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INSOLVENCY AND BANKRUPTCY JOURNAL

NO. 8 | PG. 1-100 | AUGUST 2021 | ₹ 500 (SINGLE COPY)

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INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)
'ICSI House', 3rd Floor, 22, Institutional Area,
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SEBI MANUAL

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Amended, updated & Annotated text
of SEBI & Securities Laws

COVERAGE

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- Notifications

SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018
- Clarifications

Securities Contracts (Regulation) Act, 1956
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- Clarifications

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- Clarifications
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WHAT SETS THIS BOOK APART?

- Updated, Amended & Annotated text of SEBI & Securities Laws
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- Circulars amending/ Clarifying the primary Circular are given together

COMPLETE PICTURE OF THE LAW

COVERING

- Alternative Investment Funds
- Bankers to an Issue
- Buy-back of Securities
- Collective Investment Scheme
- Credit Rating Agency
- Custodian/Debenture Trustee
- Debt Securities/Commercial Papers – Issue and Listing of
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- Sweat Equity
- Takeover Regulations
- Underwriters
- Unfair Trade Practices
- Vanishing Companies
- Other Rules & Regulations
- Application Supported by Blocked Amount Process (ASBA)

NEWS FROM THE INSTITUTE

◆ Pre-Registration Educational Course 46th Batch/8th August-14th August 2021

Pursuant to Regulation 5(*b*) of the IBBI (Insolvency Professionals) Regulations, 2016, individuals are eligible to register themselves as Insolvency Professionals (IP) only after undergoing through the mandatory 50 hours Pre-Registration Educational Course from an Insolvency Professional Agency after his/her enrolment as a Professional Member.

ICSI IIP jointly with the other three Insolvency Professional Agencies conducted Pre-Registration Educational Course online from 8th August-14th August, 2021.

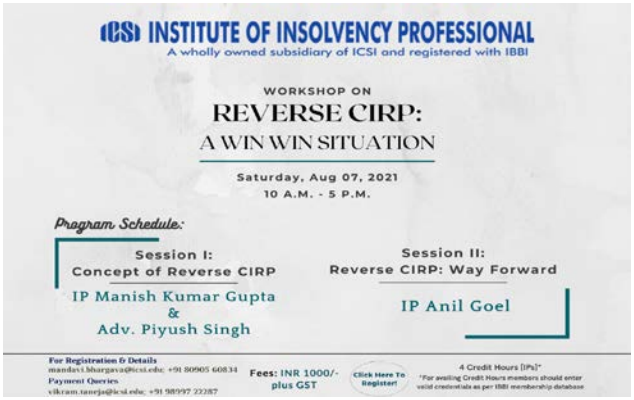
◆ Pre-Registration Educational Course 47th Batch/23rd August-29th August 2021

Pursuant to Regulation 5(*b*) of the IBBI (Insolvency Professionals) Regulations, 2016, individuals are eligible to register themselves as Insolvency Professionals (IP) only after undergoing through the mandatory 50 hours Pre-Registration Educational Course from an Insolvency Professional Agency after his/her enrolment as a Professional Member.

ICSI IIP jointly with the other three Insolvency Professional Agencies conducted Pre-Registration Educational Course online from 8th August-14th August, 2021.

◆ Workshop on 'Reverse CIRP: A Win Win Situation'

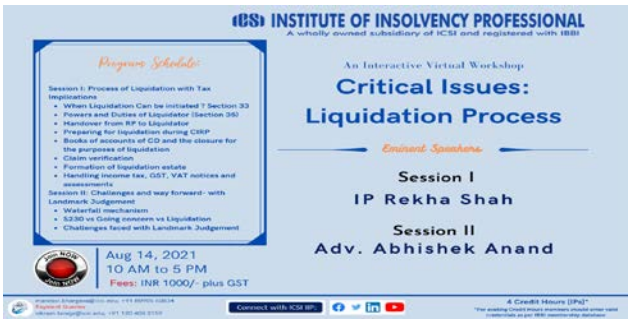
On 7th August, 2021, ICSI IIP organized a full day workshop on `**Reverse CIRP: A Win Win Situation'**. It was attended by 77 professional members. The workshop was addressed by the eminent speakers namely, IP Manish Kumar Gupta, Adv. Piyush Singh and IP Anil Goel.



◆ Workshop on 'Critical Issues: Liquidation Process'

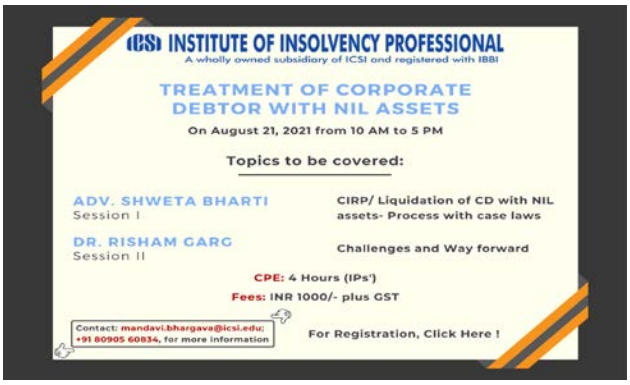
On 24th July, 2021, ICSI IIP organized a full day workshop on **'Critical Issues: Liquidation Process'**. It was attended by

54 professional members. The workshop was addressed by the eminent speakers namely, IP Rekha Shah and Adv. Abhishek Anand.



◆ Workshop on Treatment of Corporate Debtor with NIL Assets

On 21st August, 2021, ICSI IIP organized a full day workshop on '**Treatment of Corporate Debtor with NIL Assets**'. It was attended by 56 professional members. The workshop was addressed by the eminent speakers namely, Adv. Shweta Bharti and Dr. Risham Garg.



◆ Workshop on Stressed Assets: Opportunities under IBC

On 28th August, 2021, ICSI IIP organized a full day workshop on '**Stressed Assets: Opportunities under IBC**'. It was attended by 55 professional members. The workshop was addressed by the eminent speakers namely, Mr. Tushar Chaudhury and IP Ashish Makhija.

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- **Kay Bouvet Engineering Ltd. v. Overseas Infrastructure Alliance (India) (P.) Ltd.**
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Section 9, read with section 5(6) of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Initiation by Corporate Creditor - Whether once, operational creditor files an application which is otherwise complete, Adjudicating Authority has to reject application under section 9(5)(ii)(d), if a notice has been received by operational creditor or if there is a record of dispute in information utility - Held, yes - Whether what is required is that notice by corporate debtor must bring to notice of operational creditor, existence of a dispute or fact that a suit or arbitration proceedings relating to a dispute is pending between parties - Held, yes - Respondent EPC contractor (operational creditor) was awarded contract by one 'M' for commissioning of a sugar plant at its site - Appellant was selected as sub-contractor for said project through com-

petitive bidding - Respondent had advanced a sum to appellant sub-contractor (corporate debtor) on behalf of M for said contract which was later terminated - Thereafter, a new contract was entered into between M and appellant directly - M had directed that amount so advanced earlier was to be adjusted against supplies to be made for purpose of completing Project - On contrary, documents clarified that termination of contract with respondent would not absolve respondent of any liability for balance disbursed to them other than amount paid to appellant - Whether therefore, after finding that there existed a dispute between appellant and respondent, NCLT rejected application of respondent as such an order under section 9 could not have been passed - Held, yes - Whether NCLAT had patently misinterpreted factual as well as legal position and erred in directing admission of section 9 petition - Held, yes (Paras 13, 31, 32 and 33)

- **Dena Bank v. C. Shivakumar Reddy**
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I. Section 238A, read with section 7 of the Insolvency and Bankruptcy Code, 2016 and section 14 of the Limitation Act, 1963 - Corporate insolvency resolution process - Limitation period - Whether an application under section 7 of IBC would not be barred by limitation, on ground that it had been filed beyond a period of three years from date of declaration of loan account of corporate debtor as NPA; if there was an acknowledgement of debt by corporate debtor before expiry of period of limitation of three years, period of limitation would get extended by a further period of three years - Held, yes - Whether a judgment and/or decree for money in favour of financial creditor, passed by DRT, or any other Tribunal or Court, or issuance of a Certificate of Recovery in favour of financial creditor, would give rise to a fresh cause of action for financial creditor, to initiate proceedings under section 7 for initiation of CIRP, within three years from date of judgment and/or decree or within three years from date of issuance of Certificate of Recovery, if dues of corporate debtor to financial debtor, under judgment and/or decree and/or in terms of Certificate of Recovery, or any part thereof remained unpaid - Held, yes (Paras 142 & 143)

II. Section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Whether there is no bar in law to amendment of pleadings in an application under section 7 of IBC, or to filing of additional documents, apart from those initially filed along with application under section 7 - Held, yes (Para 144)

- **Pratap Technocrats (P.) Ltd.** *v.* **Monitoring Committee of Reliance Infratel Ltd.**
  (2021) 129 taxmann.com 132 (SC) • P-330

Section 31, read with section 30 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - Whether once resolution plan in respect of corporate debtor is approved by 100 per cent voting share of Committee of Creditors (CoC), exclusion of certain financial debts and hence, exclusion of certain financial creditors from CoC will be of no consequence; resolution plan continues to be approved with 100 per cent majority even after their exclusion - Held, yes (Para 42)

- **Kotak Mahindra Bank Ltd. v. K. Bharathi**
  (2021) 130 taxmann.com 418 (Madras) • P-333

Section 60 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Whether in insolvency proceedings, it is for NCLT to decide whether matter before it ought to be decided or not, whether any injunction operates or impedes progress of matter before it; parties cannot be asked to approach High Court for it to hand-hold NCLT and guide it through its proceedings - Held, yes - Whether NCLT would do well to confine itself to its area of specialisation and deal with matter in accordance with law without waiting for High Court to extend any advice or assistance, which High Court, in any event, is not obliged to extend - Held, yes (Paras 6 and 7)

- **Rajesh Goyal v. Babita Gupta**
  (2021) 130 taxmann.com 423 (NCLAT - New Delhi) • P-335

Section 12, read with section 7 of the Insolvency and Bankruptcy Code, 2016 and rule 11 of the National Company Law Appellate Tribunal Rules, 2016 - Corporate insolvency resolution process - Time limit for completion of - Allottee-financial creditors moved an application under section 7 for initiation of CIRP against corporate debtor an Infrastructure Company - NCLT admitted application - Thereafter, promoter preferred an appeal which was decided by NCLAT by order dated 5-2-2020, holding concept of reverse CIRP and directing promoter to cooperate with IRP, to disburse amount as financial creditor and timelines were set - Thereafter, appeal was filed by promoter to seek extension of timelines stipulated in judgment dated 5-2-2020, due to outbreak of COVID-19 - NCLAT vide order dated 4-3-2021, disposed of application allowing to extend timelines envisaged in order dated 5-2-2020, without altering, substituting or modifying its structural terms - Applicant promoter filed instant application seeking clarification of order dated 4-3-2021 - It was submitted that revised timeline proposed by applicant in Chart was up to 15-1-2021, as same was based on assumption that order would be passed around 15-1-2021, however, since order was passed on 4-3-2021 i.e. after 48 days from proposed exclusion date, therefore, exclusion for period when order was passed i.e. 4-3-2021, may be granted, otherwise it would cause irreparable loss - Whether in view of above facts, applicant would be entitled to get revised timeline with exclusion up to 4-3-2021, for completion of project - Held, yes (Paras 9 and 11)

- **Parag Sheth v. Sunil Kumar Agarwal**
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Section 20 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Management of operations of corporate debtor as going concern - Appellant was appointed as Interim Resolution Professional (IRP) in respect of corporate debtor - Existing insurance of assets of corporate debtor was with insurance company 'IFFCO', which was going to lapse - Appellant thus, had entered into a new contract with another insurance company for insurance of assets of corporate debtor, for which he paid higher insurance premium - Whether section 20(2)(b) authorizes IRP to enter into contracts before commencement of CIRP - Held, yes - Whether however, in instant case appellant had entered into a new contract after commencement of CIRP without approval of CoC, same was in violation to section 20 - Held, yes (Para 19)

- **Ravi Ajit Kulkarni v. State Bank of India**
  (2021) 130 taxmann.com 442 (NCLAT - New Delhi) • P-337

Section 95, read with sections 96 and 99 of the Insolvency and Bankruptcy Code, 2016 read with rules 11 and 44 of the National Company Law Tribunal Rules, 2016 - Individual/firm's insolvency resolution process - Application by creditor - Whether once application under section 95 is filed, Adjudicating Authority has to act on it, and following principle of natural justice, it has to give limited notice to debtor/personal guarantor - Held, yes - Whether limited notice has to be only to secure presence of debtor/personal guarantor referring to Interim Moratorium which has commenced so that when Resolution Professional is appointed, they may provide material in their favour as per section 99(2) - Held, yes - Whether before appointment of Resolution Professional, debtor is not allowed to raise disputes, however, if debtor raises dispute on merit, same may be adjudicated only after receipt of report from Resolution Professional under section 99 - Held, yes - Whether stage for considering default arrives when matter is taken up under section 100 - Held, yes (Paras 42, 44 and 47)

- **Siva Industries and Holdings Ltd., In re**
  (2021) 130 taxmann.com 440 (NCLT - Chennai) • P-338

Section 12A of the Insolvency and Bankruptcy

Code, 2016, read with regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Withdrawal of application - Whether Adjudicating Authority is required to be vigilant in considering settlement plan in relation to section 12A and is only required to permit unprejudiced settlement plan to succeed - Held, yes - CIRP in case of corporate debtor was admitted and IRP was appointed - Initially two resolution plans were received, however both of them were withdrawn - After this a third resolution plan was received which did not receive consent of Committee of Creditors(CoC) - Soon after, promoter of corporate debtor, although ineligible to submit a resolution plan tried to restructure loans under pretext of a settlement proposal - However, purported plan was not a settlement simpliciter as envisaged under section 12A, rather, it was a business restructuring plan - Further, as per settlement Plan, there was no final offer made by promoter of corporate debtor and also no acceptance made by CoC in this regard - Whether therefore, there being ambiguity of terms of settlement and no finality having been reached between promoter of corporate debtor and CoC as per settlement proposal, order for withdrawal of CIRP could not have been passed - Held, yes (Paras 21, 22, 27 and 28)

- **State Bank of India v. Tantia Constructions Ltd.**
  (2021) 130 taxmann.com 419 (NCLT - Kolkata) • P-340

Section 31, read with section 3(6) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution plan - Approval of - Applicant and corporate debtor entered into a Joint Venture Agreement (JVA) for completing construction of pumping stations, which was later revised vide a supplementary agreement - Applicant on coming to know that corporate debtor had been admitted into CIRP, submitted its claim before Resolution Professional (RP) - However, RP replied that claim could not be accepted - Hence, applicant filed instant application seeking a direction upon RP to include its claim and, pending disposal of application, direct that no resolution plan be considered or approved - Whether since it was an ongoing project and final accounts could have been drawn up either at stage of invitation of claims or stage of approval of resolution plan, hence RP should have made provision for a contingency in case corporate debtor owed any dues to applicant after finalization of accounts, which it had failed to do - Held, yes - Whether RP could not have denied applicant's claim while at same time admitting liability in capacity of Resolution Professional in books of account - Held, yes - Whether applicant having knocked on doors of this Adjudicating Authority seeking a determination of its claim, even before approval of Resolution Plan, its claim was to be included with dues payable to operational creditors - Held, yes (Paras 4 and 4.10)

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P. K. MALHOTRA

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

From Chairman's Desk

The worst crime in the world is indecision.

