If the Appellant is aggrieved of the impugned order having been passed by the Adjudicating Authority due to fraud played upon it, the Appellant shall be at liberty to raise such issue before the learned Adjudicating Authority.

2. The appeal is disposed of accordingly.

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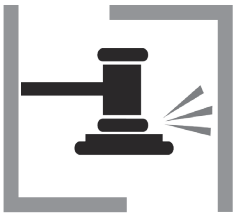

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI BENCH

Rakesh Wadhwan

v.

Bank of India

JUSTICE BANSI LAL BHAT, CHAIRPERSON
V.P. SINGH AND ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 906 OF 2019

JULY 13, 2020

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Financial debt - Respondent No. 1 Bank (Financial creditor) filed an application under section 7 for initiation of CIRP against corporate debtor on ground that it committed default in repayment of facilities granted to extent of Rs. 522 crores - However, during pendency of petition, corporate debtor proposed to settle matter by submitting One Time Settlement (OTS) - Resultantly, petition was withdrawn - After that, corporate debtor again committed default in making payment as per terms of OTS - In compliance of OTS, corporate debtor had issued post-dated cheques which were all also dishonoured - Therefore, respondent-bank revoked OTS and called upon corporate debtor to pay off Rs. 522 crores - After that, respondent filed second petition, which was admitted by impugned Order - Corporate debtor stated that impugned order had been passed without affording an opportunity to corporate debtor to file reply and Adjudicating Authority had not given any finding of debt and default, and order had been passed even though application was not complete - However, even though statutory provisions under IBC do not permit to provide several opportunities to corporate debtor in hope of settlement, Adjudicating Authority had tried its best to afford ample opportunity to both parties to settle matter amicably - But, despite that, corporate debtor failed to make payment or arrive at a settlement - Further, debt in instant case was of more than Rupees One Lakh and default in repayment of such debt was admitted and application in Form-1 was also complete - Whether therefore, no interference was called for in impugned order of Adjudicating Authority admitting petition - Held, yes (Paras 15, 16 and 17)

CASE REVIEW

Bank of India v. Housing Development and Infrastructure Ltd. (2020) 119 taxmann.com 179 (NCLT - Mum.) (para 17) - Affirmed (See Annex).

Dr. U.K. Chaudhary, Sr. Adv. **Farman Ali** and **Ashish Verma**, Advs. *for the Appellant.* **Arun Kathpalia**, Sr. Adv. **Ms. Meghna Rao**, **A.K. Mishra**, **Saurabh Upadhyay**, **Ms. Pallavi Pratap**, Advs. and **Rana Mukherjee**, Sr. Adv. *for the Respondent.*

JUDGMENT

V.P. Singh, Technical Member - This Appeal emanates from the Order of admission Dated 20th August, 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai in Company Petition (I.B.) No. 27 of 2019, whereby the Adjudicating Authority has admitted the Application under section 7 of the Insolvency and Bankruptcy Code, 2016 (in short `I&B Code') against Housing Development & Infrastructure Limited ("HDIL"). The Parties are represented by their original status in the Company Petition for the sake of convenience.

2. These brief facts of the case are as follows:

The Respondent No. 1 Bank of India filed an Application for Initiation of Corporate Insolvency Resolution Process on the ground that the Corporate Debtor committed default on 4th December, 2018 in repayment of facilities granted to the extent of Rs. 5,22,29,06,768/-, under section 7 of the Insolvency and Bankruptcy Code, 2016.

3. The Petitioner had subscribed to the issue of Non-convertible Debentures (from now on will be referred to as NCD's) offered by the Corporate Debtor to the extent of Rs. 2,48,63,00,000/-. Further, the Petitioner executed the Term Loan facility to the extent of Rs. 20,66,59,553/- to the Corporate Debtor. The Corporate Debtor with a view to enhancing the long term resources of the Company for financing the working capital requirements requested the lenders to subscribe to the debentures. The Lenders agreed to subscribe 1,15,000/- NCD's of Rs. 10,00,000/- each aggregating to Rs. 1150/- Crores and Green Shoes Options of Rs. 517/- Crores (Five Hundred Seventeen Crores only). Out of the said debentures, the Petitioner alone has subscribed to the extent of Rs. 422.50 Crores. The debentures were secured *inter alia* by mortgage of the properties. The Debenture Trust Deed dated 22nd March, 2010, and other security documents were executed and after that amount was disbursed by the Petitioner. However, the Corporate Debtor committed default in debt servicing, and its account was classified as NPA.

4. The IDBI Trustee, *i.e.* the trustee of the debenture holders, issued a notice of demand on 8th July, 2015 on behalf of Debentures Holders including the Petitioner/Respondent for an amount of Rs. 6,16,91,40,462.26. But the Corporate Debtor has failed to pay in terms of the demand. Therefore, on 6th December, 2016, the IDBI Trusteeship Services Limited took possession of the mortgaged properties.

5. The Petitioner filed a Company Petition No. 1788 of 2018 under section 7 of the Code for Initiation of CIRP. During the pendency of the Petition, the Corporate Debtor proposed to settle the matter by submitting OTS dated 31st August, 2018. Resultantly, the Petition was withdrawn. After that, the Corporate Debtor again committed default in making payment as per terms of OTS. The Corporate Debtor

issued, post-dated cheques which were all also dishonoured. Therefore, the Petitioner *vide* letter dated 4th December, 2018 revoked the OTS and called upon the Corporate Debtor to pay off Rs. 522.30 Crores. The said amount is inclusive of interest.

6. After that, the Petitioner/Respondent filed the second Petition, which was admitted by the impugned Order and moratorium order was passed against the Corporate Debtor. The Appeal is filed mainly on the ground that impugned Order is in violation of the Principles of Natural Justice by not allowing the Appellant Company to submit its Reply to the Company Petition No. 27 of 2019.

7. The Appellant has claimed that the Adjudicating Authority has failed to appreciate that the Application under section 7 of the I&B Code read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is not complete. Further, the common Loan Agreement dated 13th October, 2006 was made and executed by the Petitioner Bank and 17 other banks, but the Petitioner Bank has alone initiated the proceeding without taking consent of the other banks. No opportunity was given by the Adjudicating Authority to the Corporate Debtor to file a reply.

8. We have heard the arguments of the Learned Counsel for the parties and perused the records.

9. The Learned Counsel for the Appellant/ Corporate Debtor emphatically raised the issue of the violation of the Principle of Natural Justice and stated that the Order had been passed without affording an opportunity to the Corporate Debtor to file Reply. It is further contended that the Adjudicating Authority has not given any finding of debt and default, and the Order has been passed even though the application was not complete.

10. It is important to the point that prior to this Company Petition No. 27 of 2019, another Company Petition No. 1788 of 2018 was filed by the respondent (Financial Creditor) against the Corporate Debtor under section 7 of the Code, wherein the Corporate Debtor after putting appearance did not oppose the Company Petition, but offered a One Time Settlement (OTS), which was approved by the Respondent Bank. After that, the Company Petition No. 1788 of 2018 was permitted to be withdrawn *vide* Order dated 25th September, 2018 passed by the Adjudicating Authority. In compliance of the OTS post-dated cheques were issued by the Corporate Debtor, which were all dishonoured. In the circumstances, the second Company Petition No. 27 of 2019 under section 7 of the Code is filed.

11. In the Company Petition No. 27 of 2019, the Adjudicating Authority on 28th February 2019 passed the following Order;

"Both sides present. Counsel for the Corporate Debtor submits that they have the ability and desire to make the payment to the Petitioner in fact the Corporate Debtor has made the payments to the extent of Rs. 691.00 Crores during the last 6 to 7 months to various financial institutions/Banks. Even though this Bench on 1-2-2019 adjourned the matter stating that no further time will be granted. It is the fit case for giving time as requested, considering the scope for settlement.

Accordingly, list this matter on 28-3-2019."