Dear Professional members,

I wish that this message finds you and your families well and in good spirits.

In our life, we constantly face challenging situations and are required to take decisions. While some decisions may have a long-lasting effect, some have just momentary impact on us. But there is a definite element of risk attached with any decision going wrong. In other words, every decision making is a risk. But the greatest risk lies in remaining indecisive. In any situation, we are required to weigh the pros and cons, and then take a decisive move based on our assessment of the situation. Remaining indecisive and taking no action is certainly a big obstacle in the advancement of our lives, and we must at all times avoid being in a state of confusion where we are not able to fix the route that we need to follow. I say this because, in the present day world, life has acquired its own pace and changes are taking place constantly which require us to remain vigilant and conscious. In the context of IBC, the need to be decisive is all the more, as assets tend to lose their value with time once the company reaches the state of insolvency. The debtors have understood that they have to set their house in order and that there is no advantage

in procrastination. Creditors have also learnt their lessons. They have learnt that they have to take quick decision to protect the value and resolve the cases of insolvencies. Our experience of previous insolvency law regime has taught us great lessons that by delaying we shall never be able to succeed. Therefore, urgency to act is there in the air itself.

One of the key features of the life journey of IBC is that all its success has come after a great deal of efforts made by the key stakeholders. But with a firm resolve to succeed, we have been able to establish this legal reform firmly and have succeeded in establishing an efficient, effective, transparent and well-functioning legal machinery for insolvency resolution. The success has been achieved through both, intent and action. This strengthens our belief in our great ability to *weather all storms come what may*.

The current challenge facing the IBC regime has emanated from some recent decisions taken by the CoC while exercising its commercial wisdom in approving resolution plans before the NCLTs. The huge haircuts, as agreed to be taken by the CoC in some cases, have left the stakeholders high and dry and feel a little jittery. The natural question that they ask themselves is if these decisions by CoC display exercise of commercial *wisdom*, or are they running counter to the scheme and spirit of the legislation. The jury is out on this issue, however, some suggestions have been made to have guidelines in place that could guide the CoC on different necessary principles to be satisfied in such exercises. The suggestion *ex facie* appears to be very convincing, but, what cannot be ignored is that the issue of haircut is subjective, and in case where liquidation value is very low, lenders should be allowed to take large haircuts too. Infact, what has been argued by the Financial Creditors is that the percentage of haircut shall always be in inverse relationship to the value left in the CD. Value of a company is a function of value of its assets, its goodwill, its customer base, *etc.*, and when a company avoids or delays initiation of insolvency proceedings, most of its assets tend to lose their value while the liabilities keep pilling-up. On the other hand, if insolvency proceedings are initiated in the initial stages of stress, then the chances of revival through a viable resolution plan increases multi-fold. As regards the haircuts taken by FCs, it is important to analyse and comprehend the broad reasons thereof.

The other major development that took place in this month concerns submission of report by the Parliamentary Standing Committee on Finance which has recommended *inter alia* for setting up a benchmark on the quantum of haircut, self-regulation of resolution professionals, Code of Conduct for the Committee of Creditors *etc*. The haircuts are depended on the value left in the company, and cannot be assessed based on its debt size. In other words, the debt is not a representation of the true value. The root cause of huge haircuts can be addressed by bringing-in changes in the process of lending and monitoring since these are the areas where the real gap lies. In terms of IBC provisions, where the factors leading to insolvency of the firm are connected with activities like misappropriation or embezzlement of funds, the legal remedies available concerning *avoidance transactions* and proceeding against *personal guarantors to corporate debtors* have the potential to lead to high recoveries. Such provisions also have an inherent quality of causing deterrence in the society against such practices. This is another area where credit is due to the IBC legislation itself, since under the previous state of law (on *recovery* and *corporate reconstruction/resolution*), it was hardly possible to recover the lost value of an asset and the provisions for initiating legal proceedings against the management was hardly yielding any results. Therefore, IBC has done a phenomenal job. This fact was also acknowledged, endorsed and underlined by the RBI in its report wherein it mentioned that the lenders have been able to recover 45.5% under the IBC, whereas the recovery made through SARFAESI (which was otherwise the most effective mechanism for recovery of secured debts) was 26.7% of the amount.

In the days and months to come, I foresee the Pre-packs scheme (PPIRP) running full stream and all eligible entities taking full advantage of this facility. Needless to mention that the Professional members shall always have a very crucial role to play in ensuring that the legislation truly succeeds in achieving its object and purpose.

I look forward to meet you all very soon either over virtual medium, or if the situation permits, over a physical meeting.

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

Managing Director's Message

Progress is impossible without change, and those who cannot change their minds cannot change anything

...George Bernard Shaw

Dear Professional Member(s),

My greetings to one and all. I trust and wish that you all are keeping safe, healthy, and are following all precautionary measures and protocols related to prevention of spread of current pandemic.

The month of August is extremely important from our national perspective. It reminds us of the great freedom struggle that our freedom fighters ventured into just to ensure that all future generations in this country are able to enjoy the freedom and liberty that we all are enjoying as a democratic nation. This year, we completed 75 years of our independence, and as Indians, it is a moment for all

of us to not only cherish, celebrate and rejoice these glorious years, but also to show our determination and resolve that we shall not stop unless and until we realise the solemn objectives enshrined in the preamble of our Constitution, and accordingly prepare ourselves for the journey ahead.

The Insolvency and Bankruptcy Code, 2016 though is a relatively recent development in India, but the changes that it has brought about in the past 5 years of its existence in the way we deal with issues related to 'corporate insolvency', I am very certain that we have been able to put ourselves on the right path and the results have been very encouraging, despite all the challenges and roadblocks that we encountered in the way. I am reminded of a very famous quote by Mr. Barack Obama (former President of United States of America) wherein he said, "If you're walking down the right path and you're willing to keep walking, eventually you'll make progress". With that spirit in mind, I welcome all the initiatives and the great courage shown by our Professional members to make sure that we keep moving on the right path.

In the insolvency and bankruptcy law space, there has never been a dull moment. Every month we have seen new developments taking place through the hands of our Chief Regulator (IBBI) and the Judiciary (NCLT/NCLAT/HC/SC) as also by the Parliament, as and when the need arises. The month of August also witnessed some major developments taking place. These developments have come from the end of the Legislature, the Executive, the Chief Regulator (IBBI), and the judiciary. On the legislative front, we saw passing of IBC (Amendment) Act, 2021, whereby the insolvency resolution mechanism of PPIRP has been introduced as a part of IBC. The amendment act has replaced the earlier promulgated IBC (Amendment) Ordinance, 2021, and thus, in order to validate any action taken under the said ordinance, the amendment act has been given a retrospective effect (from 4th April 2021). Pre-packs, as we all know now, envisages a mechanism for debt resolution of a distressed company wherein there is a facility of direct engagement and agreement *inter se* the secured creditors of CD and its existing management or outside investors, instead of a public bidding process. Under the Pre-packs, the maximum time available is 120 days only (with further 90 days extension available to stakeholders to bring a resolution plan for approval before the NCLT). Pre-packs

are largely aimed at providing MSMEs with an opportunity to restructure their liabilities and have a clean slate to start with again. Adequate safeguards have been put into the mechanism to ensure that the system is not put to any misuse, and it is thus expected that pre-packs shall be very effective in arriving at a quick resolution for distressed companies.

One of the challenges that have emerged recently pertains to the functioning of the Committee of Creditors (CoC). The CoC, as a decision making body, is vested with commercial wisdom to decide the fate of CD, *i.e.* whether the CD goes for 'resolution' or 'liquidation'. In that process, it evaluates the feasibility of all resolution plans submitted *vis-à-vis* the CD, and takes the ultimate call on who shall be the successful resolution applicant (SRA). While the CoC, by and large, comprises of the Financial Creditors (except the related ones), the decisions that it takes, impact other stakeholders as well. Therefore, there is an inherent and a definite duty of care that the CoC owes to the other creditors. The supremacy of commercial wisdom of CoC is now a well-established principle of law in the IBC context (especially after SC judgments in *Swiss Ribbons* case and *Essar Steel* case), and therefore, there is a good reason for the CoC to ensure that its decision not only involves an exercise of commercial wisdom, but such exercise also gets reflected in the decision. This is extremely important since the CoC's decision is binding on other stakeholders as well.

The Committee of Creditors (CoC) traces its birth/origin to the IBC itself, and therefore, does not have much legacy behind it to guide it on its functioning. As an institution, the CoC is evolving, and therefore, a definite need has now arisen to work on some broad principles which the CoC needs to adhered to while discharging its functions under the IBC. The CoC's decisions have very far-reaching implications as it gets to decide on issues as crucial as CD's life, and therefore, there is a need to be fair and transparent in its functioning. There is no doubt that when the lawmakers framed the IBC, they wanted the CoC to base all its decisions (on resolution or liquidation) depending on the commercial call that it takes, however, such commercial call is required to be also guided by a sense of wisdom behind it, and hence coining of the term "commercial wisdom".

The IBBI has already circulated a discussion paper *inter alia*

on the subject of "issues related to Code of Conduct for the Committee of Creditors" wherein some very pertinent and important issues concerning the said subject have been discussed and comments/suggestions have been invited from the public. Needless to mention that ICSI IIP shall, in discharge of its functions as an IPA, be holding Round-table of Professional members on the said discussion paper in order to take a stock of the comments and suggestions by our members, which shall then be submitted to the IBBI for its consideration.

I am eagerly waiting to meet all of you in person, and waiting for the situation and circumstances to permits holding of a meeting. Till then, please do take a very good care of yourself and your loved ones.

INTERVIEW

Mahadev Tirunagari
Insolvency Professional

- By Profession he is a Fellow Member of Institute of Company Secretaries of India (ICSI) and a Company Secretary in Practice and also an Insolvency Professional registered with Insolvency and Bankruptcy Board of India (IBBI).
- He is Founding Partner of V7 Advisors LLP, an Insolvency Professional Entity registered with IBBI.
- He holds a Master Degree in Finance and Master Degree in Law
- He is a visiting faculty in NALSAR University
- He was the Chairman of ICSI Hyderabad Chapter for the year 2016.

1. Looking back at these five years of the Insolvency and Bankruptcy Code, 2016, how significantly this regime has shaped the economy? Has IBC been successful?

Reply: This important piece of legislation has bought significance in multi-fold in shaping the economy. Apparently the image of our nation has been changed in the international arena. The creditors' regime has taken over the age old promoter regime in most succulent manner. Having said that, still there remains few pertinent questions to understand the actual impact of IBC on the economy. They are:

a. Whether the Creditors are in a position to ensure that the objectives of IBC are met in true spirit?

b. Is the economy of our nation blooming with the induction of IBC?

c. Are the interests of all the stakeholders are addressed appropriately under IBC mechanism?

2. Since, "bad bank" concept has been introduced in India, will it help in reducing overall NPA situation in the economy? How will it impact the functioning of Insolvency and Bankruptcy Code?

Reply: The concept of "Bad Bank" is very innovative and out of box thinking. This will result into healthy financial statements of all the Banks and in turn could envisage a plethora of new activities like infusion of finance into the banks because the bad loans/NPAs will be transferred to bad bank at discount, granting new loans by the Banks thereby boosting the economy, placing the nation on the fulcrum of growth etc.

However, one should also keep this in mind about the following consequences/ scenarios:

a. The onus of initiating action for recover of the said bad loans/ NPAs will fall on the shoulders of single entity or even if multiple bad banks are incorporated, still it will be on the shoulders of those few entities only when compared to the large segment of banks and financial institutions. This will result into non-catering to the needs of credit healthiness because of the sheer inability to concentrate on those many number of cases by very few organisations.

b. The entire pragmatism of implementation of IBC on all those cases will become single institute oriented resulting into few players only playing the game and others will be kept aside. This is because the sole bad bank will tend to deal with very few Insolvency Professionals who are having good rapport with the said bad bank. Here we also have to think that too much of concentration of anything at single place will yield into monopoly and destroys the competition. Ultimately, if there is no competition then those who are effectively in the play will down play their capacity and may result into the collapse of the implementation of IBC.

c. There is one more disadvantage when looking from the dimension of banks. All the banks and financial institutions will exercise least care and caution while granting the

loans. This is because all the NPAs either existing or future will be transferred with some discount to the Bad Banks and the banks are ensured of certain amount without fail. This may result into the banks concentrating on expanding their business rather than concentrating on checking the credit worthiness and exercising due diligence while granting the loans. This may result into more NPAs and the economy of the nation itself may collapse.

d. Another disadvantage is all the banks and financial institutions are relieved from their responsibilities in recovering the amounts which might have/be resulted/resulting because of certain untimely and unwanted decisions taken while granting and disbursing the loans. If there is any flaw associated with the banks which might have resulted the company falling into NPA, then such flaw cannot be relieved without making the bank responsible for the associated inappropriate decision. The said bank or financial institution should be made accountable not only in recovering the amounts but also in taking steps to build the company by reviving in the form of CIRP and also enhancing the credit worthiness of the nation as a whole.

Therefore just by creating the bad bank concept, the image of our nation which is slowly gaining the importance as creditor friendly or creditor oriented control will be lost in the international spectrum, which I think at this juncture is not an appropriate decision until and unless all the above concerns are addressed in a fool proof manner.

3. How has your overall experience as an Insolvency Professional been since you are handling quite a number of assignments? What changes are you looking forward to in this already implemented law?

Reply: The experience as an Insolvency Professional is magnificent being the earliest entrant into the profession. This has given me an opportunity to diversify my perspectives like stepping up from compliances management to evolving as person who relentlessly working for the reviving of Corporates.

While handling the assignments, we even come across various dimensions of the problem which has resulted the company to undergo the insolvency resolution process. On few occasions we find out what kind of decisions taken by the erstwhile management has thrown the company into trouble, whereas in certain other occasions, the policy decisions taken by the Government could have yielded this unwanted situation. At the same time because of the company undergoing this turmoil, how the interests of various stakeholders is getting affected.

The financial creditors have to undergo the huge haircuts, the operational creditors sometimes will not receive anything out of the resolution plan, the workmen and employees have to spend nightmare

during the trouble times of the company and even after the receipt of resolution plan, there may not be a penny to them. As an Insolvency Professional, we have to even handle the fury of these segments of stakeholders.

Sometimes they may not even understand what is permissible and what is not. But they come to the Insolvency Professional under the impression that their problems will be solved. Even after receipt of the Resolution Plans, we may not be in a position to address the concerns of all the stakeholders to their satisfaction.