(Verbatim copy)

12. Thus, it appears that the contention of the Appellant that no opportunity for filing reply is given is erroneous. It is clear that the Corporate Debtor had ample opportunity to file Reply but chose not to do so. On the contrary, the Corporate Debtor after putting an appearance in Court showed his ability and desire to make payment to the Petitioner Bank. On perusal of record from the paper book, it is apparent that again and again time was granted to the Corporate Debtor from 1st February, 2019 to 28th March, 2019, in view of the possibility of the settlement. Appellant has also annexed a copy of Order of the Adjudicating Authority dated 8th April, 2019 which is at page no. 347 of the paper book. It appears that on 8th April, 2019 the Adjudicating Authority granted further time upto 30th April, 2019 for making payment of Rupees Forty-Seven Crores in compliance with OTS. It is also on record that on 4th April, 2019 both sides were represented before the Adjudicating Authority. Still, despite the failure of the Corporate Debtor in honouring the undertaking given to the Court, further three weeks was given for making payment in pursuance of the settlement. Appellant has also annexed a copy of a letter dated 26th July, 2019 issued by the Corporate Debtor for granting further time for payment of Rs. 96.50 Crores towards payment against One Time Settlement of NCD's and PMDO facilities. Copy of this letter is annexed (Annexure A-11) is on page 354 of Appeal paper book. The above letter shows that the Corporate Debtor further sought time up to 9th August 2019 for making payment in response to the OTS. It is also on record that the Corporate Debtor again issued a letter to the Respondent Bank requesting further time to pay the upfront amount for consideration of OTS. All these correspondences clearly show that the Corporate Debtor was granted several opportunities by the Adjudicating Authority for arriving at a settlement. The second Petition was filed after the non-adherence to the terms of OTS, settled in earlier company petition No. 1788 of 2018, which was withdrawn after Settlement in Court.

13. Based on the above discussion, it is beyond doubt that there was an admission of debt and default of more than Rs. 1,00,000/-. Still, despite taking several opportunities from the Adjudicating Authority for settlement with the Financial Creditor, the Corporate Debtor defaulted in making the payment. Therefore, the contention of the Appellant that Order has been passed without affording an opportunity for filing Reply, in violation of the principle of natural justice is without any basis.

14. It is the admitted position that for the same Financial Debt the earlier Company Petition No. 1788 of 2018 was filed against the Corporate Debtor, which was not opposed and the Corporate Debtor offered One Time Settlement. Based on that offer the Adjudicating Authority permitted the withdrawal of the earlier Petition by its Order dated 25th September, 2018.

15. It is also apparent that the Corporate Debtor in compliance of OTS issued post-

dated cheques which were returned, dishonoured and Petitioner was constrained to file fresh proceeding under section 7 of the Code, which was numbered as 27 of 2019. In the second Petition again, the Adjudicating Authority provided several opportunities to the Corporate Debtor considering the scope of the settlement. However, after the failure of any hope of settlement, the Order of admission was passed against the corporate debtor.

16. It is pertinent to mention that statutory provision under the Insolvency and Bankruptcy Code, 2016 does not permit to provide several opportunities to Corporate Debtor in hope of the settlement. However, the Adjudicating Authority has tried his best to afford ample opportunity to both the parties to settle the matter amicably. But despite that, the Corporate Debtor has failed to make the payment or arrive at a settlement. In this case debt is of more than Rupees One Lakh; default in repayment of such debt is admitted and application in Form-1 is also complete. Therefore the Adjudicating Authority has admitted the Petition by the impugned Order.

17. In view of our finding as aforesaid, no interference is called for against the impugned Order dated 20th August, 2019. Therefore, Appeal fails. No order as to costs.

ANNEX

(2020) 119 taxmann.com 179 (NCLT - Mum.)

NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH

Bank of India

v.

Housing Development and Infrastructure Ltd.

BHASKARA PANTULA MOHAN, JUDICIAL MEMBER AND
V. NELLASENAPATHY, TECHNICAL MEMBER
CP(IB) NO. 27/I&BP/MB/2019
AUGUST 20, 2019

Prakash Shinde, Rohan Agrawal and **Ms. Faiza Dhanani**, Advs., *for the Petitioner*. **Ashish Kamat, Subir Kumar, Sagar Shetty** and **Indrajeet Hingane**, Advs., *for the Respondent*.

ORDER

Bhaskara Pantula Mohan, Judicial Member - Bank of India (hereinafter called the `Petitioner') has sought the Corporate Insolvency Resolution Process of Housing Development and Infrastructure Ltd. (hereinafter called the `Corporate Debtor') on the ground, that the Corporate Debtor committed default on 4-12-2018 in repayment of facilities granted to the Corporate Debtor to the extent of Rs. 5,22,29,06,768/-, under section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the `Code') read with Rule 4 of the Insolvency and Bankruptcy

(Application to Adjudicating Authority) Rules, 2016.

2. The Petitioner had subscribed to the issue of Non-Convertible Debentures (NCD's) offered by the Corporate Debtor to the extent of Rs. 2,48,63,00,000/-. Further the Petitioner extended Term Loan facility to the extent of Rs. 20,66,59,553/- to the Corporate Debtor. The Corporate Debtor enclosed the following documents in support of the above said financial debts:

a. Copy of application form of the Petitioner for the subscription of NCD of Rs. 250 crores dated 17-1-2010.
b. Copy of Debenture trust Deed dated 22-3-2010.
c. Copy of Debenture trust Deed dated 17-8-2010.
d. Copy of Letter of the Corporate Debtor dated 2-6-2010 setting out the details of Rs. 1150 crores issued by them and the confirmation of Rs. 250 crores allotted to the Petitioner.
e. Copy of application form of the Petitioner for the subscription of NCD of Rs. 100.
f. Crores dated 9-7-2010.
g. Copy of Letter of the Corporate Debtor dated 9-7-2010 requesting for disbursement of Rs. 100 crores towards Rs. 100 crores, 12% NCD.
h. Copy of Letter of the Petitioner for the Investment of Rs. 25 crores 12 NCD dated 14-6-2011.
i. Copy of application form of the Petitioner for the subscription of NCD of Rs. 47.5 crores dated 19-9-2012.
j. Copy of Notice issued by IDBI Trusteeship Services Ltd., under Section 13(2) of SARFAESI Act issued by the Debenture Trustee on behalf of all the Debenture Holders dated 8-7-2015.
k. Copy of Certificate of Registration of Charges dated 15-4-2010, 1-9-2010 and 18-5-2009.
l. Copy of Financial Contracts mentioned in Schedule I - NCD Facilities.
m. Copy of Financial Contracts mentioned in Schedule II - Term Loan Facilities.
n. Copy of CIBIL Report dated 10-4-2018.
o. Copies of Entries in a Banker's Book dated 30-11-2018 and 12-12-2018 in accordance with the Bankers Book Evidence Act, 1891.
p. Copy of audited financial statements of the Corporate Debtor.

3. The Counsel for the Petitioner submitted that the Corporate Debtor with a view to enhancing the long-term resources of the Company for financing its Working Capital requirements requested the Lenders to subscribe to the Debentures. The Lenders by their respective Letters of Intent agreed to subscribe 1,15,000 NCD's of Rs. 10,00,000/- each aggregating to Rs. 1150 crores, and Green Shoes Option of Rs. 517 crores. Out of the said Debentures the Petitioner has subscribed to the extent of Rs. 422.50 crores. The Debentures were secured, *inter alia,* by mortgage of the properties being land situated at village Kasrali, Taluka

Vasai, Distt. Thane, admeasuring about 173.40 acres belonging to Privilege Power & Infrastructure Pvt. Ltd.

4. Accordingly, Debenture Trust deed dated 22-3-2010 and other security documents were executed. An amount was disbursed by the Petitioner, however, there is default in debt servicing by the Corporate Debtor. Despite repeated requests and reminders the Corporate Debtor failed to repay the dues and the account was classified as NPA.

5. On 8-7-2015, IDBI Trustee, the trustee of the debenture holders issued notice of demand on behalf of the Debenture Holders including the Petitioner for an amount of Rs. 6,16,91,40,462.26/-. However, till date the Corporate Debtor has failed to pay in terms of the demand. Hence, on 6-12-2016, the IDBI Trusteeship Services Ltd. Took possession of the mortgaged properties.

6. The Counsel for the Petitioner further submitted that the Petitioner filed a petition under section 7 of Insolvency and bankruptcy Code, 2016 (IBC) for initiating Corporate Insolvency Resolution Process (CIRP) before this Tribunal *viz*. CP No. 1788 of 2018. During the pendency of the said petition and before the admission of the petition, the Corporate debtor proposed for settlement of the debt and accordingly communicated the acceptance of the OTS *vide* letter dated 31-8-2018. Pursuant to the OTS the said petition was withdrawn. Thereafter, the corporate Debtor failed to pay in terms of the OTS. The Corporate debtor's post-dated cheques issued were also dishonoured due to insufficiency of funds. Hence the Petitioner *vide* letter dated 4-12-2018 revoked the OTS and called upon to pay Rs. 522.30 crores which is inclusive of interest.

7. The Petitioner enclosed the statement of account for the loan wherein it was found that the amount claimed in the Petition is as per the statement of account. The statement of account further reveals that there are defaults in payment of dues.