The following changes I am looking forward to be incorporated in this Code:

a. The Removal of IRP concept

The concept of Interim Resolution Professional (IRP) should be removed. This is because the IRP is also a person appointed by NCLT and is qualified to run the CIRP process. However any misdeeds done like violating the code and the regulations thereunder by the IRP shall be the reason to replace him similar to how the appointed RP can be replaced with another RP.

b. Mandatory Contribution of CIRP Expenses

The concept of mandatory contribution of CIRP expenses by the Financial Creditors in the first month of CIRP itself should be placed in the code, wherever it is necessary based on the availability of the funds in Corporate Debtor. Though there are various judgments, but in some cases the contribution is not coming. Simultaneously certain guidelines about how to utilise the contributed amount towards CIRP can be placed in the regulations like where to take mandatory permission from CoC members and where the amount can be utilised by the RP on his own.

c. Restriction on voting time lines by CoC Members

The concept of mandatory voting at the CoC meeting and/or restriction of evoting window for only 3 to 5 days shall be added. This will save the time in CIRP and also the CoC members will come prepared and with proper authorisation to meet the dead lines of voting.

d. Removal of the concept of priority payment to the dissenting CoC member

The payment to the dissenting CoC Member has to be made as per the plan amount. If priority payment is there, then certain CoC members are trying to take advantage of this by intentionally either dissenting or even abstaining themselves. There should be a mandatory requirement to express why the CoC member is dissenting to the resolution plan and the same should be noted in the Minutes. If the concern of that particular CoC member is about not getting a fair amount then that should be curbed. This is because the motive of the Code is not the recovery of money.

4. Since you are also a Company Secretary by profession, how has being a Company Secretary helped you in handling the assignments?

Reply: Being a Company Secretary, there is immense advantage in handling the assignments. This is because, the Company Secretaries has the acumen to understand the trivialities from the legal stand point of view, which has direct bearing in handling the assignments *vis-à-vis* understanding the financials as well.

Interpretation of the law is the core of any Company Secretary and the same will come as a greatest aid while handling the assignments. All the stakeholders will interact with the Insolvency Professional while handling that particular assignment and the said Insolvency Professional has to provide replies within the gamut of the Code. In such scenarios, I being a company secretary also, could be able to respond to such queries while explaining the legal position what the code has envisaged. This is because, quite often these stakeholders can approach the Insolvency Professional with their queries associated with lot of emotional quotient to safeguard their own interests against the interests of all the stakeholders, which may not be feasible under this legislation.

5. One of the major duties of Insolvency professionals is to identify avoidable transactions and seek appropriate reliefs from Adjudicating Authority. How far filing of these applications have benefitted the stakeholders under insolvency?

Reply: Before answering this question, I request everyone to understand that this Code is not having the teeth of dealing with avoidable transactions in a manner of criminal jurisprudence. At the most the orders from Adjudicating Authorities will be in the form of reversal of those transactions. But to what extent those orders can be implemented. At the same time, we also need to understand about the time lines. Within what timelines those transactions has to be reversed. Who has to follow up for the implementation of such orders? This is because, there is no direct linkage for the orders passed as reliefs against avoidable transactions and approval of resolution plans.

Once the resolution plan is approved, the Resolution Applicant is least bothered about those transactions, since it is not having any direct bearing on his interests. The Financial Creditors and the Resolution Professional are out of the control of the Corporate Debtor.

At the same time, the responsibility to be bestowed on the Insolvency Professionals could be only to identification of such avoidable transactions. This is because the duties of Insolvency Professionals are not like investigating authorities. They are in this process to obtain resolution in the given situation. May be once those transactions are identified, then further investigation can be handed over to various investigating authorities and make the Corporate Debtor free from such transactions, so that the Resolution Applicants will have interest

to submit resolution plans in "as is where is basis".

6. What is your take on the implementation of Pre-packaged Insolvency Resolution Framework for Corporate MSMEs which has been introduced through "The Insolvency and Bankruptcy Code (Amendment) Act, 2021?"

Reply: The concept of pre-packaged insolvency resolution framework has its own pitfalls. First and foremost, we must understand that the situation of testing the solvency of the corporate might have arisen due to the inappropriate decisions of the promoters in certain cases and the basic tenet of Section 29A which makes the promoter is ineligible to submit the resolution plan in normal cases has this background.

When the basic premise is to make the promoter ineligible to participate in the resolution plan submission, then why the same logic should not be applied for MSMEs. I agree that the promoter of MSME can participate in the normal CIRP process for submission of resolution plan, but the process followed here is the CoC and Resolution Professional invite from outside and alongside the promoter can participate. Because of this existing process, all the stakeholders mainly the CoC and Resolution Professional will be having knowledge about the corporate and can form an opinion which will become the base to evaluate the resolution plans which might have received for the said corporate along with the plan submitted by the Promoter of MSME.

Whereas in the pre-packaged process, the understanding or forming the base to judge the resolution plan itself is starting with the plan already submitted by the promoter of MSME and then we will initiate inviting the plans from outsiders. In such scenario the entire formation of opinion itself is getting biased and prejudiced. Apart from this, if the base resolution plan is acceptable to the CoC, then the opportunity to get different resolution plans from outsiders itself is lost, thereby the opportunity of possible maximisation of the value of assets and corporate debtor may be lost.

In addition to the above, the Insolvency professional can only monitor the management of affairs of the corporate unlike the management of affairs which is vested in the insolvency professional under normal CIRP process. This might eventually not having full control over the corporate in order to achieve the desired objective of resolution process. If any gross mismanagement is identified then the Resolution Professional has to make an application with the Adjudicating Authority seeking vesting of management of affairs with the Resolution Professional. This will ultimately result into loss of time and energies of all the stakeholders.

In the pre-packaged process, the list of claims has to be submitted by the corporate debtor to the resolution professional. This will create a situation where the entire disclosure of the claims might not be done by the promoter of the corporate debtor and may result into not taking into consideration the interests of all the stakeholders. Though there is a provision to move any court which is having jurisdiction

for seeking compensation, this may create delay in completion of the process and unnecessarily result into too many litigations. Moreover, the mention of court is made instead of Adjudicating Authority. In such scenario the outcome of this process itself will have unknown debacles.

Under section 54-O, there is a possibility for recommending by CoC to initiate the normal CIRP by terminating the pre-packaged process. In such circumstances, the time period vested in pre-packaged process is totally wasted and in fact the process itself is delayed by that pre-packaged process time period.

In my opinion, under the guise of speedy recovery of the corporate and immediate implementation of CIRP, we are losing focus on evaluating the situations which might have caused the distress to the corporate. Moreover, we are contemplating to implement this pre-pack process for big corporates, which may result into disaster.

7. According to you, how far the Insolvency and Bankruptcy Code, 2016 has benefitted the allottees of real estate projects?

Reply: Generally, these home buyers fall under the category of stakeholders who are large in number but holding only a small unit of housing unit/apartment in the real estate project. In the given scenario it is very difficult to protect the interests of the home buyers. Off late the home buyers have got the recognition as financial creditors with the verdict of supreme court.

Though they got the recognition as financial creditors with the abovementioned verdict, they still fall under the category of unsecured creditors. Therefore, in case of liquidation they disembark the priority list and will fall below the secured creditors. In such cases, the decisions of the secured lenders only will prevail over the decisions of these unsecured financial creditors. And often in waterfall mechanism the secured financial creditors may get the whole amount, and nothing may be spilling over for the benefit of these home buyers.

In my opinion, though there is no much benefit to the home buyers, at least they got some voice to showcase in the IBC cases where real estate projects are involved.

8. First batch of GIP students has been graduated, what advice would you like to give these young Insolvency Professionals?

Reply: Firstly, I wish to convey my hearty congratulations to all the GIP students who have been graduated and also my good wishes to the future batches. My advice to all the students is to view this Code and perceive this code as a game changer in the Business world. This is because, when an Insolvency Professional is taking up an assignment, he/she should understand that this is not just a simple assignment. It is "The Assignment" with which the interests of various stakeholders is going to be changed. There are multiple sections of stakeholders who are totally dependent on the outcome of the proceedings under this code. While performing the assignment, one has to keep in mind that the Insolvency Professional is the pivotal

point and the entire show runs based on the sole Insolvency Professional. Therefore we have to pragmatically place ourselves as everything required for the implementation of the resolution process of that entity, which requires humongous maturity and capability to deal with various situations and scenarios.

9. How significantly do you think the IBBI and IPAs serve the profession of Insolvency Professionals and what suggestion you want to give for the improvement?

Reply: Both IBBI and IPAs are significantly helping the profession to grow leaps and bounds. However, I would like to make a suggestion to segregate the duties and responsibilities with clear demarcation. The disclosures and compliance matters should be clearly bestowed upon IPAs alone rather than insisting on disclosures to be done for both the bodies. IBBI should relentlessly concentrate only on the legislation part of the Act, Rules and Regulations.

With this kind of demarcation, the emphasis for acting as a guiding force by IBBI for all the stakeholders like IPAs, IPEs, IPs etc., will be enhanced in understanding and implementing the code. Similarly the monitoring of these stakeholders will also be streamlined and also eased when IPAs are bestowed with the responsibility of monitoring the disclosures being made by the aforesaid stakeholders.

Under the present mechanism, complying with the disclosures to both IBBI and IPAs itself is herculean task. Moreover there is a necessity to streamline the forms in order to make a logical connection for the data submission, so that meaningful MIS can be made out of it.

10. Lastly, where do you see Insolvency and Bankruptcy Code and yourself as an IP in next 5 years?

Reply: The success of the profession and the standing of any Insolvency professional depends on what kind of measures being taken by various stakeholders in implementation of this piece of legislation. I foresee myself in acting like a torch bearer and making all the stakeholders vigilant about the possible outcomes for the decisions being taken today, so that we all can stand as successful stakeholders in building the image of our nation.

Insight!

Interplay between Direct Tax Laws & The Insolvency & Bankruptcy Code 2016

KARAN N. SANGHAVI
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I am a qualified Chartered Accountant and a semi qualified Company Secretary, I am currently pursuing LLB with the University of Mumbai. I have also secured the rank #1 by merit in the Graduate Insolvency Program hosted by the IICA.

I am associated as a partner with M/s Nainesh Sanghavi & Co, Chartered Accountants, providing a range of legal consulting as well as financial & regulatory advisory services and as a director in a multifunctional executive search firm named Fact Personnel Pvt. Ltd. Based out of Mumbai engaged primarily in the headhunting of top talent.

On 18th August 2021, the Central Board of Direct Taxes issued a notification (Notification No. 93/2021/F.No. 370142/34/2021-TPL(Part III)) to allow resolution professionals appointed by the National Company Law Tribunal (NCLT) to verify the tax returns of companies undergoing bankruptcy. The Income-tax (24th Amendment) Rules, 2021 notified by the tax department also made it the obligation of the resolution professional to follow the rules meant for tax return preparers of certain assessees.

Authorised representatives who prepare tax returns for assessees are required to furnish details of the documents given by the assessee for preparation of the return as well as details of the scope and findings of any examination the representative has done on such documents. The new rules authorise the resolution professional to furnish this information in the case of a company undergoing bankruptcy proceedings, showed the rule amendment.

The idea was to synchronize the two laws so that there remain no cracks in the regulatory process and bring about and end to the debates, conflicts and ambiguities in interpretation of both laws read with each other. Through this article we examine the interplay between Tax Laws & the Insolvency & Bankruptcy Code 2016 and bring to light ongoing issues.

◆ Direct Tax Aspects of CIRP

The following are the provisions wherein the interplay between Tax Authorities and the Corporate Debtor occurs:

Insolvency & Bankruptcy Code, 2016		*Income-tax Act, 1961*	
Section 6	Persons who may initiate CIRP	2nd Schedule	Procedure for Recovery of Tax
Section 14	Moratorium	Section 28	Profits & Gains of Business & Profession
Section 31	Approval of Resolution Plan	Section 41	Profits chargeable to Tax
Section 36	Liquidation Estate	Section 50C	Special provision for full value of consideration in certain cases.
Section 53	Distribution of assets	Section 56	Income from other sources
Section 66	Fraudulent & Wrongful Trading	Section 79	Set off & carry forward of losses
Section 228	Provisions of the Code to override other laws.	Section 115JB	Special provision for payment of tax by certain companies.
		Section 140	Return to be verified by whom
		Section 147	Income escaping assessment
		Section 178	Company in Liquidation
		Section 194-IA	Payment on transfer of immovable property other than agriculture land

◆ Important Case Laws and issues:

Swiss Ribbons (P). Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365	Supreme Court
Committee of Creditors of Essar Steel India (P.) Ltd. v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234	Supreme Court

CIT v. *Mahindra & Mahindra Ltd.* (2018) 93 taxmann.com 32/255 Taxman 305/404 ITR 1 (SC)	Supreme Court
Ghanashyam Mishra and Sons (P.) Ltd. v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237	Supreme Court
Om Prakash Agrawal v. *Chief CIT* (2021) 124 taxmann.com 305	NCLAT- New Delhi

(*a*) The conundrum of the Tax Department being a financial or an operational creditor:

The Government and its agencies are key stakeholders of the IBC, as they are a key catalyst to economic growth, promote entrepreneurship and availability of credit, rehabilitate a company in distress through resolution process, and release under-utilised resources for more efficient uses through liquidation process. The Code balances the interests of all stakeholders, including the Government.

IBC provides for a waterfall mechanism of order of payments which prioritises the claims of various stakeholders for payment from the proceeds. The stakeholders placed higher in priority get paid first, and the claims of the set of stakeholders placed next in priority are considered only if there is any surplus left after fully satisfying the claims of the prior set of stakeholders.

Operational creditors defined under section 5(20) as "A person to whom operational debt is owed and includes any person to whom such debt has been legally assigned or transferred."

In the landmark judgment of "*Swiss Ribbons (P.) Ltd. (Supra)* .— Writ Petition (Civil) No. 99 of 2018", the Hon'ble Supreme Court while dealing with the different provisions of the 'I&B Code', including Section 5(20), observed as follows:

"an 'operational debt' would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.

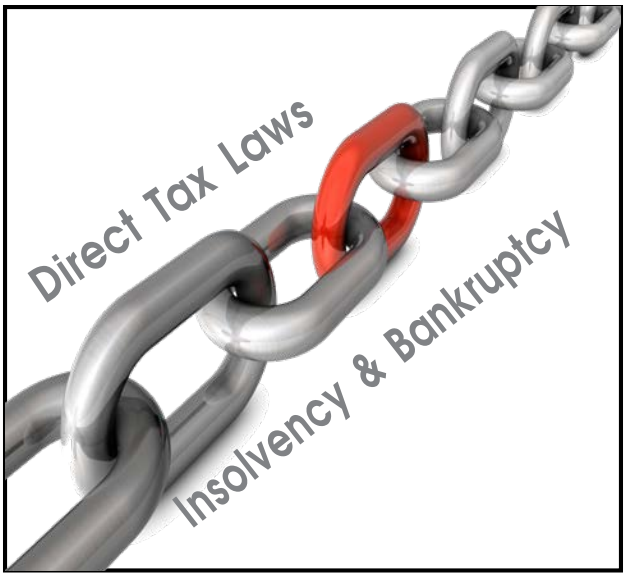
From the plain reading of sub-section (21) of Section 5, we find that there is no ambiguity in the said provision and the legislature has not used the word 'and' but chose the word 'or' between 'goods or services' including employment and before 'a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, and State Government or any local authority"

(*b*) Status of TDS under the code:

Introduced in 2013, section 194-IA prescribes that a buyer of immovable property that costs more than Rs. 50 Lakhs is required to deduct TDS while paying the seller.

In the landmark judgment of *Om Prakash Agrawal (Supra)*, the appeal was against an order of the NCLT, where the Adjudicating Authority for direction against the successful bidder in an auction held for sale of assets of the Corporate Debtor and, Income-tax Authority not to deduct 1% TDS from the sale consideration on the premise that Income-tax dues can be recovered by the department as per waterfall mechanism set out under section 53 of Insolvency and Bankruptcy Code.