8. On various occasions various opportunities had been given to the Corporate Debtor to repay its creditors. However, despite these opportunities the Corporate Debtor failed in making the payments. In fact, on 4-7-2019, during the court proceedings, the Corporate Debtor accepted its default. Relevant portion of the order has been reproduced below -

"Both Side Present. In view of the failure on the part of the Corporate Debtor in honouring the undertaken given to the Court by the Senior Counsel and later on even after affording an opportunity to the Corporate Debtor to discuss the issue with the bank and to settle the matter amicably. The Corporate Debtor expressed his inability to pay on the very same day and requests 3 weeks' time to make the payment. In view of the express admission made by the Corporate Debtor as regards to the debt as well as the default on their part, the matter is reserved for orders."

9. The above facts shows that the Corporate Debtor defaulted in making the payment towards the liability to the Petitioner and the petition deserves to be admitted.

10. This Adjudicating Authority, on perusal of the documents filed by the Creditor, is of the view that the Corporate Debtor

defaulted in repaying the loan availed and also placed the name of the Insolvency Resolution Professional to act as Interim Resolution Professional and there being no disciplinary proceedings pending against the proposed resolution professional, therefore the Application under sub-section (2) of Section 7 is taken as complete, accordingly this Bench hereby admits this Petition prohibiting all of the following of item-I, namely:

(I) (*a*) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(*b*) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(*c*) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);

(*d*) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

(II) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(III) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(IV) That the order of moratorium shall have effect from 20-8-2019 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of Corporate Debtor under section 33, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

(VI) That this Bench hereby appoints, Mr. Abhay Narayan Manudhane, having office at 201, Shubhashish, 129, Model Town, Andheri (west), Mumbai - 400 053; having Registration No. IBBI/IPA-001/IP-P00054/2017-18/10128 as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

11. Accordingly, this Petition is admitted.

12. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional immediately.

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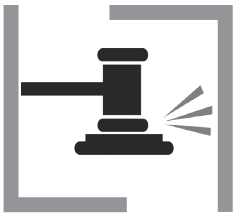

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI BENCH

V Nagarajan Resolution Professional

v.

SKS Ispat and Power Ltd.

BANSI LAL BHAT, CHAIRPERSON

V. P. SINGH AND ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 561 OF 2020‡

JULY 13, 2020

Section 61 of the Insolvency and Bankruptcy Code, 2016, read with rule 22 of the National Company Law Appellant Tribunal Rules, 2016 - Corporate person's Adjudicating Authorities - Appeals and Appellate Authority - Whether as per section 61 an appeal filed before Appellate Tribunal against Order of Adjudicating Authority can be filed within 30 days - Held, yes - Whether however, proviso to section 61 provides that Appellate Tribunal may allow an appeal to be filed after expiry of statutory period of 30 days and this extension of 15 days depends upon satisfaction of Appellate Tribunal, on being shown sufficient cause for not filing Appeal within time limit - Held, yes - Whether where appellant had neither filed any application for condonation of delay nor filed any evidence to prove that certified/free copy was not supplied to appellant on date of order, time limit of filing of appeal without any application for condonation of delay could not have been extended - Held, yes (Paras 9 and 11).

CASE REVIEW

V. Nagarajan v. *SKS Ispat & Power Ltd.* (2020) 119 taxmann.com 181 (NCLT - Chennai) (para 16) *affirmed*. (*See* Annex)

R. Subramanian, Adv. *for the Appellant.* **Ramji Srinivasan**, Sr. and **Atul Shanker Mathur**, Advs. *for the Respondent.*

JUDGMENT

V.P. Singh, Technical Member. - This Appeal emanates from the Order dated 31st December, 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Chennai Bench, Chennai in M.A. No. 908 of 2019 in I.A. No. 38/2018 in C.P. No. 511(I.B.)/2017 whereby the Adjudicating Authority declined to interfere with the invocation of performance guarantee given about another contact and thereby refused to grant interim relief to the Corporate Debtor.

This Appeal is against the Order dated 31st December, 2019. The Registry of this Tribunal has objected about limitation, and in response to that, the Appellant has filed its reply, which is at page No. 427 of the Appeal paper book and mentioned below.

"Defect Query on Limitation:

1. The provisions of limitation applicable are as per Section 61 of the Insolvency & Bankruptcy Code, 2016.
2. Appeal is to be filed within 30 days of Order.
3. Order was passed on 31-12-2019.
4. Certified Copy of Order not issued till date. Free Copy also not issued till date.
5. Unsigned Order was uploaded online on 12-3-2020 with wrong details of the Members who passed Order.
6. Corrected unsigned Order with correct named of Members uploaded thereafter.
7. So no order copy atleast till 12-3-2020.
8. Appeal due date 11-4-2020.
9. As per Order of Supreme Court dated 23-3-2020 in *Suo Motu* Civil W.P. No. 3/2020 all limitation stands extended from 15-3-2020.
10. That Order is continuing.
11. Appeal filed on 8-6-2020.
12. Hence within limitation and not barred."

Admittedly, this Appeal is preferred against the Order dated 31st December, 2019 and filed before this Appellate Tribunal on 8th June, 2020. Appellant has not submitted an application to Condone the delay despite being filed beyond 30 days statutory time limit. In reply to the objection, the Appellant contends that the impugned Order was passed on 31st December, 2019, but the certified copy and free copy of the Impugned Order has not been issued to date. An unsigned copy of Order was uploaded on the website on 12th March, 2020 with wrong details of the name of the Members, who had passed the Order. After that corrected unsigned copy of the Order with the correct name of Members was uploaded. Therefore, no copy of the Order was available till 12th March, 2020.

Consequently, the Appeal could have been filed up to 11th April, 2020. But as per Order of the Hon'ble Supreme Court dated 23rd March, 2020 limitation stands extended from 15th March, 2020 onwards. In the circumstances, it is claimed that Appeal is not time-barred.

2. We have heard the arguments of the Learned Counsel for the parties and perused the records.

3. Appellant has filed this Appeal on 8th June, 2019 against the Order dated 31st December, 2019 passed by the Adjudicating Authority/NCLT, Chennai Bench, Chennai. As per Section 61 of the Insolvency & Bankruptcy Code, 2016, the Appeal filed before this Appellate Tribunal against Order of the Adjudicating Authority can be filed within 30 days. The relevant provision of the Code is as under:

"61. *Appeals and Appellate Authority.*— (1) Notwithstanding anything to the contrary contained under the Companies Act, 2013, any person

aggrieved by the Order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) Every Appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the Appeal but such period shall not exceed fifteen days."

The proviso to Section 61 of the Insolvency and Bankruptcy Code provides that the Appellate Tribunal may allow an Appeal to be filed after the expiry of the statutory period of 30 days. Still, in no circumstances, such extended period shall exceed 15 days. The language of the proviso to Section 61(1) of the I&B Code makes it clear that this Tribunal does not have the power to extend the time limit beyond 15 days, in addition to the statutory time limit of 30 days. It is also clear that this extension of 15 days depends upon the satisfaction of the Appellate Tribunal, on being shown the sufficient cause for not filing the Appeal within the time limit.

4. Hon'ble the Supreme Court of India in the case of *Mobilox Innovations (P.) Ltd.* v. *Kirusa Software (P.) Ltd.* (2018) 1 SCC 353: 2017 SCC OnLine SC 1154: (2018) 1 SCC (Civ.) 311 at page 394 has also laid down the law about the timeline to be observed in Section 61 of the Insolvency & Bankruptcy Code, 2016. Hon'ble the Supreme Court has held that:

"35. Another thing of importance is the timelines within which the insolvency resolution process is to be triggered. The corporate debtor is given 10 days from the date of receipt of demand notice or copy of invoice to either point out that a dispute exists between the parties or that he has since repaid the unpaid operational debt. If neither exists, then an application once filed has to be disposed of by the adjudicating authority within 14 days of its receipt, either by admitting it or rejecting it. An appeal can then be filed to the Appellate Tribunal under section 61 of the Act within 30 days of the order of the adjudicating authority with an extension of 15 further days and no more.

36. Section 64 of the Code mandates that where these timelines are not adhered to, either by the Tribunal or by the Appellate Tribunal, they shall record reasons for not doing so within the period so specified and extend the period so specified for another period not exceeding 10 days. Even in appeals to the Supreme Court from the Appellate Tribunal under section 62, 45 days' time is given from the date of receipt of the order of the Appellate Tribunal in which an appeal to the Supreme Court is to be made, with a further grace period not exceeding 15 days. The strict adherence of these timelines is of the essence to both the triggering process and the insolvency resolution process. As we have seen, one of the principal reasons why the Code was enacted was because liquidation proceedings went on interminably, thereby damaging the interests of all stakeholders, except a

recalcitrant management which would continue to hold on to the company without paying its debts. Both the Tribunal and the Appellate Tribunal will do well to keep in mind this principal objective sought to be achieved by the Code and will strictly adhere to the time-frame within which they are to decide matters under the Code."