However, setting aside the order of the NCLT, NCLAT held that any buyer of property from a Liquidator under Insolvency and Bankruptcy Code, 2016 shall not deduct and pay 1% TDS from the sale consideration under section 194-IA of the Income-tax Act, 1961. It was also held that TDS once deducted cannot be claimed as refund during Liquidation Process because the Liquidator is not required to prepare Audited Financial Statements during Liquidation Process and filing of Income-tax return is not possible under the law without preparing an auditing annual financial statements and other documents. Since the TDS is not refundable during Liquidation Process, it is a clear inconsistency with section 53(1)(*e*) of the IBC and therefore, section 238 would prevail and IBC would have an overriding effect.



(*c*) Taxation of "haircuts":

On the hands of the Corporate Debtor

Provisions of section 28(*iv*) and section 41(1) of the Act become relevant in the case of the corporate debtor where the debt or part of the debt is waivered.

Section 28

> "The following income shall be chargeable to income- tax under the head Profits and gains of business or profession:
>
> (*iv*) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession"

The Apex court in the case of *Mahindra & Mahindra Ltd. (Supra)*, has held that

waiver of loan by the creditor results receipt in the hands of the assessee and once 'waiver of loan' is treated as 'receipt', it can be said that the benefit accrued to the assessee is monetary benefit and it would automatically fall outside the purview of section 28(*iv*). In other words, only non-monetary benefit or non-monetary perquisite is taxed as income under this section, hence no liability is created.

Section 41

> "Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year—
>
> (*a*) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not"

In the same case law of *Mahindra & Mahindra Ltd.(Supra)*, The Supreme Court held that this section shall not be attracted if no benefit was earlier taken in form of deductions on interest paid under section 36 of the Income-tax Act, 1961. With respect to the waiver of principle amount of the loan, the same shall not be liable to any tax.

On the hands of the Resolution applicant

Under Section 56(2)(*x*) of the Income-tax Act, 1961, an assessee being any person as defined under the Income-tax Act, receives any immovable property or a property other than immovable property, fair market value of which exceeds the consideration paid for by a difference of Rs. 50,000 or more, such difference between the fair market value and the consideration paid shall be liable to be charged to tax under "Income from other sources"

(*d*) Possibilities of Reassessment after CIRP or Acquisition of Corporate Debtor by the Resolution Applicant:

While at the time of writing this article, both the Income-tax Act & the Insolvency & Bankruptcy Code are silent on matters of reassessment of direct taxes, we rely on the pronounced judgments to declutter the issue of reassessments after CIRP or in the hands of the Resolution Applicant.

Section 147 of the Income-tax Acts lays down that "*If*—

(*a*) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material

facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(*b*) notwithstanding that there has been no omission or failure as mentioned in clause (*a*) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153 assess or re-assess such income or re-compute the loss or the depreciation allowance, as the case may be, for the assessment year concerned."

A discouraging aspect of this could be placed in the hands of the potential resolution applicants, could the tax department come after them for the past wrong doings of the erstwhile corporate debtors.

Laid down in the Landmark Judgment of Committee of Creditors of *Essar Steel India Ltd. (Supra).* The Supreme Court clarified that reagitation of undecided claims cannot be permitted and that all claims must be submitted to and decided by the resolution professional so that the prospective resolution applicant knows exactly what needs to be paid to take over and run the business. This provision ensures that the successful resolution applicant starts running the business of the corporate debtor with a "clean slate". This shall include. A successful Resolution Applicant cannot suddenly be faced with "undecided" claims after the Resolution Plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by the successful resolution applicant.

Also, in the case of *Ghanashyam Mishra and Sons (P.) Ltd .(Supra),* The Apex Court held that once the Adjudicating authority approves the Resolution Plan, it shall be binding on everyone including Corporate Debtor and its employees, Members, Creditors including the Central Government, any State Government or any local authority, to whom a debt is owed in respect of the payment of dues arising under any law for the time being in force, guarantors and other stakeholders, involved in the Resolution Plan. Thus, On the date of approval of resolution plan by the AA, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan, including dues to any department of the central or state government.

◆ Conclusion

In the Rajya Sabha debates, on 29th July 2019, when the Bill for amending I&B Code came up for discussion, there were certain issues raised by certain Members. While replying to the issues raised by certain Members, the Hon'ble Finance Minister stated thus:

"IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that

IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but largely, yes, it is IBC.

There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim. The Government will not make any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan. Criminal matters alone would be proceeded against individuals and not company. There will be no criminal proceedings against successful resolution applicant. There will be no criminal proceedings against successful resolution applicant for fraud by previous promoters. So, I hope that is absolutely clear. I would want all the Hon'ble Members to recognize this message and communicate further that this Code, therefore, gives that comfort to all new bidders. So now, they need not be scared that the taxman will come after them for the faults of the earlier promoters. No. Once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company"

While not many case laws have come to conclude the interplay between the Direct Tax Laws and the Insolvency & Bankruptcy Code, We can expect the near future to lay down some clarifications and provide a guidance on steering one through the direct tax aspects of the CIR process & Liquidation.

INSIGHTS

Commercial Wisdom of the Committee of Creditors

Anjali Sharma
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"Partner, Integral Law Offices
Director, Resolve International Pvt. Ltd."

1. A FRESH PERSPECTIVE IN THE CONTEXT OF SECTION 22 OF THE INSOLVENCY AND BANKRUPTCY CODE

In insolvency law and practice, the terms "commercial decision" or "commercial wisdom" of the Committee of Creditors, are often repeated in various contexts. However, neither of these terms, commercial decision/commercial wisdom, are defined in the Insolvency and Bankruptcy Code, and therefore, to fully understand their import, their meanings are derived from the judgments dealing with these aspects, or even their dictionary meanings can be looked at. In this article, I intend to explore whether it really is the intention of the law that every decision of the Committee of Creditors (COC) during the corporate insolvency resolution process of a corporate person, particularly, replacing an Interim Resolution Professional under section 22 of the Insolvency and Bankruptcy Code, is non-justiciable on account of its being a "commercial decision" of the COC. I shall do so in the context of a recent, very lucid judgment passed by the NCLT Ahmedabad Bench-I on 12th July, 2021, in the matter titled *"Committee of Creditors v. Parag Sheth* (2021)129 taxmann.com 295.".

2. K. SASIDHAR, COMMERCIAL WISDOM, AND IN-FORMED DECISIONS

As is well known, these terms first gained prominence in insolvency law parlance after the decision of the Hon'ble Supreme Court in the case titled, "*K. Sashidhar v. Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312". When seized with a challenge to a liquidation order passed after a resolution plan was not approved by the requisite majority in voting share of the COC, the Hon'ble Supreme Court *inter alia* held as follows in that case :-

> 'There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor

and the feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.' (Para 52)

There can be no dispute with the proposition that examination of a resolution plan, and the decision whether to approve it or not, is indeed a commercial/business decision of the Committee of Creditors. Their commercial wisdom in such a case is non-justiciable because the COC is assumed to be fully informed about the viability of the corporate debtor and the feasibility of the proposed resolution plan.

There are many other decisions along the same lines, of Hon'ble Supreme Court, the NCLAT, and different benches of the NCLT in the context of resolution plans, liquidation, distribution of amounts, extent of claims admitted & reflected in resolution plans, and their sufficiency or otherwise. In each such case, there is 'an intrinsic assumption that the financial creditors are fully informed' about the aspect under consideration; and that they take informed decisions. Can this however be assumed when the COC replaces an Interim Resolution Professional under section 22 of the Insolvency and Bankruptcy Code with a Resolution Professional of their choice? Especially when it does so within 7 (seven) days after being constituted, during the first COC meeting? That doesn't quite seem to stand the test of reason.

3. WHAT THE NCLAT HAS HELD

The NCLAT New Delhi has held that such replacements of IRPs with the RPs of the COC's choice is a commercial decision of the COC, and that it is their prerogative to do so. In the case of "*Committee of Creditors of LEEL Electricals Ltd. through State Bank of India* v. *Leel Electricals Ltd. through its Interim Resolution Professional, Arvind Mittal Co. Appeal (AT) (Insolvency) No. 1100 of 2020*", the NCLAT *vide* its order passed on 21st December, 2020, unequivocally held that it is well settled that the decision with regard to appointment of IRP as RP or replacement of IRP by another RP in terms of Section 22 of the Code, is a decision based on the commercial wisdom of the COC which is not amenable to judicial review. Two earlier decisions of the NCLAT in the cases titled "*Naveen Kumar Jain* v. *Committee of Creditors of K.D.K. Enterprises (P.) Ltd.* (2021) 123 taxmann.com 55/163 SCL 703", as well as "*Punjab National Bank* v. *Kiran Shah,* (2020) 117 taxmann.com 427 (NCL-AT).", were referred to and relied upon. In a recent well-reasoned judgment passed by it in the matter titled "*Parag Sheth* (Supra)" however, the NCLT Ahmedabad Bench-I has held differently.

4. REPLACEMENT OF IRP WITH ANOTHER RP UNDER SECTION 22 OF THE IBC : A DIFFERENT PERSPECTIVE

The facts in the case before the Ahmedabad Bench hearing the case titled, "*Parag Sheth (Supra)*" were that during the very first COC meeting, the COC had passed a resolution in favour of replacing the IRP. The name of another RP was approved with 78.26% votes. The COC contended that the appointment of the RP is its prerogative and based on its commercial wisdom. However, the Financial Creditor that had filed the application under section 7 of Code, as well as the IRP, both objected to the same on the ground that there was no need for such replacement, and that the decision was arbitrary. Further, that the proposed RP was based at a location which was quite distant from the location where the Corporate Debtor and its properties are situated. Furthermore, that the fee quoted by the proposed RP was higher than the fee quoted by IRP. The learned Bench upon hearing the parties noticed the following:

That in the first meeting itself, the COC had decided to replace the IRP without assigning any reason therefor;

> "The IRP had performed his duties as expected under the Code read with the relevant Regulations;
>
> The IRP was based at the place where the registered office and assets of the Corporate Debtor are located, but the proposed RP was from New Delhi;
>
> The fee quoted by the proposed RP was higher as compared to the fee quoted by the IRP;
>
> No material had been brought on record to show the incompetence or non-suitability of the IRP while passing a resolution for removal of the IRP and appointing a new RP in his place; and
>
> A perusal of the consent form given by the proposed RP revealed that he had many assignments as RP and as liquidator, and hence considerable workload."

The Bench duly noted the stand of the COC that it is their prerogative to change the IRP and appoint RP in his place, but then proceeded to elaborately discuss the provisions of the Code and the Regulations dealing with the functions that the IRP is expected to perform. It was noticed that the smooth conduct of the CIRP in the initial phase, when the COC is not even constituted, is the responsibility of IRP; and the IRP has to manage the operations of the Corporate Debtor as a going concern in that period.

As per Section 22(1) of Code, the first meeting of the COC has to be held within seven days after its constitution; and as per Section 22(2), in this first meeting the COC may either resolve to appoint the IRP as RP, or replace him with another Resolution Professional. The Bench paused to reflect upon the use of the word, may in Section 22(2) of the Code, *i.e.*, that the IRP appointed by the Adjudicating Authority may (or may not) be replaced by the COC. Discretion is given to the COC in this regard; but it is well settled judicially that discretion cannot be exercised in an unreasonable or arbitrary manner. Therefore, if the COC decides to replace the IRP with another RP, there must exist valid grounds/

justifiable reasons for it to do so. Such valid grounds/justifiable reasons could be, that the conduct of IRP is not up to the mark, or he is not working independently, or other compelling reasons; but it is difficult to understand how the appointment or replacement of IRP, in the very first COC meeting after the Corporate Debtor being admitted into CIRP be construed as being an exercise of commercial wisdom. This is because until that stage no significant developments with respect to the steps specified in Section 25(2)(*h*) of the Code have usually been taken, and it is only for taking such steps that the need for the COC to exercise its commercial wisdom arises. Looking to Sections 15, 17, 18 and 20 of the Code which define the scope of duties and powers of IRP - that are mainly to do with background work for the smooth conduct of CIRP, and management of the Corporate Debtor as a going concern during the IRP's tenure - the Bench concluded that in fact the appointment or replacement of IRP as RP is an exercise of administrative nature. Consequently, the question of immunity from judicial scrutiny under the garb of commercial wisdom does not arise.

The Bench also adverted to Section 27 of Code, which comes into play when a Resolution Professional appointed under section 22 is required to be replaced during the corporate insolvency resolution process if the COC is of the opinion that such replacement is required. The Bench then opined that this pre-supposes the COC forming an opinion that the replacement is necessary. To do so capriciously or whimsically would adversely affect the conduct of the CIRP which is to be completed in a time-bound manner. The Bench then juxtaposed this requirement of forming an opinion before replacing a RP with another RP under section 27 of the Code, with the contention that an IRP can be replaced with a RP under section 22 of the Code by the COC without assigning any reason or forming any opinion. The Bench opined that the absence of the word 'opinion' in Section 22(2) of Code cannot be construed to mean that no formation of opinion is required, since the use of the word may in Section 22(2) necessitates the formation of an opinion before the contemplated decision is taken. In the words of the Bench, excerpted from

its lucid and logical judgment passed on 12th July, 2021, in the matter titled " Parag Sheth (Supra)" :

> 'Thus, even under section 22 of IBC, 2016, proper justification is required for not appointing IRP as RP, as IRP performs very critical functions in the initial phases of CIRP which have already been discussed and on that basis the performance of IRP can be evaluated. In our considered view, such evaluation for changing the IRP

even under section 22 of IBC, 2016 is necessary and it must be born out of deliberations on this aspect in the minutes of COC where a resolution for replacement of IRP is passed.'

Referring to Section 22(5) of the Code the Bench also observed that even if the COC passes the resolution with the requisite percentage of votes to replace the IRP, it cannot be said that such decision has mandatorily to be confirmed by the Adjudicating Authority in all circumstances. If that were to be so, '*the Adjudicating Authority would become a signpost and not a check post*', which is not the intention of the law. The Bench excerpted the following observations of the Hon'ble Supreme Court in the case of "*Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234", to emphasize that checks & balances, even in the context of consideration of resolution plans by the COC, are actually in place :

> 'This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all

stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.'

Last but not the least, the Bench also pointed out that these checks and balances in replacement/appointment of IRPs/RPs will augment independent action, and as officers of the Court that is what is expected of IRPs/RPs. They are expected to act in an unbiased manner, for the benefit of all stakeholders, and not merely for FCs will large voting percentages.

The Bench concluded with looking to the common parlance and dictionary meanings of the words, "commercial" and wisdom" since they are not defined in the Code, and then held that, *'Therefore the exercise of commercial wisdom involves rational thinking, justified reasons and ability to understand the consequences of such action while taking such action. If commercial wisdom is viewed in this manner, then it becomes apparent that in many cases the decision to replace the IRP is not an instance of exercise of commercial wisdom, but is actually an exercise of voting strength.'* In the case before it the Bench held that the replacement of IRP was obviously an imprudent decision in the stated facts and circumstances, and the basic objects of the Code, including timely resolution of insolvency of the Corporate Debtor, were unlikely to be achieved by the same. The same was therefore set aside. In the parting words of the Bench :

'Before parting, we may add that the success of CIRP is contingent upon independence competence of IRP and genuineness of intent of Committee of Creditors who acts in fiduciary capacity for all stakeholders and not merely confining to fulfilling of their own interests which makes IBC, 2016 like earlier regimes where individual actions and rights were a primary focus. Further, under the present structure such approach of Committee of Creditors would result into substantial damage to larger public interests including slowing down of economy due to massive write-offs imposed upon Operational Creditors who may become insolvent or go out of business due to loss of their legitimate dues. Thus, more unemployment and non-availability of credit, defeating one of the objects of IBC, 2016. Such approach of Committee of Creditors gets reflected from the very beginning in replacing IRP in this manner, hence, this needs to be checked at this stage only, so as to make CIRP achieve the stated objectives to the fullest extent.'