5. This Tribunal has also taken the same view in the case of *Pr. Director General of Income-tax* v. *Spartek Ceramics India Ltd.* 2018 SCC OnLine NCLAT 289. In the abovementioned case, this Tribunal has held that:

> "53. As per sub-section (2) of Section 61, the appeal is required to be filed within thirty days before the NCLAT. The Appellate Tribunal is empowered to condone the delay of `another fifteen days' after the expiry of the period of thirty days in preferring the appeal that too for sufficient cause. It has no power to condone the delay if appeal under section 61 is preferred beyond fifteen days from the date of the expiry of the period of thirty days. Meaning thereby, no appeal under sub-section (1) of Section 61 can be entertained after forty-five days of knowledge of the order passed by the Adjudicating Authority."

6. The reason assigned by the Appellant is that the certified and free copy of impugned Order was not issued to him and unsigned Order was uploaded on the website on 12th March, 2020. Therefore, 30 days' time limit was available until 11th April, 2020. After that, by the general Order of the Hon'ble, the Supreme Court dated 23rd March, 2020 limitation period extended from 15th March, 2020 onwards. Therefore, Appellant claims that the Appeal is within time.

7. The Appellant has not filed any Application showing sufficient cause for not filing the Appeal within time. The contention of the Appellant that certified and a free copy of Order was not issued to him is unsupported by any evidence. The Appellant has not filed any Application for Condonation of delay. In contrast, Section 61(1) of the Code provides that the Appellate Tribunal can extend 15 days' time subject to being satisfied with the sufficient cause for not filing the Appeal within time. Since the Appellant has not submitted any application showing enough reason for not filing the Appeal within time, therefore the question of automatic extension of time limit does not arise.

8. It is pertinent to mention that Hon'ble the Supreme Court of India in the case of Mobilox Innovations Private Limited (*supra*) has already held that "The Appeal can be filed to the Appellate Tribunal under section 61 of the Act within 30 days of the order of the Adjudicating Authority with an extension of 15 further days and no more." Hon'ble Supreme Court has further held that the strict adherence of these time lines is of essence to both the triggering process and the Insolvency Resolution Process.

9. This Tribunal in the case of *Pr. Director of Income-tax* (*supra*) has held that no appeal under sub-section 1(61) can be entertained after 45 days of knowledge of the order passed by the Adjudicating Authority. In this case the Appellant contends that delay in filing in appeal was

caused due to non-availability of certified/ free copy of order till 12th March, 2020. Appellant has not pleaded that he was not having knowledge of the impugned order of the Adjudicating Authority dated 31st December, 2019. Appellant has neither filed any Application for Condonation of Delay nor filed any evidence to prove that certified/free copy was not supplied to the Appellant on the date of order. This Tribunal cannot extend the time limit of filing of appeal without any application for Condonation of Delay. It is also important to mention that this Tribunal has very limited jurisdiction to extend the time limit of 15 days on satisfaction and sufficient cause only.

10. It is also pertinent to mention that rule 22 of the National Company Law Appellate Tribunal Rules provides that:

> "Every appeal shall be accompanied by a certified copy of the impugned order."

11. This Appeal has been filed without any certified copy of the Order. Appellant has also not filed any proof to substantiate its claim that certified copy of the Order had not been issued to him. Even the Appellant is contention regarding the delay in filing is unsupported by affidavit. In the circumstances, the Appeal is not maintainable and barred by limitation.

12. The Appeal before us is against the Order of the Adjudicating Authority in not granting the interim relief about the invocation of the performance bank guarantee given by the bankers, on behalf of the Corporate Debtor.

13. It is essential to the point that proviso to Section 3(31) of the I&B Code provides that:

> Sec. 3(31):
>
> "Security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:
>
> **Provided** that security interest shall not include a performance guarantee;

Thus, it is clear that security interest as defined in I&B Code does not include performance guarantee. It is further necessary to point out that Moratorium order under section 14 prohibits any action to foreclose, recover or enforce any security interest created by the Corporate Debtor during Corporate Insolvency Resolution Process.

Section 14(3) of the I&B Code provides that;

The provisions of sub-section (1) shall not apply to—

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

(*b*) a surety in a contract of guarantee to a corporate debtor.)

14. Thus it is clear that the moratorium order passed under sub-section (1) to sec. 14 of the I&B Code does not apply to the surety in a contract of guarantee to a Corporate Debtor. Therefore, in the circumstances, the Adjudicating Authority passed the Order that "the performance guarantee given by the bankers on behalf of the Corporate Debtor, whereby simply to set-off the money in the event of an order was passed in favour of the Corporate Debtor, cannot be interfered with the performance guarantee with regard to another contract".

15. Therefore, the Adjudicating Authority has rightly refused to grant an interim relief about the invocation of bank guarantee given by bankers on behalf of the Corporate Debtor.

16. In view of our observation aforesaid, even on merits no interference is called for against the impugned Order dated 31st December, 2019. Therefore, Appeal fails—no order as to costs.

ANNEX

(2020) 119 taxmann.com 181 (NCLT- Chennai)

NATIONAL COMPANY LAW TRIBUNAL, CHENNAI BENCH II

V Nagarajan (RP) (Ceithar Ltd.)

v.

SKS Ispat & Power Ltd.

B. S. V. PRAKASH KUMAR, JUDICIAL MEMBER
AND S. VIJAYARAGHAVAN, TECHNICAL MEMBER

MA/906/2019
CA/38/IB/2018
CP/511/IB/2017
DECEMBER 31, 2019

R. Subramanian, Adv. *for the Petitioner.* **P.H. Arvindh Pandian**, Sr. Councel, **Avinash Krishnan Ravi** and **Dev Eshwaar J.,** for the Respondent.

ORDER

It is an MA906/2019 filed by the liquidator seeking Amendment to CA 38/IB/2018 filed by the same liquidator for inclusion of the reliefs as mentioned below along with interim directions restraining R10 from any manner releasing or seeking to release the Bank Guarantee issued on behalf of the Corporate Debtor pending final disposal of CA 38/IB/2018:

"*a.* Permit the Applicant to amend CA/38(IB)/2018 to array the persons set out as 12th to 14th Respondents in this IA as the 12th to 14th Respondents respectively in the CA/38(IB)/2018.

b. An order permitting the Applicant to amend CA/38(IB)/2018 and thereby add the following as final relief a(*i*)(*a*), after Relief presently set out as a(*i*) as under: a(*i*)(*a*): Direct Respondent No. 10 to repay to the Applicant a sum of Rs. 158 Crores being the amount received by it from R1 whether as equity or loans or advances or whatever else limited to the maximum extent of funds provided by Applicant to R1 with interest thereon.

c. An order restraining and injuncting Respondent 10 from in any manner realizing or seeking to realise the Bank Guarantee issued on behalf of the Corporate Debtor pending the final disposal of CA/38(IB)/2018. For *ad-interim* relief in terms of prayer (*c*) above.

d. For costs and

e. For such other and further reliefs which the Hon'ble Tribunal may feel necessary and required in the nature and circumstances of the case."

The genesis of filing this amendment application is, the Liquidator filed CA 38/2018 against R1-R4 stating that R 1 to R 4 indulged in fraudulently receiving Rs. 228 Crore from the Corporate Debtor in the year 2011, therefore the Liquidator has sought directions against R1 to R 4 not to alienate the assets of R1 to R 4, to explain the movement of the funds, to direct R1 to R 4 to place adequate security by way of Bank Guarantee in respect of the amount due to the Corporate Debtor, and to direct SFIO to investigate the affairs of R1 to R 4 and other reliefs as may deem fit and proper.

Now the amendment sought is, since these Respondents having indulged in diversion of Rs. 228 Crore of the Corporate Debtor in the year 2011, and the same having not come back to the Corporate Debtor, and for the Corporate Debtor has provided Bank Guarantee of Rs. 57.30 Crores from Indian Bank and Rs. 116.05 Crores from Canara Bank in favour of R11 apart from Guarantees from ICICI Bank in respect of the Corporate Debtor and Corporate Debtor's subsidiaries, where Rs. 33 Crores guarantee was provided from ICICI Bank in favour of R10 and having all these Respondents being part of diverting Rs. 228 Crores from the Corporate Debtor, they shall refund Rs. 228 Crores along with interest till date and the Bank Guarantee issued on behalf of the Corporate Debtor shall not be allowed to be encashed by R10 for R10 management is part of fraud played against the Corporate Debtor with regard to diversion of Rs. 228 Crores of it.