5. SUMMATION

The NCLT Ahmedabad Bench-I, in its judgment in "*Parag Sheth (Supra)*", has not noticed the view of the NCLAT New Delhi in "*Leel Electricals Ltd.(Supra)* through its Interim Resolution Professional, Arvind Mittal", and in earlier judgments. The Hon'ble NCLAT has, without discussion, held that it is well settled that appointing the IRP as RP or replacing the IRP by another RP under section 22 of the Code falls within the realm of commercial wisdom of the COC, which is not amenable to judicial review. The NCLT has not adverted to the NCLAT's view, and therefore, its order will perhaps be *set aside* in appeal if any is filed. That notwithstanding, the NCLT has passed a well-reasoned judgment and raised moot questions, the principal ones among them being, that if there is to be an '*intrinsic assumption that financial creditors are fully informed*', as held in "*K. Sashidhar (Supra)*", regarding the viability of the CD, and other aspects of the CIRP of a CD that fall within their commercial wisdom, then can the appointment of IRP as RP, or replacement of IRP by another RP under section 22 of the Code, be also taken to fall within this category? Most COC resolutions in this regard are passed during the first COC meeting after the constitution of the COC. Can they be construed as informed decisions emanating out of commercial wisdom, and hence non-justiciable? The answer is, in the view of this author is, obviously not.

(2021) 129 taxmann.com 133 (SC)

SUPREME COURT OF INDIA

Kay Bouvet Engineering Ltd. v. Overseas Infrastructure Alliance (India) (P.) Ltd.

R.F. NARIMAN AND B.R. GAVAI, JJ.

CIVIL APPEAL NO. 1137 OF 2019

AUGUST 10, 2021

Section 9, read with section 5(6), of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Initiation by Corporate Creditor - Whether once, operational creditor files an application which is otherwise complete, Adjudicating Authority has to reject application under section 9(5)(ii)(d), if a notice has been received by operational creditor or if there is a record of dispute in information utility - Held, yes - Whether what is required is that notice by corporate debtor must bring to notice of operational creditor, existence of a dispute or fact that a suit or arbitration proceedings relating to a dispute is pending between parties - Held, yes - Respondent EPC contractor (operational creditor) was awarded contract by one 'M' for commissioning of a sugar plant at its site - Appellant was selected as sub-contractor for said project through competitive bidding - Respondent had advanced a sum to appellant sub-contractor (corporate debtor) on behalf of M for said contract which was later terminated - Thereafter, a new contract was entered into between M and appellant directly - M had directed that amount so advanced earlier was to be adjusted against supplies to be made for purpose of completing Project - On contrary, documents clarified that termination of contract with respondent would not absolve respondent of any

liability for balance disbursed to them other than amount paid to appellant - Whether therefore, after finding that there existed a dispute between appellant and respondent, NCLT rejected application of respondent as such an order under section 9 could not have been passed - Held, yes - Whether NCLAT had patently misinterpreted factual as well as legal position and erred in directing admission of section 9 petition - Held, yes (Paras 13, 31, 32 and 33)

FACTS

- The respondent/Overseas was awarded an EPC Contract by one 'M' for commissioning of a sugar plant at its site. The said project was proposed to be financed under the Government of India's line of credit being operated through EXIM Bank. Appellant was selected as sub-contractor for the said project through competitive bidding. A Tripartite Agreement came to be executed between 'M', the appellant and the respondent in this regard. The respondent claimed to have paid 10 per cent of the contract value to the appellant as advance payment. The project was decided to be financed by EXIM Bank in two tranches.

- The first tranche contract between 'M' and the respondent was almost completed without involvement of appellant. However, since the bank did not release the payment under second tranche agreement. 'M' terminated the contract vide its letter dated 15-6-2017 citing unwillingness of Government of India and EXIM bank to support the project with the respondent. The appellant filed suit before the High Court against bank.

- Later on, 'M' appointed the appellant as its EPC contractor for the said project. In terms of new EPC contract, the earlier tripartite agreement became invalid and incapable of being performed. The respondent, in view of the aforesaid development, demanded refund of the advance amount. In its reply to the demand notice issued by the respondent, the appellant alleged existence of dispute with respect to the operational debt. This was contested by the respondent as being spurious. The respondent claimed that subject matter of the suit was completely different from the subject matter of the petition under section 9 and pendency of the suit in no manner operated as a bar against the respondent to claim payments from appellant qua the operational debtor.

- The respondent filed application under section 9 against appellant for initiation of 'Corporate Insolvency Resolution Process' but same had been dismissed by NCLT on the ground that there was existence of a dispute between the two parties as the respondent was contesting a specific performance civil suit on one hand and on the other hand pressing for commencement of

insolvency proceedings in respect of an amount which was the subject matter in both the proceedings.

- On appeal, the NCLAT allowed the appeal of the respondent.
- On appeal by appellant to the Supreme Court:

HELD

- Perusal of sections 8 and 9 of the IBC would reveal that an 'operational creditor', on the occurrence of default, is required to deliver a 'demand notice' of unpaid 'operational debt' or a copy of invoice, demanding payment of amount involved in the default to the 'corporate debtor' in such form and manner as may be prescribed. Within 10 days of the receipt of such 'demand notice' or copy of invoice, the 'corporate debtor' is required to either bring to the notice of the 'operational creditor' 'existence of a dispute' or to make the payment of unpaid 'operational debt' in the manner as may be prescribed. Thereafter, as per the provisions of section 9 of the IBC, after the expiry of the period of 10 days from the date of delivery of notice or invoice demanding payment under sub-section (1) of section 8 and if the 'operational creditor' does not receive payment from the 'corporate debtor' or notice of the dispute under sub-section (2) of section 8 of the IBC, the 'operational creditor' is entitled to file an application before the adjudicating authority for initiating the Corporate Insolvency Resolution Process. (Para 13)
- It could be seen that this Court has held that one of the objects of the IBC qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It has been held that it is for this reason that it is enough that a dispute exists between the parties.(Para 15)
- It is clear that once the 'operational creditor' has filed an application which is otherwise complete, the adjudicating authority has to reject the application under section 9(5)(ii)(d) of IBC, if a notice has been received by 'operational creditor' or if there is a record of dispute in the information utility. What is required is that the notice by the 'corporate debtor' must bring to the notice of 'operational creditor' the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. All that the adjudicating authority is required to see at this stage is, whether there is a plausible contention which requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is

important to separate the grain from the chaff and to reject a spurious defence which is a mere bluster. It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defence is likely to succeed or not. The Court also cannot go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application. (Para 17)

- In the light of the law laid down by this Court stated hereinabove, the facts of the present case need to be examined. It is clarified that though arguments have been advanced at the Bar with regard to the questions as to whether the so-called claim made by overseas would be considered to be an `operational debt' and as to whether Overseas could be considered to be an `operational creditor', it is not necessary to go into said questions, inasmuch as the present appeal can be decided only on a short question as to whether appellant has been in a position to make out the case of `existence of dispute' or not. (Para 18)

- It can be seen that the claim of Overseas is that in the reply filed to its Notice of Motion by appellant, it has admitted that `M' has, as a replacement of Overseas, appointed appellant as the Contractor. As such, the Tripartite Agreement dated 18-12-2010, stands vitiated and superseded. As such, appellant cannot perform under the said Tripartite Agreement. According to Overseas, therefore, in view of the admission in the reply, appellant is liable to refund the advance amount forthwith. (Para 20)

- It can thus be seen from reply, addressed by appellant to Overseas that appellant has clearly stated that the said amount of Rs. 47.12 crores was received as advance money on behalf of `M'. It has been specifically stated that in the agreement entered into between `M' and appellant on 5-7-2017, the said advance payment of Rs. 47.12 crores has been duly considered. It is stated that the execution of the fresh contract in favour of appellant in no manner creates an automatic liability on appellant. As such, appellant has pressed into service the `existence of dispute' for opposing the demand made by Overseas. (Para 22)

- It is to be examined as to whether the claim of appellant with regard to the `existence of dispute', can be considered to be the one which is spurious, illusory or not supported by any evidence. It will be relevant to refer to clause 14.1 of the Tripartite Agreement dated 18-12-2010, between M, respondent and appellant which provides that 10 per cent of the

sub-contract price as interest free advance payment by way of telegraphic transfer directly to the bank account of the sub-contractor against submission of invoice and Advance Payment Bank Guarantee for 10 per cent of the sub-contract price, from any Indian public sector bank acceptable to M upon receipt of amounts from EXIM Bank. The Advance Payment Bank Guarantee shall be as per format attached and its value may be reduced in proportion to the value of amounts invoiced as evidenced by shipping documents and receipt of payment from EXIM Bank. (Para 23)

- A perusal of various communications amongst parties abundantly makes it clear that the case of appellant that the amount of Rs. 47.12 crores which was paid to it by Overseas, was paid on behalf of M from the funds released to respondent by EXIM Bank on behalf of M, cannot be said to be a dispute which is spurious, illusory or not supported by the evidence placed on record. The material placed on record amply clarifies that the initial payment which was made to appellant as a sub-contractor by Overseas who was a Contractor, was made on behalf of M and from the funds received by Overseas from M. It will also be clear that when a new contract was entered into between M and appellant directly, M had directed the said amount of Rs. 47.12 crores to be adjusted against the supplies to be made for the purpose of completing the Project. On the contrary, the documents clarify that the termination of the contract with Overseas would not absolve Overseas of any liability for the balance of the LoC 1st tranche of 25 Million disbursed to them other than USD 10.62 paid to appellant. (Para 31)

- In these circumstances, it is found that NCLT had rightly rejected the application of Overseas after finding that there existed a dispute between appellant and Overseas and as such, an order under section 9 of the IBC would not have been passed. The NCLAT has patently misinterpreted the factual as well as legal position and erred in reversing the order of NCLT and directing admission of section 9 petition. (Para 32)

- Resultantly, this appeal is allowed and the impugned order dated 21-12-2018, passed by NCLAT is quashed and set aside. The order passed by NCLT dated 26-7-2018, is maintained. (Para 33)

CASE REVIEW

Overseas Infrastructure Alliance (India) (P.) Ltd. v. *Kay Bouvet Engg. Ltd.*(2019) 102 taxmann.com 172 (NCL-AT) (para 32) *set aside.*

CASES REFERRED TO

Overseas Infrastructure Alliance (India) (P.) Ltd. v. *Kay Bouvet Engg. Ltd.* (2019) 102 taxmann.com 172 (NCL-AT) (para 1) and *Mobilox Innovations (P.) Ltd.* v. *Kirusa*

Software (P.) Ltd. (2017) 85 taxmann.com 292/144 SCL 37 (SC) (para 14).

Jayant Bhushan, Sr. Adv., **Akshat Kumar**, AOR, **Ajay K. Jain**, **Atanu Mukherjee** and **Yash Karan Jain**, Advs. *for the Appellant.* **C.A. Sundaram**, Sr. Adv., **Amir Arsiwala**, **V. Siddharth**, Advs. and **P.N. Puri**, AOR *for the Respondent.*

JUDGMENT

B.R. Gavai, J. - This appeal challenges the judgment and order passed by the National Company Law Appellate Tribunal (hereinafter referred to as the "NCLAT") dated 21st December 2018, thereby allowing the appeal filed by respondent herein. The respondent herein had preferred an appeal being Company Appeal (AT) (Insolvency) No. 582 of 2018, in *Overseas Infrastructure Alliance (India) (P.) Ltd.* v. *Kay Bouvet Engg. Ltd.* (2019) 102 taxmann.com 172 (NCL - AT) challenging the order passed by the National Company Law Tribunal (hereinafter referred to as the "NCLT") dated 26th July 2018, thereby rejecting the petition being C.P. (IB)-20(MB)/2018, filed by the respondent herein under section 9 of the Insolvency and Bankruptcy Code (hereinafter referred to as the "IBC"). By the impugned order dated 21st December 2018, the NCLAT while allowing the appeal, has remitted back the matter to the NCLT with a direction to admit the petition filed by the respondent herein under section 9 of the IBC after giving limited notice to the appellant herein so as to enable it to settle the claim.

2. The facts in brief giving rise to the present appeal are as under:-

The Government of India extended Dollar Line of Credit (hereinafter referred to as the "LoC") of USD 150 Million to the Republic of Sudan through Exim Bank of India (hereinafter referred to as the "Exim Bank") for carrying out Mashkour Sugar Project in Sudan. This was in two tranches of USD 25 Million and USD 125 Million. On 26th January 2009, the first tranche of USD 25 Million was executed between Republic of Sudan and Exim Bank for financing the Mashkour Sugar Project. On 11th October 2009, Mashkour Sugar Company Limited, Sudan (hereinafter referred to as the "Mashkour") entered into an agreement with the respondent-Overseas Infrastructure Alliance (India) Private Limited (hereinafter referred to as the "Overseas") for USD 149,975,000 to be financed by Exim Bank. As per the said agreement, Mashkour was to nominate a sub-contractor. A subsequent agreement was entered into on 14th April 2010, between Mashkour and Overseas for payment of USD 25 Million to Overseas towards "design and engineering package and plant civil package including site mobilization". In response to the invitation by Mashkour, the appellant-Kay Bouvet Engineering Limited (hereinafter referred to as the "Kay Bouvet") submitted its bid as a sub-contractor for supply, erection and completion of the Sugar Plant at Sudan, which was accepted by Mashkour. On 18th December 2010, a Memorandum of Understanding (hereinafter referred to as the "MoU") was entered into between Mashkour, Overseas and Kay Bouvet at Khartoum, Sudan. The said MoU provided that the contract has to be governed by the laws of Sudan. The same MoU also defined roles and responsibilities of each of the parties. On the same date, a Tripartite

Agreement was also executed between all the three parties *vide* which, Kay Bouvet was appointed as a sub-contractor for executing the whole work of designing, engineering, supply, installation, erection, testing and completion of Factory Plant for Mashkour Sugar Company for an amount of USD 106.200 Million.

3. On 29th March 2011, Overseas *vide* an e-mail sent to Mashkour confirmed that under the Tripartite Agreement, Mashkour was to release payment of first tranche of LoC to Overseas and the Overseas in turn was to release payment of USD 10.62 Million to Kay Bouvet on submission of Advance Bank Guarantee and Performance Bank Guarantee by Kay Bouvet to Mashkour. *Vide* letter dated 21st April 2011, Exim Bank informed Overseas that an amount of Rs. 46.58 Crore had been remitted to its bank account. Overseas *vide* letter of the same date confirmed to Mashkour about receipt of funds and further informed that it will release USD 10.62 Million to Kay Bouvet on submission of requisite bank guarantees. On 28th July 2011, Kay Bouvet informed Overseas that it had submitted necessary Guarantees to Mashkour. On the advice of Mashkour, Overseas paid an amount of Rs. 47,12,10,000/- to Kay Bouvet. There were certain disputes with regard to exchange rate, on account of which, Kay Bouvet informed Mashkour that it ought to have been paid more amount in Indian Rupees.