The story behind filing CA 38/2018 is, the Corporate Debtor Company (EPC Contractor, *inter alia*, undertakes civil work, engineering and supply contracts and also interested in diversification into power project and also at that time willing to be an active participant as an equity partner directly or through its partners) called M/s. Ceithar Limited (the Debtor) filed CA38/IB/2018 under sections 43 & 45, read with section 60 of the Insolvency

& Bankruptcy Code, 2016 stating that this Debtor entered into an Agreement dated 15-3-2011 with R 3 (M/s. Compact Agencies Private Limited) to invest Rs. 250 Crores in R 3 in order to provide new impetus to R 3 for investing in the Project of R1 (M/s. SKS Ispat and Power Limited) with an understanding with R 3 that R3 shall on or before 31-12-2015 make the requisite arrangements in order to confer an ultimate beneficial ownership to the extent of 7.5% of the then prevailing paid up equity share capital of R1 company in favour of the Corporate Debtor with a clarification that the shares offered shall be unencumbered and shall be allotted or transferred in the name of the Corporate Debtor within 60 days from the date of completion date and after receipt of 7.5% ultimate beneficial holding by the Corporate Debtor, the post-dated cheques given by R 3 shall be returned to R 3 and in the event of default of providing such beneficial economic interest, R 3 shall within 90 days from the date of default, to repay the advance in three equal annual instalments to the lender with an interest compounding at the rate of 12% per annum from the date of disbursement of entire advance. As per the records, the Corporate Debtor paid Rs. 228.6 Crores in the year 2011. Though this agreement was *ex-facie* illegal and in violation of Section 372 of the Companies Act, 2013, and though the Corporate Debtor was in severe financial crisis, instead of seeking of refund of money to which shares were not allotted as per earlier agreement, the debtor chose to take shares from R1 and R 4, which is also in violation of section 186 of the Companies Act 2013. After agreement to take shares for Rs. 228.6 Crores, on 17-6-2016 even before allotment of shares, it agreed to sell them to persons connected with promoters of R1 for Rs. 4 Crores resulting in loss of Rs. 224 Crores.

According to the Applicant, this share-holding was not transferred in favour of the Corporate Debtor as stated in the Agreement entered in between the Corporate Debtor and R 3. R 3 had not issued Shares, *nor* even returned money. In the meanwhile, winding-up Petition was filed before Hon'ble High Court of Madras on 26-10-2015, thereafter by the advent of IBC, the said winding-up Petition was transferred to NCLT somewhere in the month of Jan., 2017.

In the meanwhile, the Amendment Agreement, the applicant says, has come in to picture with a date of 6-4-2016 in between the Corporate Debtor and the same R 3 reflecting that R 4 shares would be allotted to the Corporate Debtor in lieu of Rs. 228.60 Crores advanced to R 3 in the year 2011 as per the agreement dated 15-3-2011.

The Applicant has further stated that the documents of the Corporate Debtor itself reflect that the shares of R1 were being subscribed at a price of Rs. 88.80 per share, when, as per R1 itself, the price of R1 share was only Rs. 8.20 per share and by this overvaluation, a loss of Rs. 1,36,21,04,536 was occasioned to the Corporate Debtor.

In addition to this agreement, the Liquidator has stated that the Corporate Debtor and R 5 have entered into another Agreement dated 17-6-2016 as if the shares being purchased for Rs. 228.60 Crores from R1

and R 4, but fact of the matter according to the liquidator is, such transaction was not even completed on that date and they we're being sold for a price of mere Rs. 4,58,93,010 entitling a direct loss of Rs. 224 Crores to the Corporate Debtor to the principal sum that was given way back in the year 2011.

The liquidator counsel has further stated that total sum payable to the Corporate Debtor, if the interest at the rate of 12% as set out in the Agreement dated 15-3-2011 is included, the total loss that come to the Corporate Debtor would be Rs. 450 Crores.

He has further stated that all these transactions were recorded in the books of account got effected by the Corporate Debtor on 28-3-2017 reflecting that a paltry amount of Rs. 4.58 Crores was also not received by the Corporate Debtor because records of the Corporate Debtor show that this Rs. 4.58 crores was directed to be paid to R 6 to R 9 at the instructions of the Corporate Debtor showing them as suppliers to the Corporate Debtor.

The Corporate Debtor has further stated that the entire transactions are on paper, there is no record reflecting delivery of any shares to the Corporate Debtor on allotment or any return of allotment by R1, or R 3 transferring these shares in favour of the Corporate Debtor.

It is apparent on record, the applicant counsel says that this Corporate Debtor never demanded refund of the proceeds after 31-12-2015 despite the provision of the agreement entitling refund of the money advanced to R 3 along with 12% per annum interest.

To get over this situation, the applicant alleges that amendments to the agreement dated 15-3-2011 was set-up so as to wipe out the dues payable to the Corporate Debtor from the books of the Corporate Debtor as well as from the books of R 3 and other Respondents.

In view thereof, for these manifestations (amendment agreement dated 15-3-2011) have occurred within look back period of one year, the Corporate Debtor has filed CA 38/2018 under sections 43 & 45 of the IBC with the reliefs as mentioned in the respective applications.

Now the point before this Bench is, as to whether this Applicant is entitled to seek any interim relief by filing an amendment application for impleadments of R12, R13 and R14 and entitled to seek any interim relief by restraining R10 from encashing the Bank Guarantee amount with regard to a separate agreement dated 2-3-2011 including variation order agreement dated 12-6-2011 entered in between the Corporate Debtor and R10 with regard to EPC Contract, wherein the Corporate Debtor gave Bank Guarantee to R11 and R10.

Since it is essential to note that what this transaction is, we believe that it is an agreement entered in between the Corporate Debtor and R10 for providing engineering services to the Power Project of R10, in lieu of it, this Corporate Debtor appears to have provided Bank Guarantee through Indian Bank for an amount of Rs. 178.95 Crores, which is still lying with the Indian Bank and the Canara Bank. Now the ground position is, though it has been invoked, it has remained under suspense

account as to whether these amounts could be released as per the agreement dated 2-3-2015 entered between the Corporate Debtor and R10 because this applicant has filed this Application for restraint order against the Banks not to release the Bank Guarantee amounts.

As to this interim relief is concerned, it is necessary to look in to whether this Bench has jurisdiction to pass such an order against R10 with which the Corporate Debtor independently entered into EPC Contract by providing Bank Guarantees.

The issue involved in CA/38/2018 is in relation to the money Rs. 228.60 Crores lent to R 3, whereas the restraint order now sought is in relation to the Bank Guarantee amount lying with the Indian Bank and the Canara Bank awaiting to release the same to R10.

The facts pertinent to mention here are:

(*i*) R10 is an independent entity
(*ii*) Guarantor Bank is no way connected with the issue in CA/38/2018
(*iii*) R10 is not the subsidiary of R 3
(*iv*) It is not known as to whether the Corporate Debtor performed the contract assigned to the Corporate Debtor by R10 or not.

In the backdrop of this factual scenario, the legal position is,

(*i*) This Bench cannot link up one issue with another issue to pass interim relief.
(*ii*) This Bench cannot pass an interim relief which is not part of the main relief in CA/38/2018.
(*iii*) This Bench cannot pass any restraint order against the Bank Guarantee given with regard to the EPC Contract, which is unrelated to the transaction involved in CA/38/2018.

For there being no quarrel between the parties over factual aspect, now the only point left is whether such relief can be passed or not

Under Section 3(31), it has been categorically mentioned that in proviso to sec.3(31) of the Code, performance guarantee cannot be construed as security interest as mentioned in the definition of the Code making it clear that performance guarantee is the guarantee given prior to the performance, the agreement holder agreeing to giving a bank guarantee stating that the promisee is entitled to realise the performance guarantee amount in the event contract is not performed as set-out in the Agreement, it has to be seen separately as to whether performance guarantee amount could be released or not independent of the issues relating to Rs. 228.60 Crores the corporate debtor lent to R 3. We don't even know whether that contract has been performed by this Corporate Debtor or not. Moreover, this performance guarantee issue is not before this Bench, now the issue before this Bench is, with regard to Rs. 228.60 Crores lent to R 3 in this case.

In view thereof, even assuming that the corporate wheel is lifted, then also this Bench has no jurisdiction to treat it as a security interest and pass a restraint order against the performance guarantee lying with the Indian Bank and the Canara Bank.

When we see Sec.36 of the Liquidation Estate is concerned, it has been categorically mentioned that the asset of the subsidiary company cannot be treated or included as part of the Liquidation Estate. Moreover, any of the Respondents are not subsidiaries of the Corporate Debtor. Under IBC, the jurisdiction is limited to deal with the asset of the Corporate Debtor alone and it cannot pass an order against the asset of some other company either for set-off or as a counter claim as stated under the regulations of IBBI Liquidation Regulations Rules.

It is a clear case that this Performance Guarantee cannot be treated as a security interest as stated under the definition. Therefore the amount given by this Corporate Debtor to the Bankers cannot be taken back by this Corporate Debtor once Performance Guarantee is given by the Bank on behalf of the Corporate.

The Liquidator has relied upon the judgment in *"Hindustan Steelworks Construction Ltd.* v. *Tarapore & Co.* (1996) 5 SCC-47" to say that a Court can interfere in respect of payment of Bank Guarantee in two circumstances as follows:

> "We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/ or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees."

As per this judgment, the ratio appears to be held by the Hon'ble Supreme Court of India is that the Courts can interfere with the bank guarantee, in the case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed. The issue involved in the said case with regard to fraud and the factual aspect, the order has come in favour of the person in whose favour the Bank Guarantee was given by directing the Respondents to pay the costs of the Appeal to the Appellants.

We do not believe that above ratio is relevant to this case, because the issue pending before this Bench with regard to monies lent to R3 by the Corporate Debtor

and not with regard to the Performance Guarantee given by the Bankers on behalf of the Corporate Debtor, whereby simply to set-off the money in the event an order was passed in favour of the Corporate Debtor, this Bench cannot interfere with the Performance Guarantee given with regard to another contract, therefore, neither the issue of fraud nor irretrievable injustice are not grievances before this Bench, hence we cannot deal with the performance guarantee issue.

In view of the foregoing reasons, we are of the view that this Corporate Debtor is not entitled to seek an interim relief with regard to the Bank Guarantee given by the Bankers on behalf of the Corporate Debtor.

As to other main reliefs sought in amendment application (MA/906/2019), they will be decided later.

At request of the parties, list this matter for hearing on 21-1-2020.

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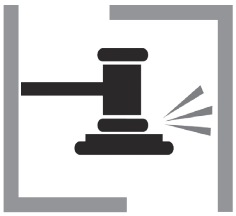
† Arising out of NCLT, Chennai in *V. Nagerajan* v. *SKS Ispat Ltd.* (2020) 119 taxmann.com 181.



NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI BENCH

Committee of Creditors of Educomp Solutions Ltd.

v.

Ebix Singapore Pte. Ltd.

JUSTICE VENUGOPAL M., JUDICIAL MEMBER AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT)(INSOLVENCY) NO. 203 OF 2020‡

JULY 29, 2020

Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Successful resolution applicant filed application seeking withdrawal of its resolution plan already approved by Committee of Creditors (CoC) of corporate debtor before NCLT, due to investigations by Special Frauds Investigation Office and other governmental agencies against corporate debtor company - Adjudicating Authority by means of Impugned Order allowed successful resolution applicant to withdraw its approved 'Resolution Plan' which was approved by a majority of 75.36 per cent of CoC and pending approval before Authority as per section 31 - Whether Adjudicating Authority, in law cannot enter into arena of majority decision of 'Committee of Creditors' other than grounds mentioned in section 32(a to e) - Held, yes - Whether once resolution plan is approved by CoC and thereafter submitted to NCLT for its approval, then NCLT is to apply its judicial mind to 'Resolution Plan' so presented and after being subjectively satisfied that plan meets or does not meet requirements mentioned in section 34 may either approve or reject such plan - Held, yes - Whether where resolution applicant had accepted conditions of 'Resolution Plan' keeping in mind that no change or supplementary information to 'Resolution Plan' shall be accepted after submission date of 'Resolution Plans' applicant could not have been allowed to withdraw approved 'Resolution Plan' - Held, yes - Whether NCLT after approval of Resolution Plan by CoC has no jurisdiction to entertain or to permit withdrawal of Resolution Plan - Held, yes (Paras 94, 95 and 97)

CASE REVIEW

EBIX Singapore Pte. Ltd. v. *Mahendra Kumar Khandelwal* (2020) 119 taxmann.com 183 (NCLT - New Delhi) *Set aside* (See Annex).

Arun Kathpalia, Sr. Adv. and **Ms. Misha**, Adv. *for the Appellant.* **Ritin Rai**, Sr. Adv. **Gautam Swarup**, **Sumesh Dhawan**, **Abhishek Sharma** and **Ms. Ashly Cherian**, Advs. *for the Respondent.*

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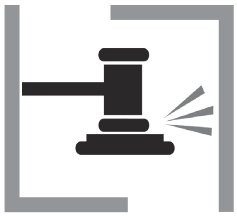
‡ **Arising out of order of NCLT, EBIX Singapore Pte. Ltd. v. Mahendra Kumar Khandelwal [2020] 119 taxmann.com 183 (NCLT - New Delhi)**

For Full Text of the Judgment see

[2020] 119 taxmann.com 184 (NCLT - New Delhi)



NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Vijay Kumar V Iyer

v.

Bharti Airtel Ltd.

JARAT KUMAR JAIN, JUDICIAL MEMBER
BALVINDER SINGH AND DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

COMPANY APPEAL (AT)(INS.) NOS. 530 AND 700 OF 2019‡

JULY 13, 2020

Section 238, read with section 14, of the Insolvency and Bankruptcy Code, 2016 - Overriding effect of Code - Aircel Limited and Dishnet Wireless Limited (Aircel entities) had entered into Spectrum Trade Agreement with Respondent Nos. 1 and 2 in April, 2016 - Corporate Insolvency Resolution Process of Aircel entities (corporate debtor) commenced from 19-3-2018 pursuant to admission of case under section 10 - Adjudicating Authority *vide* its order allowed set-off while making payment of amount out of total consideration of Rs. 453 crores settled as per Spectrum Trade Agreement - Resolution professional submitted that Adjudicating Authority by permitting present set-off had granted respondents a preferential payment over other Operational Creditors and it was also against objective of I&B Code and article 14 of Constitution - Respondent Nos.1 & 2 submitted that right of a party to apply set-off is a well-known and recognised concept in Accounting - Whether, in light of express provisions of specific law on subject, provisions of Code will prevail over accounting conventions - Held, yes - Whether further, since I&B Code provides mechanism of Moratorium during CIRP till Resolution Plan is approved or Liquidation order is passed, even if there are some such provisions in any other law, I&B Code will prevail over that - Held, yes - Whether therefore, order passed by Adjudicating Authority was to be set aside and Respondent Nos.1 & 2 were to be directed to pay amount whatever had been set-off by them to Aircel Entities - Held, yes (Paras 14 and 15)

CASE REVIEW

Bharti Airtel Ltd. v. *Vijaykumar V. Iyer* (2019) 106 taxmann.com 103/154 SCL 56 (NCLT - Mum.) (para 15) *Set aside*.

CASES REFERRED TO

Aircel Ltd. In, re (2018) 98 taxmann.com 274 (NCLT - Mum.) (para 2), *Dishnet Wireless Ltd.* v. *Union of India* (Civil Appeal No. 5744 of 2018, dated 12-2-2019) (para 6), *Indian Overseas Bank* v. *Dinkar T. Venkatsubramaniam Resolution Professional for Amtek Auto Ltd.* (2017) 88 taxmann.com 132/(2018) 145 SCL 138 (NCL - AT)

‡ **Arising out of order of NCLT, Mumbai in Bharti Airtel Ltd. v. Vijaykumar V. Iyer [2019] 106 taxmann.com 103/154 SCL 56**

(para 10), *MSTC Ltd.* v. *Adhunik Metalliks Ltd.* (2019) 103 taxmann.com 299/153 SCL 175 (NCL - AT) (para 11) and *Liberty House Group (P.) Ltd.* v. *State Bank of India* (2019) 103 taxmann.com 299/153 SCL 175 (NCL - AT) (para 11).

Raju Ramachandran, Sr. Adv., **Sumesh Dhawan**, **Vaijayant Paliwal** and **Ms. Charu Bansal**, Adv. *for the Appellant.* **Ramji Srinivasan**, Sr. Adv., **Ramakant Rai**, **Ms. Mehak Suri**, Adv., **Raunak Dhillon**, **Ms. Ananya Dhar Choudhury** and **Parikalp Gupta**, Adv. *for the Respondent.*

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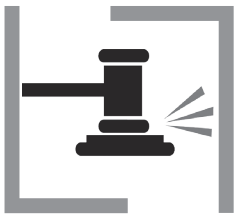
For Full Text of the Judgment see
[2020] 119 taxmann.com 178 (NCLAT - New Delhi)



(2020) 119 taxmann.com 92 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Pradeep M.R

v.