4. After execution of second tranche of USD 125 Million on 24th July 2013, between Republic of Sudan and Exim Bank, an agreement was executed between Mashkour and Overseas on 9th February 2014, for balance amount of USD 124,975,000 for financing the final part of the Sugar Factory Project. On 30th October 2014, Overseas informed Exim Bank to transfer partial amount of USD 95,580,000 in favour of Kay Bouvet from the funds to be received under the LoC in relation to Sugar Project.

5. It appears that in the meantime, there was certain exchange of communications between the Ministry of External Affairs, Government of India (hereinafter referred to as the "GoI") and the Sudan Government. In pursuance to such exchange of communications, on 17th April 2017, the Ambassador of Sudan to India addressed to the Minister of State of External Affairs, GoI and advised to terminate the contract of Mashkour with Overseas and in turn to appoint Kay Bouvet as a Contractor. In response thereto, the Ministry of External Affairs informed the Ambassador of Sudan that it will be necessary to execute an agreement with Kay Bouvet in order to enable Exim Bank to release funds to Kay Bouvet. *Vide* communication dated 25th April 2017, the Ambassador of Sudan informed Mashkour to enter an agreement with Kay Bouvet as a direct contract for unutilized portion of GoI's LoC for USD 150 Million. It was also informed that the advance amount of Rs. 47,12,10,000/- received by Kay Bouvet from the first tranche of USD 25 Million was to be adjusted against supplies to be made to Mashkour for completing the project.

6. On 15th June 2017, Mashkour terminated the contract with Overseas for failure on its part to perform the duties. Overseas filed a Civil Suit being No. 785 of 2017 before the High Court of Bombay seeking specific performance of contract and an order of injunction from appointing Kay

Bouvet as a Contractor in the Mashkour Project. Notice of Motion No. 1314 of 2017 was also moved for injunction. *Vide* order dated 27th June 2017, prayer for ad interim relief made by Overseas came to be rejected by the Bombay High Court.

7. *Vide* communication dated 5th July 2017, Mashkour informed Kay Bouvet about the developments and termination of contract and further informed that the advance payment of Rs. 47,12,10,000/- received by Kay Bouvet from Overseas, was to be adjusted against supplies to be made to Mashkour for completion of the Project. It was further informed that Overseas will not claim back the said amount from Kay Bouvet. Accordingly, on the same day an agreement came to be executed between Mashkour and Kay Bouvet. The same was informed by the Ambassador of Sudan to the Ministry of External Affairs on 11th July 2017.

8. A Demand Notice under section 8 of the IBC was served upon Kay Bouvet by Overseas alleging default under the Tripartite Agreement and claiming an amount of USD 10.62 Million, paid by Overseas to Kay Bouvet. Kay Bouvet *vide* communication dated 6th December 2017, denied the claim of Overseas. It was specifically pointed out that the amount which was paid to Kay Bouvet by Overseas, was received on behalf of Mashkour and it was only routed through Overseas and the same stands adjusted under new agreement. On 27th December 2017, Overseas claiming itself to be an Operational Creditor, filed a petition under section 9 of the IBC before NCLT, Mumbai being CP (IB) No. 20(MB)/2018. *Vide* order dated 26th July 2018, the NCLT dismissed the petition. Overseas carried the same in an appeal being Company Appeal (AT) (Insolvency) No. 582 of 2018 before the NCLAT. By the impugned order dated 21st December 2018, NCLAT allowed the appeal as aforesaid. Being aggrieved thereby, the appellant-Kay Bouvet has approached this Court.

9. Shri Jayant Bhushan, learned Senior Counsel appearing on behalf of the appellant-Kay Bouvet submitted that by no stretch of imagination, the claim made by Overseas could be considered to be an "Operational Debt" and as such, Overseas cannot be an "Operational Creditor", enabling it to invoke the jurisdiction of NCLT under section 9 of the IBC. Shri Bhushan further submitted that Kay Bouvet could not have moved as a Financial Creditor and as such, by stretching the definition of "Operational Creditor", though it does not fit in the same, has filed the proceedings under section 9 of the IBC. The learned Senior Counsel submitted that no amount is receivable by Overseas from Kay Bouvet in respect of the provisions of goods or services, including employment or a debt in respect of the payment of dues and as such, it will not fit in the definition of "Operational Debt" as provided under sub-section (21) of Section 5 of the IBC. The learned Senior Counsel submitted that by the same analogy, Overseas would also not fall under the definition of "Operational Creditor".

10. Shri Bhushan further submitted that as a matter of fact, the payment which was made to Kay Bouvet by Overseas, was from the amount received by it from

Mashkour. He submitted that the material placed on record would clearly fortify this position. The learned Senior Counsel submitted that, in any case, perusal of clause 14.1 of the Tripartite Agreement would clearly show that the amount so paid, was paid by Mashkour to Overseas. It is submitted that in any case, the material placed on record and specifically the Demand Notice and reply thereto, clearly showed that there was an "existence of dispute" and as such, the NCLT had rightly dismissed the petition. It is submitted that, however, the NCLAT has misconstrued the provisions and allowed the appeal and directed admission of Section 9 petition. It is submitted that the jurisdiction of the adjudicating authorities under IBC is limited and it can adjudicate only on the limited areas that are delineated in the Statute.

11. Shri C.A. Sundaram, learned Senior Counsel appearing for respondent-Overseas, on the contrary, asserts that the amount which was paid to Kay Bouvet, was the amount paid from the funds of Overseas and not from Mashkour. He submitted that perusal of material placed on record would reveal that Kay Bouvet has admitted of receiving the amount from Overseas and once the party admits of any claim, the same would come in the definition of "Operational Debt" as defined under sub-section (21) of Section 5 of the IBC and enable the party to whom admission is made to file the proceedings under section 9 of the IBC being an "Operational Creditor". The learned Senior Counsel therefore submitted that NCLAT rightly considered the provisions and allowed the appeal of Overseas and directed admission of Section 9 petition. He therefore submitted that the present appeal deserves to be dismissed.

12. Though, elaborate submissions have been made on behalf of both the parties, we are of the considered view that the present appeal can be decided on a short ground without going into the other aspects of the matter. It will be relevant to refer to Sections 8 and 9 of the IBC:-

> "*8. Insolvency resolution by operational creditor.*—(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.
>
> (2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—
>
> (a) existence of a dispute, (if any, or) record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
>
> (b) the (payment) of unpaid operational debt —
>
> (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

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

9. *Application for initiation of corporate insolvency resolution process by operational creditor*.—(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of Section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(*a*) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(*b*) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(*c*) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt (by the corporate debtor, if available;)

((*d*) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and)

((*e*) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.)

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(*a*) the application made under sub-section (2) is complete;

(*b*) there is no (payment) of the unpaid operational debt;

(*c*) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(*d*) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(*e*) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(*a*) the application made under sub-section (2) is incomplete;

(*b*) there has been (payment) of the unpaid operational debt;

(*c*) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(*d*) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(*e*) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (*a*) of clause (*ii*) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

13. Perusal of the aforesaid provisions would reveal that an "Operational Creditor", on the occurrence of default, is required to deliver a "Demand Notice" of unpaid "Operational Debt" or a copy of invoice, demanding payment of amount involved in the default to the "Corporate Debtor" in such form and manner as may be prescribed. Within 10 days of the receipt of such "Demand Notice" or copy of invoice, the "Corporate Debtor" is required to either bring to the notice of the "Operational Creditor" "existence of a dispute" or to make the payment of unpaid "Operational Debt" in the manner as may be prescribed. Thereafter, as per the provisions of Section 9 of the IBC, after the expiry of the period of 10 days from

the date of delivery of notice or invoice demanding payment under sub-section (1) of Section 8 and if the "Operational Creditor" does not receive payment from the "Corporate Debtor" or notice of the dispute under sub-section (2) of Section 8 of the IBC, the "Operational Creditor" is entitled to file an application before the adjudicating authority for initiating the Corporate Insolvency Resolution Process.

14. The issue is no more *res integra*. It will be relevant to refer to paragraph 38 of the judgment of this Court in the case of *Mobilox Innovations (P.) Ltd.* v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/144 SCL 37:-

> "38. It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(*a*) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an Arbitral Tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an Arbitral Tribunal or a court for up to three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code *qua* operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties."

15. It could thus be seen that this Court has held that one of the objects of the IBC *qua* operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It has been held that it is for this reason that it is enough that a dispute exists between the parties.

16. It will further be apposite to refer to the following observations of this Court in *Mobilox Innovations (P.) Ltd.* (*supra*), wherein this Court has considered the terms "existence", "genuine dispute" and "genuine claim" and various authorities construing the said terms:-

> "45. The expression "existence" has been understood as follows:
>
> *"Shorter Oxford English Dictionary gives the following meaning of the word "existence":*
>
> (a) Reality, as opp. to appearance.
>
> (b) The fact or state of existing; actual possession of being. Continued being as a living creature, life, esp. under adverse conditions.
>
> *Something that exists; an entity, a being. All that exists. (P. 894, Oxford English Dictionary)"*
>
> 46. Two extremely instructive judgments, one of the Australian High Court, and the other of the Chancery Division in the UK, throw a great deal of light on the expression "existence of a dispute" contained in Section 8(2)(*a*) of the Code. The Australian judgment is reported as *Spencer Constructions Pty Ltd.* v. *G & M Aldridge Pty Ltd.* (*Spencer Constructions Pty Ltd.* v. *G & M Aldridge Pty Ltd.*, 1997 FCA 681 (Aust)) The Australian High Court had to construe Section 459H of the Corporations Law, which read as under:
>
> *"(1)** ** ***
>
> (*a*) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
>
> (*b*) ** ** **"
>
> 47. The expression "genuine dispute" was then held to mean the following:
>
> *"Finn, J. was content to adopt the explanation of "genuine dispute" given by McLelland, C.J. in Eq in Eyota Pty Ltd. v. Hanave Pty Ltd. (Eyota Pty Ltd. v. Hanave Pty Ltd., (1994) 12 ACSR 785 (Aust)) ACSR at p. 787 where his Honour said:*
>
> *'In my opinion (the) expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit 'however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently and probable in itself, it may be not having 'sufficient* prima facie *plausibility to merit further investigation as to (its) truth' (cf Eng Mee Yong v. Letchumanan (Eng*

> *Mee Yong v. Letchumanan, 1980 AC 331 :(1979) 3 WLR 373 (PC)) AC at p. 341G), or 'a patently feeble legal argument or an assertion of facts unsupported by evidence': cf South Australia v. Wall (South Australia v. Wall, (1980) 24 SASR 189 (Aust)) SASR at p. 194.'*

His Honour also referred to the judgment of Lindgren, J. in *Rohalo Pharmaceutical Pty Ltd.* (*Rohalo Pharmaceutical Pty Ltd.* v. *RP Scherer*, (1994) 15 ACSR 347 (Aust)) where, at p. 353, his Honour said:

> *'The provisions (of Section 459H(1) and (5)) assume that the dispute and offsetting claim have an "objective" existence the genuineness of which is capable of being assessed. The word "genuine" is included (in "genuine dispute") to sound a note of warning that the propounding of serious disputes and claims is to be expected but must be excluded from consideration.'*

There have been numerous decisions of Single Judges in this Court and in State Supreme Courts which have analysed, in different ways, the approach a court should take in determining whether there is "a genuine dispute" for the purposes of Section 459H of the Corporations Law. What is clear is that in considering applications to *set aside* a statutory demand, a court will not determine contested issues of fact or law which have a significant or substantial basis. One finds formulations such as:

> *'... at least in most cases, it is not expected that the court will embark upon any extended enquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute.'*

See *Mibor Investments Pty Ltd.* v. *Commonwealth Bank of Australia* (*Mibor Investments Pty Ltd.* v. *Commonwealth Bank of Australia*, (1993) 11 ACSR 362 (Aust)) ACSR at pp. 366-67, followed by Ryan, J. in *Moyall Investments Services Pty Ltd.* v. *White* (*Moyall Investments Services Pty Ltd.* v. *White*, (1993) 12 ACSR 320 (Aust)) ACSR at p. 324.

Another formulation has been expressed as follows:

> *'It is clear that what is required in all cases is something between mere assertion and the proof that would be necessary in a court of law. Something more than mere assertion is required because if that were not so then anyone could merely say it did not owe a debt....'*

See *John Holland Construction and Engg. Pty Ltd.* v. *Kilpatrick Green Pty Ltd.* (*John Holland Construction and Engg. Pty Ltd.* v. *Kilpatrick Green Pty Ltd.*, (1994) 12 ACLC 716 (Aust)) ACLC at p. 718, followed by Northrop, J. in *Aquatown Pty Ltd.* v. *Holder Stroud Pty Ltd.* (*Aquatown Pty Ltd.* v.

Holder Stroud Pty Ltd., Federal Court of Australia, 25-6-1996, Unreported)

In *Morris Catering* (*Australia*) *Pty Ltd.* (*Morris Catering* (*Australia*) *Pty Ltd., In re*, (1993) 11 ACSR 601 (Aust)) ACSR at p. 605, Thomas, J. said:

> *'There is little doubt that Div 3 is intended to be a complete code which prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a "genuine dispute" and whether there is a "genuine claim".*

It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.

The essential task is relatively simple — to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it).'

In *Scanhill Pty Ltd.* v. *Century 21 Australasia Pty Ltd.* (*Scanhill Pty Ltd.* v. *Century 21 Australasia Pty Ltd.*, (1993) 12 ACSR 341 (Aust)) ACSR at p. 357 Beazley, J. said:

> *'... the test to be applied for the purposes of Section 459H is whether the court is satisfied that there is a serious question to be tried that the applicant has an offsetting claim.'*

In *Chadwick Industries* (*South Coast*) *Pty Ltd.* v. *Condensing Vaporisers Pty Ltd.* (*Chadwick Industries* (*South Coast*) *Pty Ltd.* v. *Condensing Vaporisers Pty Ltd.*, (1994) 13 ACSR 37 (Aust)) ACSR at p. 39, Lockhart, J. said:

> *'... what appears clearly enough from all the judgments is that a standard of satisfaction which a court requires is not a particularly high one. I am for present purposes content to adopt any of the standards that are referred to in the cases.... The highest of the thresholds is probably the test enunciated by Beazley, J., though for myself I discern no inconsistency between that test and the statements in the other cases to which I have referred. However, the application of Beazley, J.'s test will vary according to the circumstances of the case.*
>
> *Certainly the court will not examine the merits of the dispute other than to see if there is in fact a genuine dispute. The notion of a "genuine dispute" in this context suggests to me that the court must be satisfied that there is a*

dispute that is not plainly vexatious or frivolous. It must be satisfied that there is a claim that may have some substance.'