Ravindra Beleyur

JARAT KUMAR JAIN, JUDICIAL MEMBER

BALVINDER SINGH AND DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS) NOS. 306, 307, 315 & 554 OF 2019‡

JULY 29, 2020

Section 5(13), read with section 31, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Insolvency resolution process costs - Ex-employee of corporate debtor triggered CIRP against corporate debtor - Adjudicating Authority approved resolution plan of resolution applicant and made it effective - Appellant, absolute owner of corporate debtor's factory, was aggrieved that licence fee for CIRP period formed part of IRP costs and should have been paid in full and same had not been considered - Appellant further insisted that resolution applicant handed over building and other apartments but his dues of Rs. 82.65 lakhs along with additional 5 months licence fee was yet to be paid - Resolution professional however stated that figures of rent etc. were invariance with income tax return filed by appellant and hence they were not entitled to claim - Whether payment of licence fee was to be made to building owner for period till CIRP was continued or they had handed over building to building owner whichever was earlier, and same was to be restricted to his income tax return so far filed and that cost needed to be included in CIRP cost - Held, yes (Para 7)

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Resolution plan submitted by resolution applicant was approved by Adjudicating Authority - Appellant, promoter/director of corporate debtor contended that resolution applicant sought several concession and exemption like allowing setting up off of brought forwarded losses and unabsorbed depreciation for computation of taxable profits as per Income-tax Act, 1961, directing to provide reasonable opportunity to jurisdiction Principal Commissioner for allowing that set-off and also claiming certain other benefits apart from exemption under Stamp Duty Act - It appeared that accumulated losses was over 121 crores apart from unabsorbed depreciation,

‡ Arising out of Ravindra Beleyur v. Merchem Ltd. [2020] 119 taxmann.com 91 (NCLT - Chennai).

however those figures were as per financial statement and would require adjustment under Income-tax Act, 1961 to determine exact carry forward of losses for setting up off - Whether approved resolution plan should not be in contravention of provision of any law for time being in force apart from other criteria as specified by IBBI - Held, yes - Whether setting up of losses under Income-tax Act was subject to scrutiny by Income-tax department, therefore, there was a need for getting an affidavit from resolution applicant that he would be successfully completing resolution plan whether he got that set-off under Income-tax Act or not - Held, yes (Para 7)

CASE REVIEW

Ravindra Beleyur v. *Merchem Ltd.* (2020) 119 taxmann.com 91 (NCLT - Chennai), *modified; (See Annex)*

CASES REFERRED TO

K. Shashidhar v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 3) and *Committee of Creditors of Essar Steel Ltd.* v. *Satish Kumar Gupta* (2019) 108 taxmann.com 69 (NCL - AT) (para 3).

Rohan Rajasekaran, **Jitendra Malkan** and **Kartik Malhotra**, Advs. *for the Appellant.*
T. Ravichandran, **K.V. Balakrishnan**, **P.V. Dinesh**, **N.P.S. Chawla** and **Suresh K. Baxy**, Advs. *for the Respondent.*

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For Full Text of the Judgment see
[2020] 119 taxmann.com 178 (NCLAT - New Delhi)

Practical Questions

Q. 1 Can the deduction of TDS by the successful resolution applicant from resolution money be opposed by the financial creditors (FCs) on the ground, that, in the waterfall mechanism, their dues have priority over tax dues?

Ans. No

(NCLT, New Delhi (Principal Bench) order dt. 11th June 2020 passed in *Om Prakash Agarwal v. Chief CIT* (2020) 119 taxmann.com 160).

Q. 2 Can an application for initiation of CIRP be rejected on the ground that the applicant is a foreign national/Entity keeping in view the language of s. 3(23) r/w. 3(35), IBC?

Ans No.

(NCLT, Mumbai Bench decision dt. 3rd June 2020 passed in the matter of *Forever Glory Trading Ltd. v. Global Powersource (India) Ltd.* (2020) 119 taxmann.com 157)

Q. 3 In the context of the fact that sale of assets by liquidator is a *supply of goods*, is it mandatory for the liquidator to be registered u/s 24, GST Act?

Ans Yes.

(West Bengal Authority for Advance Ruling decision dt. 29.06.2020 passed in the matter of *M/s Mansi Oils and Grains (P.) Ltd.* (2020) 117 taxmann.com 446/80 GST 502)

Q. 4 In view of the language of s. 22 (2), IBC, can an IRP object to CoC's decision of appointing some other IP as the RP in CoC's first meeting after its constitution?

Ans No.

(NCLT, Hyderabad Bench decision dt. 9th June, 2020 passed in the matter of *Power Finance Corporation Ltd. v. Mahender kumar Khandelwal* (2020) 119 taxmann.com 161)

Q.5. Can an application filed u/s 60(5) be maintained by an auction purchaser seeking refund of the auction money paid by him to the Certificate Holder Banks?

Ans No, however, the issue can be decided by NCLT in exercise of its powers u/Rule 11 of NCLT Rules.

(NCLT, Kolkata decision dt. 17th June 2020 passed in the matter of *Dena Bank v. M/s Kharkia Steels (P.) Ltd.* (2020) 119 taxmann.com 156)

Q.6. Can an application be maintained (before the AA) by the RA seeking extension of lease deed besides approval of resolution plan (approved by 87.03% in CoC)?

Ans No.

(NCLT, Guwahati decision dt. 19th June 2020 passed in the matter of *Bank of India v. RNB Cements Pvt. Ltd.* (2020) 119 taxmann.com 155)

Q.7. Can CIRP proceedings initiated in respect of a *default* committed after 25th March 2020 (but before 5th June 2020) be said to be covered by the bar of section 10A, IBC?

Ans Yes.

(NCLT, Chennai Bench decision dt. 9th July 2020, passed in the matter of *M/s Siemens Gamesa Renewable Power (P) Ltd. v. Ramesh Kymal* (2020) 119 taxmann.com 781/160 SCL 500)

Q.8. Can a proprietary concern maintain a CIRP application in its own name against a CD?

Ans No.

(NCLT, Ahmedabad Bench decision dt. 26th June 2020 passed in the matter of *Neev Construction v. DCOM Systems Ltd.* (2020) 119 taxmann.com 159)

Q.9. Can questions in the nature of *infringement of copyright* which arise out of (or in relation to) CIRP proceedings be addressed by the AA?

Ans. Yes.

(Delhi High Court decision dt. 26th June 2020, passed in the matter of *GE Power India Ltd. v. NHPC Ltd.* (2020) 119 taxmann.com 158)

Q.10. Can the liquidator of a company which is a financial creditor of the CD subsequently file an application u/s 60(5)(b) for inclusion of its claim in the resolution plan?

Ans. No.

(NCLT, Ahmedabad Bench decision dt. 26th June 2020 passed in the matter of *Ramachandra D Choudhary v. Marshall Multiventures (I) (P.) Ltd.* (2020) 119 taxmann.com 162)

Learning Curves

- **Rather than the "inability to pay debts", it is the "determination of default" that is relevant for allowing or disallowing an application filed under section 7, 9 or 10 of IBC.**

Monotrone Leasing Pvt. Ltd. v. PM Cold Storage Private Limited (2020) 119 taxmann.com 96 (NCLAT - New Delhi)

- **Unless the plan approved by the CoC is in conflict with any provision of law and the distribution mechanism balances the interests of all stakeholders, judicial intervention would not be warranted.**

Office of the Specified Officer, Special Economic Zone, Warora. v. Mr. V. Venkatachalam, (2020) 119 taxmann.com 163 (NCLAT - New Delhi)

- **NCLAT sets aside the ruling of NCLT which allowed to set off a certain amount while making payment.**

Mr. Vijay Kumar V. Iyer v. Bipin Kumar Vohra Company appeal (AT) (Ins.) No. 600 of 2020.

- **Persons who contributed to default of company with their misconduct have to be excluded from submitting a Resolution Plan or acquiring the assets of the Corporate Debtor when pushed into liquidation**

Bank of Baroda v. Mr. Sisir Kumar Appikatla (2020) 119 taxmann.com 94 (Mad.)

- **The definition of 'person' in section 3(23) of IBC is an inclusive definition which inter alia also includes Sole Proprietorship Firms**

SBER Bank v. Varrsana Ispat Ltd. (2020) 118 taxmann.com 141 (NCLT- Kol.)

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA(ONLINE DELIVERY OF EDUCATIONAL COURSE AND CONTINUING PROFESSIONAL EDUCATION BY INSOLVENCY PROFESSIONAL AGENCIES AND REGISTERED VALUERS ORGANISATIONS) GUIDELINES, 2020

PRESS RELEASE, DATED 10-7-2020

Education by Insolvency Professional Agencies (IPAs)

1. Regulation 5(*b*) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) provides that subject to the other provisions of IP regulations, an individual is eligible for registration as an Insolvency Professional (IP), subject to meeting other requirements, if he has completed a pre-registration educational course, as may be required by the Insolvency and Bankruptcy Board of India (Board), from an Insolvency Professional Agency (IPA) after his enrolment as a professional member. In pursuance of this, the Board has specified the details of the pre-registration educational course *vide* Circular No. IPA/011/2018 dated 23rd April, 2018.

2. Further, clause (*ba*) of sub-regulation (2) of regulation 7 of the IP Regulations mandates that the registration of an IP is subject to the condition that he shall undergo continuing professional education as may be required by the Board. In pursuance of this, the Board has issued the

IBBI (Continuing Professional Education for Insolvency Professionals) Guidelines, 2019.

Education by Registered Valuers Organisations (RVOs)

3. Clause (*a*) of sub-rule (2) of rule 12 of the Companies (Registered Valuers and Valuation) Rules, 2017 (*Valuation Rules*) requires that a Registered Valuers Organisation (RVO) shall conduct educational courses in valuation, in accordance with the syllabus determined by the Authority, for its valuer members. In pursuance of this, the Board, being the Authority, has been determining syllabus and reviewing the same from time to time. In its last review notified on 18th March, 2020, it specified the syllabus effective from 1st July, 2020 for all three asset classes.

4. Clause (*e*) of sub-rule (2) of rule 12 of the Valuation Rules requires an RVO to provide continuing education to its members.

Delivery of Education

5. It has been specified, in discussion with IPAs and RVOs, through circulars, guidelines and minutes of monthly meetings with them, that the educational courses and continuing professional education shall be delivered in classroom mode. However, in the wake of COVID-19, it was felt that it would be difficult for RVOs and IPAs to deliver educational courses and continuing professional education through classroom mode due to social distancing norms mandated by the Central Government. To minimize difficulties for the registered valuers, IPs, valuer members and prospective IPs, the Board, *vide its* advisories No. IBBI/IPA/031/2020 dated 20th March, 2020 and No. IBBI/RVO/032/2020 dated 20th March, 2020, allowed online delivery of courses by RVOs and IPAs and continuing education by RVOs till 30th September, 2020.

Online Delivery of Education

6. The menace of COVID-19 continues with no resolution in sight. It is considered necessary to continue online delivery of education beyond 30th September, 2020, in addition to classroom mode, wherever possible. However, it is necessary that such delivery is as effective as class-room delivery of education. Therefore, the following Guidelines are issued to govern the online delivery of education by IPAs and RVOs.

Applicability

7. These Guidelines shall apply to delivery of:-

(*a*) Pre-registration educational course under regulation 5(*b*) of the IBBI (Insolvency Professionals) Regulations, 2016;

(*b*) Continuing professional education under clause (*ba*) of sub-regulation (2) of regulation 7 of the IBBI (Insolvency Professionals) Regulations, 2016;

(*c*) Educational Courses under clause (*a*) of sub-rule (2) of rule 12 of the Companies (Registered Valuers and Valuation) Rules, 2017; and

(*d*) Continuing education under clause (*e*) of sub-rule (2) of rule 12 of the Companies (Registered Valuers and Valuation) Rules, 2017.

These are collectively called 'courses' and individually as 'course'.

Technical requirements

8. Only a licensed version of a software shall be used for these courses. It must:

(*a*) be user-friendly;

(*b*) have appropriate security features;

(*c*) have proper access control mechanism such as User ID/password;

(*d*) have facility to refuse access to participants after XX minutes from the start of a session;

(*e*) provide for both audio and video for participants and faculty;

(*f*) provide for audio-visual interaction between participants and faculty;

(*g*) have facility to record the sessions either itself or with an extended device; and

(*h*) enable online tests of participants to test their learning immediately on conclusion of the course.

Administration

9. An IPA/RVO shall ensure the following:

(*a*) The IPA/RVO shall ensure delivery of courses, strictly in accordance with the syllabus specified by the Board.

(*b*) The fee charged for a course shall be reasonable.

(*c*) The Board shall have prior intimation of the courses and shall have access to every course at any time.

(*d*) The IPA/RVO shall enrol participants before permitting them to attend the course. The number of participants shall not exceed 50 for an educational course and 100 for a continuing educational course.

(*e*) Every course shall have a Course Co-ordinator who shall ensure that the sessions start and end on time and monitor the presence of participants and attend to other issues of participants.

(*f*) The Co-ordinator shall share the details of the IT personnel, or personnel familiar with the software, to assist the participants in case of technical difficulties during the course, with all the participants before commencement of the course.

(*g*) The Co-ordinator shall ensure that software is tested half an hour before commencement of every course so that no participant misses out on course contents due to technical issues at either end.

(*h*) The Co-ordinator shall not permit access to a participant after 10 minutes from the start of course except for reasons to be recorded by him in writing. The software shall record attendance at the start and end of every day in case of educational course and at the start and end of the course in case of continuing education.

(*i*) The Co-ordinator shall not allow participants to switch off video during the session.

(*j*) The faculty shall have the necessary qualifications and professional experience to take the sessions. The IPAs/RVOs shall have guidelines providing for qualifications,

experience, participant feedback, etc. for identification of faculty for each session.

(*k*) Wherever feasible, a session shall have a faculty guided activity to support learning and to keep the participants engaged. The IPA/RVO should encourage the faculty to engage participants using active learning strategies, including debate, group discussion, Think-Pair-Share, Peer Instructions, etc.

(*l*) The faculty and participants shall engage interact through the audio-visual mode and not through the 'chat' mode.

(*m*) The faculty shall deliver sessions live through VC. The videos of all sessions shall be made available on the website of the IPA/RVO for the reference of the participants. This may be accessible through an ID/ password.

(*n*) The IPA/RVO shall have an online feedback mechanism for the participants at the end of every session. The feedback received by them RVOs/IPAs and steps taken to remove the deficiencies, if any, shall be summarised and provided to the Board.

(*o*) An exit test comprising at least fifty questions shall be administered online, immediately on conclusion of the educational course to assess the learning during the course. Every participant shall have a unique set of questions in this test. This may be done, if necessary, by changing the order of questions in the test.

(*p*) The IPA/RVO shall provide a compliance report to the Board in respect of each course within seven days of conclusion of the course.

(*q*) The IPA/RVO shall maintain records of every course for at least three years.

Compliance

10. It is the exclusive responsibility of the IPAs/RVOs concerned to comply with these Guidelines for online delivery of courses.

Validity

11. The Guidelines shall be effective till 31st March 2021, unless rescinded or extended otherwise.

12. This is issued in consultation with IPAs and RVOs, in exercise of powers under section 196(1)(*aa*) of the Code read with regulation 5(*b*) and clause (*ba*) of sub-regulation (2) of regulation 7 of the IBBI (Insolvency Professionals) Regulations, 2016 and clauses (*a*) and (*e*) of sub-rule (2) of rule 12 of the Companies (Registered Valuers and Valuation) Rules, 2017.

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SECTION 419 OF THE COMPANIES ACT, 2013 - NATIONAL COMPANY LAW TRIBUNAL - BENCHES OF - RE-CONSTITUTION OF BENCHES OF NCLT MUMBAI

ORDER F. NO. 10/03/2020-NCLT, DATED 31-7-2020

Consequent to order No. 10/36/2016 dated 30.4.2020 & 12.5.2020 and in exercise of the powers conferred by Section 419 of the Companies Act, 2013 the Hon'ble President. NCLT hereby re-constituted the Benches at NCLT Mumbai for the purpose of exercising and discharging the functions assigned by the statue(s). The Benches shall comprise of :

Bench at NCLT, Mumbai Court No. I

1. Shri Mohammed Ajmal, Member (Judicial)
2. Shri V. Nallasenapathy, Member (Technical)

Bench at NCLT, Mumbai Court No. II

1. Shri H.P. Chaturvedi, Member (Judicial)
2. Shri Ravikumar Duraisamy, Member (Technical)

Bench at NCLT, Mumbai Court No. III

1. Shri Venkata Subba Rao Hari, Member (Judicial)
2. Shri Shyam Babu Gautam, Member (Technical)

Bench at NCLT, Mumbai Court No. IV

1. Shri Rajasekhar V.K., Member (Judicial)
2. Shri Rajesh Sharma, Member (Technical)

Bench at NCLT, Mumbai Court No. V

1. Ms. Suchitra Kanuparthi, Member (Judicial)
2. Shri Chandra Bhan Singh, Member (Technical)

2. The aforementioned benches shall attend urgent matters of respective courts through Video conference till further order.

3. This order issues in suppression of orders dated 21.4.2020 & 5.5.2020 issued for constitution of special benches and subsequent orders issued in this regard.

4. This order shall come into force with effect from 3rd August, 2020.

5. This issues with approval of the Hon'ble Acting President, NCLT

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