In *Greenwood Manor Pty Ltd.* v. *Woodlock* (*Greenwood Manor Pty Ltd.* v. *Woodlock*, (1994) 48 FCR 229 (Aust)) Northrop, J. referred to the formulations of Thomas, J. in *Morris Catering* (*Australia*) *Pty Ltd., In re* (*Morris Catering* (*Australia*) *Pty Ltd., In re*, (1993) 11 ACSR 601 (Aust)) ACLC at p. 922 and Hayne, J. in *Mibor Investments Pty Ltd.* v. *Commonwealth Bank of Australia* (*Mibor Investments Pty Ltd.* v. *Commonwealth Bank of Australia*, (1993) 11 ACSR 362 (Aust)) , where he noted the dictionary definition of "genuine" as being in this context "not spurious ... real or true" and concluded (at p. 234):

'Although it is true that the Court, on an application under sections 459G and 459H is not entitled to decide a question as to whether a claim will succeed or not, it must be satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt. If it can be shown that the argument in support of the existence of a genuine dispute can have no possible basis whatsoever, in my view, it cannot be said that there is a genuine dispute. This does not involve, in itself, a determination of whether the claim will succeed or not, but it does go to the reality of the dispute, to show that it is real or true and not merely spurious'.

In our view a "genuine" dispute requires that:

(i) the dispute be *bona fide* and truly exist in fact;

(ii) the grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived.

We consider that the various formulations referred to above can be helpful in determining whether there is a genuine dispute in a particular case, so long as the formulation used does not become a substitute for the words of the statute.

17. It is thus clear that once the "Operational Creditor" has filed an application which is otherwise complete, the adjudicating authority has to reject the application under section 9(5)(*ii*)(*d*) of IBC, if a notice has been received by "Operational Creditor" or if there is a record of dispute in the information utility. What is required is that the notice by the "Corporate Debtor" must bring to the notice of "Operational Creditor" the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. All that the adjudicating authority is required to see at this stage is, whether there is a plausible contention which requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is a mere bluster. It has been held that however, at this stage, the Court is not required to be satisfied as to whether the

defence is likely to succeed or not. The Court also cannot go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application.

18. In the light of the law laid down by this Court stated hereinabove, we will have to examine the facts of the present case. We clarify that though arguments have been advanced at the Bar with regard to the questions as to whether the so-called claim made by Overseas would be considered to be an "Operational Debt" and as to whether Overseas could be considered to be an "Operational Creditor", we do not find it necessary to go into said questions, inasmuch as the present appeal can be decided only on a short question as to whether Kay Bouvet has been in a position to make out the case of "existence of dispute" or not.

19. For considering the rival submissions, it will be appropriate to refer to the Demand Notice/Invoice dated 23rd November 2017, addressed to Kay Bouvet by Overseas:-

> "7. Due to termination of the EPC contract by Mashkour, the tripartite sub-contract also came to an automatic end by virtue of the clause 15.2 of the Particular Conditions of the said sub-contract.
>
> 8. On or about 14th July 2017, the Corporate Debtor filed its affidavit dated 14th July 2017 in the Notice of Motion (L) No. 1314 of 2017 in Suit (1) No. 382 of 2017 in reply to the said Notice of Motion (hereinafter referred to as the "said Reply"). In the said reply, the Corporate Debtor has categorically stated and admitted that Mashkour has now, in replacement of the Operational Creditor, appointed the Corporate Debtor itself as its EPC Contractor for the said Project under and the EPC Contract dated 5th July 2017. Consequently the tri-partite contract dated 18th April 2010 between Mashkour, the Corporate Debtor and the Operational Creditor stands vitiated and superseded by the fresh Contract executed between Mashkour and Corporate Debtor. In view thereof the Corporate Debtor can no longer perform under the said tripartite contract dated 18th April 2010 between Mashkour, the Corporate Debtor and the Operational Creditor as the same stands superseded by the fresh contract dated 5th July, 2017 executed between Mashkour and the Corporate Debtor.
>
> 9. The Operational Creditor therefore states that in the light of the Corporate Debtors admission in the said reply, the Corporate Debtor is liable to refund the said Advance Amount forthwith to the Operational Creditor. The Operational Creditor further states that the said Advance Amount became due and payable as and by way of refund to the Operational Creditor by the Corporate Debtor on or about 5th July 2017 *i.e.* the date on which the Corporate Debtor was appointed as an EPC Contractor by Mashkour.
>
> 10. The Corporate Debtor has, therefore, defaulted in refunding the said Advance Amount"

20. It can thus be seen that the claim of Overseas is that in the reply filed to its Notice of Motion by Kay Bouvet, it has admitted that Mashkour has, as a replacement of Overseas, appointed Kay Bouvet as the Contractor. As such, the Tripartite Agreement dated 18th December 2010, stands vitiated and superseded. As such, Kay Bouvet cannot perform under the said Tripartite Agreement. According to Overseas, therefore, in view of the admission in the reply, Kay Bouvet is liable to refund the advance amount forthwith.

21. It will be relevant to refer to the Reply dated 6th December 2017, addressed by Kay Bouvet to Overseas as per the provisions of clause (*a*) of sub-section (2) of Section 8 of the IBC:-

> "3. We state that Kay Bouvet expressly denied the claim of 10.62 million of equivalent to Rs. 47,12,10,000/- (Rupees 47 Crores Twelve Lakhs Ten Thousand Only). We state that Kay Bouvet had received advance monies on behalf of Mashkour Sugar Company Limited (hereinafter Mashkour) as per the Agreement executed between the parties. We state that thereafter Mashkour has terminated an agreement with you *vide* their letter dated 17-5-2017 and therefore Kay Bouvet has monetary liability towards OIA.
>
> 4. We state that on 5-7-2017 Mashkour has entered into a fresh contract with Kay Bouvet. In the said Agreement Mashkour has considered the earlier Advance Payment of USD 10.62 Million equivalent to Rs. 47,12,10,000/- (Rupees 47 Crores Twelve Lakhs Ten Thousand Only) made to Kay Bouvet from Mashkour. The execution of the fresh contract in favour of Kay Bouvet in no manner creates an automatic liability on Kay Bouvet to refund any amount. There is no such legal and contractual monetary liability between the OIA and Kay Bouvet. The very perusal of the definition of "debt" and "operational Creditors" would establish that termination of contract by Mashkour with you does not create any debt due from Kay Bouvet towards OIA. It expressly denied that Kay Bouvet is an Operational Creditor towards OIA.
>
> 5. We state that, as per the pleadings in the Suit (L) No. 382 of 2017, you have sought a relief of release of the amount of USD 10,745,000/- under the letter of agreement of 2nd March 2014. Thereafter there is an existence of dispute of the existence of such amount of debt claimed by you. In such event your demand notice is erroneous, illegal and bad in law considering provisions of Insolvency and Bankruptcy Code, 2016 and more particularly Section 5(6), Section 9(5)(*i*)(*d*) and Section 9(5)(*ii*)(*d*)."
>
> (*Emphasis supplied*)

22. It can thus be seen that Kay Bouvet has clearly stated that the said amount of Rs. 47,12,10,000/- was received as advance money on behalf of Mashkour. It has been specifically stated that in the agreement entered into between Mashkour and Kay Bouvet on 5th July 2017, the said advance payment of Rs. 47,12,10,000/- has been duly considered. It is stated that the execution of the fresh contract in favour of Kay Bouvet in no manner creates an

automatic liability on Kay Bouvet. As such, Kay Bouvet has pressed into service the "existence of dispute" for opposing the demand made by Overseas.

23. We will have to examine as to whether the claim of Kay Bouvet with regard to the "existence of dispute", can be considered to be the one which is spurious, illusory or not supported by any evidence. It will be relevant to refer to clause 14.1 of the Tripartite Agreement dated 18th December 2010, between Mashkour, Overseas and Kay Bouvet:-

> "1.10% of the sub-contract Price as interest free advance payment by way of telegraphic transfer directly to the bank account of the Sub-Contractor against submission of invoice and Advance Payment Bank Guarantee for 10% of the sub-contract Price, from any Indian public sector bank acceptable to Mashkour upon receipt of amounts from EXIM Bank. The Advance Payment Bank Guarantee shall be as per format attached herewith (Uniform Rules for Demand guarantees, Publication No. 758, International Chamber of Commerce) and its value may be reduced in proportion to the value of amounts invoiced as evidenced by shipping documents and receipt of payment from EXIM Bank."

24. It will further be relevant to refer to the e-mail dated 29th March 2011, from Overseas to Mashkour:-

> "1. Mashkour Sugar Company will release payment of two invoices to OIA against factory DDE for USD 10.5 Million (USD 9.00 M + USD 1.50M).
>
> 2. OIA will release payment of USD 10.62 Million to Kay Bouvet on submission of Advance Bank Guarantee and Performance Bank Guarantee to Mashkour and its confirmation and acceptance by Mashkour and discharge of OIA Bank Guarantee of USD 7.5 Millions.
>
> 3. Mashkour will release Second payment of two Invoices of USD 4.375 Million (USD 3.50M + USD 0.875M) ... civil work to OIA.
>
> 4. OIA will release advance payment of USD 1.113 Million to Civil Contractor after signing of contract between OIA and civil contractor and on confirmation from Mashkour regarding acceptance or ABG/ PBG of the Civil Contractor as per Contract.
>
> You are requested to please accept this proposal and send authorization letters to EXIM."

25. A perusal thereof would clearly reveal that Mashkour was to release payment of two invoices of Overseas for USD 10.5 Million (USD 9.00 Million + USD 1.50 Million). It will further reveal that Overseas was to release payment of USD 10.62 Million to Kay Bouvet on submission of Advance Bank Guarantee and Performance Bank Guarantee to Mashkour and its confirmation and acceptance by Mashkour.

26. It will further be relevant to refer to the communication addressed by Exim Bank to Overseas dated 21st April 2011:-

> "GOI supported Exim Bank's Line of Credit for USD 25 Million to Government of Sudan Approval No. Exim/ GOILOC-82/1.Disbursement advice 3.

We advise that an amount of Rs. 46,58,75,853/- has been remitted to India Overseas Bank, Nehru Place, New Delhi through RTGS Code - IOBA0000543 *to the credit of account of Overseas Infrastructure Alliance* (*India*) *Private Limited. The disbursement is made against the contract between Mashkour Sugar Company, Sudan and Overseas Infrastructure Alliance* (*India*) *Private Limited.* Details of the disbursement are as under:-

Amt. in USD"

Disbursement No.	*Invoice Value (CIF) 100%*	*Eligible Value 100%*	*Net Remitted*	*Value Date*
2	15,000,000.00	10,500,000.00	10,476,781.85	April 18, 2011

2. The breakup of the disbursement made as follows:-

USD		
Eligible Value	10,500,000.00	465,911,250.00
Less Negotiation Charges (Service Tax)	23,218.15	10,30,247.00
Currency Conversion Chg. And Service Tax		110.00
Net Remittance	10,476,781.85	46,48,80,893.00

3. Please confirm receipt of the credit."

(*Emphasis supplied*)

27. It will further be relevant to refer to the communication addressed by Overseas of the same date to Mashkour:-

"We have been paid the advance amount to 10.05 million USD in INR by Exim Bank because of Stringent Sanction entrancement by the United State Office of Foreign asset Control (OFAC) as per the letter enclosed herewith. The amount has been delivered to us @ Rs. 44.37 per disbursement advice of the Exim bank attached herewith.

Further OIA will release payment of USD 10.62 Million to Kay Bouvet on Submission of Advance Bank Guarantee and Performance Bank Guarantee to Mashkour Sugar Company and its confirmation and acceptance by Mashkour Sugar Company and discharge of OIA Bank Guarantee of USD 7.5 Million (As per mail dated 29-3-2011) of Mr. Ghodgankar."

(*Emphasis supplied*)

28. The communication dated 28th July 2011, addressed by Mashkour to Overseas would further clarify the position which reads thus:-

"We are please to inform you that nominated sub-contractor messres Kay Bouvet Engineering Private Limited has submitted Advance Payment Bank Guarantee as well as Performance Bank Guarantee to us as per the sub-contract agreement and we are satisfied with the same.

In the light of the above we request your good self to release the 10% of the Sub-contract value as per letter dated 21-4-2011 addressed to Mashkour.

The payment to be released as under:-

Name of the Beneficiary	:	M/s Kay Bouvet Engineering Private Ltd.
Name of Bank	:	M/s Bank of Maharashtra, Satara, City Branch
IFSC Code	:	MAH80000134
Account No.	:	60018168457
Mode of Payment	:	RTGS

+ amount of Rs. 47,12,10,000/- (Rupees Forty Seven Crores Twelve Lakhs Ten Thousand only)

As soon as we get confirmation from your side regarding release of payment we shall release your Bank Guarantee USD 7.5 Million.

As I discussed today with Mr. Suresh I will be in India with original discharge bank Guarantee in the beginning of last week."

(*Emphasis supplied*)

29. As already discussed hereinabove that Kay Bouvet had certain grievances with regard to payment of less money on account of exchange rate, the communication dated 21st September 2011, addressed by Kay Bouvet to Mashkour would clarify the said position which reads thus:-

"We have been paid Rs. 47,12,10,000/- by M/s. Overseas Infrastructure Alliance (India) Ltd. On 30th August 2011 equivalent to USD 10.62 Million converted 1 USD @ Rs. 44.37/-, whereas on that day the conversion rate as per the attached list was 1 USD - Rs. 46.26/-, so the amount would have been Rs. 49,12,08,012/-, so they have underpaid a sum of Rs. 1,99,98,012/-. So you are requested to advise OIA to release amount of Rs. 1,99,98,012/- to us without any delay."

30. The last nail in the case of the Overseas would be in the nature of communication addressed by the Ambassador of Sudan to Mashkour dated 25th April 2017, which reads thus:-

"With reference to the earlier correspondence, we have received the DO No. 1425/Secy(ER)/2017 dated 18th April, 2017 from Mr. Amar Sinha, Secretary (Economic Relations) Ministry of External Affairs, Government of India, New Delhi, India expediting the termination of the agreement with Overseas Infrastructure Alliance (India) Private Limited (OIA) and that an agreement be signed with Kay Bouvet Engineering Ltd. (KBEL) as a direct contractor for the unutilized portion of the GOI's Line of Credit for US Dollars 150,000,000 for the Mashkour Sugar Project.

It is on the record that a sum of Rs. 47,12,10,000/- (US $ 10.62 Million) was

paid by OIA to Kay Bouvet Engineering Ltd. "KBEL" on behalf of Mashkour Sugar Company from the funds released to OIA by Exim Bank from the 1st disbursed tranche of US $ 25 Million.

Kindly make a note, while signing the revised contract with KBEL that the abovementioned amount of US Dollars 10.62 shall be adjusted by Kay Bouvet Engineering Ltd. against the supplies to be made to Mashkour Sugar Company Ltd. for the purpose of completing the project.

Naturally, it should be borne in mind that the termination of OIA contract with Mashkour should not absolve them of any liability for the balance of the LoC 1st tranche of 25 Million disbursed to them, other than the US Dollars 10.62 already paid to KBEL and which will be adjusted when a contract is signed with KBEL as a main contractor."

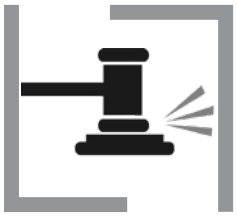
(*Emphasis supplied*)

31. It is thus abundantly clear that the case of Kay Bouvet that the amount of Rs. 47,12,10,000/- which was paid to it by Overseas, was paid on behalf of Mashkour from the funds released to Overseas by Exim Bank on behalf of Mashkour, cannot be said to be a dispute which is spurious, illusory or not supported by the evidence placed on record. The material placed on record amply clarifies that the initial payment which was made to Kay Bouvet as a sub-Contractor by Overseas who was a Contractor, was made on behalf of Mashkour and from the funds received by Overseas from Mashkour. It will also be clear that when a new contract was entered into between Mashkour and Kay Bouvet directly, Mashkour had directed the said amount of Rs. 47,12,10,000/- to be adjusted against the supplies to be made to Mashkour Sugar Company Ltd. for the purpose of completing the Project. On the contrary, the documents clarify that the termination of the contract with Overseas would not absolve Overseas of any liability for the balance of the LoC 1st tranche of 25 Million disbursed to them other than USD 10.62 paid to Kay Bouvet.

32. In these circumstances, we find that NCLT had rightly rejected the application of Overseas after finding that there existed a dispute between Kay Bouvet and Overseas and as such, an order under section 9 of the IBC would not have been passed. We find that NCLAT has patently misinterpreted the factual as well as legal position and erred in reversing the order of NCLT and directing admission of Section 9 petition.

33. Resultantly, this appeal is allowed and the impugned order dated 21st December 2018, passed by NCLAT is quashed and set aside. The order passed by NCLT dated 26th July 2018, is maintained.

34. In view of the above, all the pending IAs shall stand disposed of.



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SUPREME COURT OF INDIA

Dena Bank v. C. Shivakumar Reddy

INDIRA BANERJEE AND V. RAMASUBRAMANIAN, JJ.

CIVIL APPEAL NO. 1650 OF 2020

AUGUST 4, 2021

I. Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 14 of the Limitation Act, 1963 - Corporate insolvency resolution process - Limitation period - Whether an application under section 7 of IBC would not be barred by limitation, on ground that it had been filed beyond a period of three years from date of declaration of loan account of corporate debtor as NPA; if there was an acknowledgement of debt by corporate debtor before expiry of period of limitation of three years, period of limitation would get extended by a further period of three years - Held, yes - Whether a judgment and/or decree for money in favour of financial creditor, passed by DRT, or any other Tribunal or Court, or issuance of a Certificate of Recovery in favour of financial creditor, would give rise to a fresh cause of action for financial creditor, to initiate proceedings under section 7 for initiation of CIRP, within three years from date of judgment and/or decree or within three years from date of issuance of Certificate of Recovery, if dues of corporate debtor to financial debtor, under judgment and/or decree and/or in terms of Certificate of Recovery, or any part thereof remained unpaid - Held, yes (Paras 142 & 143)

II. Section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Whether there is no bar in law to amendment of pleadings in an application under section 7 of IBC, or to filing of additional documents, apart from those initially filed along with application under section 7 - Held, yes (Para 144)

FACTS

- By a letter dated 23-12-2011, the appellant Bank had sanctioned Term Loan and Letter of Credit-cum buyers credit in favour of the corporate debtor, with an upper limit of Rs. 45.00 crores. The said Term Loan was to be repaid in 24 quarterly instalments of Rs. 187.50 lakhs, which were to commence two years after the date of disbursement, and the entire Term Loan was to be repaid in eight years, inclusive of the implementation period of one year and the moratorium period. The corporate debtor executed various documents including Demand Promissory Notes, Letters of General Lien, etc. in favour of the appellant bank and also mortgaged its lease

hold rights in its immovable property specified in the petition of appeal, by depositing the Title of Deeds of the said immovable property with the appellant bank.

- On 20-9-2013 the corporate debtor defaulted in repayment of its dues to the appellant bank. The Loan Account of the corporate debtor was therefore declared Non-Performing Asset (NPA) on 31-12-2013.
- Thereafter, the corporate debtor addressed a letter dated 24-3-2014 to the appellant bank, making a request for restructuring the Term Loan. The appellant bank did not accede to the request.
- On 22-12-2014, the appellant bank issued legal notice to the corporate debtor, calling upon it to make payment of Rs. 52.12 crores, claimed to be due from the corporate debtor as on 22-12-2014. The corporate debtor did not make the payment.
- Thereafter, the appellant bank filed an application before the Debt Recovery Tribunal (DRT) for recovery of its outstanding dues of Rs. 52.12 crores as on 22-12-2014.
- The corporate debtor again by a letter dated 5-1-2015 requested for restructuring of its loan. The appellant bank submitted that the corporate debtor had accepted its liability to the appellant bank, by its aforesaid letter dated 5-1-2015.
- On or about 3-3-2017, while proceedings were pending in the DRT, the corporate debtor gave a proposal for one-time settlement of the Term Loan Account, upon payment of Rs. 5.50 crores. The proposal was, however, not accepted by the appellant bank.
- On 27-3-2017, the DRT passed a final judgment and order/decree against the corporate debtor for recovery of Rs. 52.12 crores with future interest at the rate of 16.55 per cent per annum, from the date of filing the application till the date of realization.
- On 25-5-2017, the DRT issued a Recovery Certificate in favour of the appellant bank for recovery of Rs. 52.12 crores from the corporate debtor. Thereafter, on 19-6-2017, corporate debtor once again gave the appellant bank a proposal for One Time Settlement to mutually settle the loan amount.
- The appellant bank pointed out, that the corporate debtor had, in its Annual Reports for the financial years 2016-2017 and 2017-2018, acknowledged its liability in respect of the loan taken by it from the appellant bank.
- On 1-10-2018, the appellant bank issued a demand notice to the corporate debtor in Form-3 contained in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and thereafter filed petition under section 7 in Form-1.

- On 2-2-2019, the corporate debtor filed its preliminary objection to the petition filed by the appellant bank under section 7, *inter alia*, contending that the said petition was barred by limitation.
- By an order dated 2-3-2019 the Adjudicating Authority admitted the Petition under section 7 and appointed an Interim Resolution Professional. The objection of the bar of limitation, raised on behalf of the corporate debtor was considered at length, but rejected by the Adjudicating Authority (NCLT).
- On appeal, the NCLAT *set aside* the order dated 21-3-2019 passed by the NCLT and dismissed the petition filed by the appellant bank under section 7, holding that the said application was barred by limitation.
- On appeal to the Supreme Court:

HELD

- The IBC is an Act 'to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto'. (Para 66)
- The IBC aims at promoting, *inter alia*, investments and also resolution of insolvency of Corporate persons. As per its Statement of Objects and Reasons 'the objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development'. (Para 67)
- Under the scheme of the IBC, the Insolvency Resolution Process begins, when a default takes place, in the sense that a debt becomes due and is not paid. (Para 68)
- The scheme of the IBC is to ensure that when a default takes place, in the sense that a debt becomes

due and is not paid, the Corporate Insolvency Resolution Process begins. Where any corporate debtor commits default, a financial creditor, an operational creditor or the corporate debtor itself may initiate Corporate Insolvency Resolution Process in respect of such corporate debtor in the manner as provided in Chapter II of the IBC. (Para 69)

- The provisions of the IBC are designed to ensure that the business and/or commercial activities of the corporate debtor are continued by a Resolution Professional, post-imposition of a moratorium, which would give the corporate debtor some reprieve from coercive litigation, which could drain the corporate debtor of its financial resources. This is to enable the corporate debtor to improve its financial health and at the same time repay the dues of its creditors. (Para 70)

- Under section 7(2) of the IBC, read with the Statutory 2016 Adjudicating Authority Rules, made in exercise of powers conferred, *inter alia*, by clauses (*c*), (*d*), (*e*) and (*f*) of sub-section (1) of section 239 read with sections 7, 8, 9 and 10 of the IBC, a financial creditor is required to apply in the prescribed Form 1 for initiation of the Corporate Insolvency Resolution Process, against a corporate debtor under section 7 of the IBC, accompanied with documents and records required therein, and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, hereinafter referred to as the 2016 IB Board of India Regulations. (Para 71)

- Statutory Form 1 under rule 4(1) of the 2016 Adjudicating Authority Rules comprises Parts I to V, of which Part I pertains to particulars of the applicant, Part II pertains to particulars of the corporate debtor and Part III pertains to particulars of the proposed Interim Resolution Professional. (Para 72)

- Since a Financial Creditor is required to apply under section 7 of the IBC, in statutory Form 1, the Financial Creditor can only fill in particulars as specified in the various columns of the Form. There is no scope for elaborate pleadings. An application to the Adjudicating Authority (NCLT) under section 7 of the IBC in the prescribed form, cannot therefore, be compared with the plaint in a suit. Such application cannot be judged by the same standards, as a plaint in a suit, or any other pleadings in a Court of law. (Para 73)

- Section 7(3) requires a financial creditor making an application under section 7(1) to furnish records of the default recorded with the information utility or such other record or evidence of default as may be specified; the name of the resolution professional proposed to act as an Interim Resolution

Professional and any other information as may be specified by the Insolvency and Bankruptcy Board of India. (Para 74)

- Section 7(4) of the IBC casts an obligation on the Adjudicating Authority to ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor within fourteen days of the receipt of the application under section 7. As per the proviso to section 7(4) of the IBC, if the Adjudicating Authority has not ascertained the existence of default and passed an order within the stipulated period of time of fourteen days, it shall record its reasons for the same in writing. The application does not lapse for non-compliance of the time schedule. Nor is the Adjudicating Authority obliged to dismiss the application. On the other hand, the application cannot be dismissed, without compliance with the requisites of the Proviso to section 7(5) of the IBC. (Para 75)

- Section 7(5)(*a*) provides that when the Adjudicating Authority is satisfied that a default has occurred, and the application under sub-section (2) of section 7 is complete and there is no disciplinary proceeding pending against the proposed resolution professional, it may by order admit such application. As per section 7(5)(*b*), if the Adjudicating Authority is satisfied that default has not occurred or the application under sub-section (2) of section 7 is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application, provided that the Adjudicating Authority shall, before rejecting the application under sub-section (b) of section 5, give notice to the applicant, to rectify the defects in his application, within 7 days of receipt of such notice from the Adjudicating Authority. (Para 76)

- The Corporate Insolvency Resolution Process commences on the date of admission of the application under sub-section (5) of section 7 of the IBC. Section 7(7) casts an obligation on the Adjudicating Authority to communicate an order under clause (*a*) of sub-section (5) of section 7 to the financial creditor and the corporate debtor and to communicate an order under clause (*b*) of sub-section (5) of section 7 to the financial creditor within seven days of admission or rejection of such application, as the case may be. Sections 8 and 9 of IBC pertain to Insolvency Resolution by an operational creditor and are not attracted in the facts and circumstances of this case. Section 10 pertains to initiation of Corporate Insolvency Resolution Process by the corporate debtor itself, and is also not attracted in the facts and circumstances of the case. (Para 77)

- Section 12(1) of the IBC requires the Corporate Insolvency Process to be completed within a period of 180 days from the date of admission of the application to initiate such process. The period of 180 days is not extendable more than once. (Para 78)
- The IBC is not just another statute for recovery of debts. Nor is it a statute which merely prescribes the modalities of liquidation of a corporate body, unable to pay its debts. It is essentially a statute which works towards the revival of a corporate body, unable to pay its debts, by appointment of a Resolution Professional. (Para 79)
- IBC has overriding effect over other laws. Section 238 of the IBC provides that the provisions of the IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law, for the time being in force, or any other instrument, having effect by virtue of such law. (Para 84)
- Unlike coercive recovery litigation, the Corporate Insolvency Resolution Process under the IBC is not adversarial to the interests of the corporate debtor. (Para 85)
- On the other hand, the IBC is a beneficial legislation for equal treatment of all creditors of the corporate debtor, as also the protection of the livelihoods of its employees/workers, by revival of the corporate debtor through the entrepreneurial skills of persons other than those in its management, who failed to clear the dues of the corporate debtor to its creditors. It only segregates the interests of the corporate debtor from those of its promoters/persons in management. (Para 86)
- Relegation of creditors to the remedy of coercive litigation against the corporate debtors could be detrimental to the interests of the corporate debtor and its creditors alike. While multiple coercive proceedings against a corporate debtor in different forums could impede its commercial/ business activities, deplete its cash reserves, dissipate its assets, movable and immovable and precipitate its commercial death, such proceedings might not be economically viable for the creditors as well, because of the length of time consumed in the litigations, the expenses of litigation, and the uncertainties of realisation of claims even after ultimate success in the litigation. (Para 87)
- It is, therefore, imperative that the provisions of the IBC and the Rules and Regulations framed thereunder be construed liberally, in a purposive manner to further the objects of enactment of the statute, and not be given a narrow, pedantic interpretation which defeats the purposes of the Act. (Para 88)
- In construing and/or interpreting any statutory provision one must look into the legislative intent of

the statute. The intention of the statute has to be found in the words used by the legislature itself. In case of doubt it is always safe to look into the object and purpose of the statute or the reason and spirit behind it. Each word, phrase or sentence has to be construed in the light of the general purpose of the Act itself. (Para 89)

- When a question arises as to the meaning of a certain provision in a statute the provision has to be read in its context. The statute has to be read as a whole. The previous state of the law, the general scope and ambit of the statute and the mischief that it was intended to remedy are relevant factors. (Para 90)

- On a careful reading of the provisions of the IBC and in particular the provisions of section 7(2) to (5) of the IBC read with the 2016 Adjudicating Authority Rules there is no bar to the filing of documents at any time until a final order either admitting or dismissing the application has been passed. (Para 91)

- The time stipulation of fourteen days in section 7(4) to ascertain the existence of a default is apparently directory not mandatory. The proviso inserted by amendment with effect from 28-12-2019 provides that if the Adjudicating Authority has not ascertained the default and passed an order under sub-section (5) of section 7 of the IBC within the aforesaid time, it shall record its reasons in writing for the same. No other penalty is stipulated. (Para 92)

- Furthermore, the proviso to section 7(5)(b) of the IBC obliges the Adjudicating Authority to give notice to an applicant, to rectify the defect in its application within seven days of receipt of such notice from the Adjudicating Authority, before rejecting its application under clause (b) of sub-section (5) of section 7 of the IBC. When the Adjudicating Authority calls upon the applicant to cure some defects that defect has to be rectified within seven days. There is no penalty prescribed for inability to cure the defects in an application within seven days from the date of receipt of notice, and in an appropriate case, the Adjudicating Authority may accept the cured application, even after expiry of seven days, for the ends of justice. (Para 93)

- Section 12 of the IBC imposes a time limit for completion of the Corporate Insolvency Resolution Process. This time limit starts running from the date of admission of an application to initiate the Corporate Insolvency Resolution Process. Section 12 is, therefore, not attracted in this case. (Para 94)

- Even in the case of section 12 of the IBC, instant Court taking note of the workload of the Adjudicating Authority, in effect held that the time stipulation was directory.

It was observed that failure to complete the Resolution Process within stipulated time should not result in corporate death by shelving of an otherwise good resolution plan. Instant Court emphasized the need to maintain balance between timely completion of the Corporate Insolvency Resolution Process and the corporate debtor otherwise being put into liquidation, for failure to maintain the time schedule. (Para 96)

- The insolvency Committee of the Ministry of Corporate Affairs, Government of India, in a report published in March 2018, stated that the intent of the IBC could not have been to give a new lease of life to debts which were already time-barred. Thereafter section 238A was incorporated in the IBC by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (Act 26 of 2018), with effect from 6-6-2018. (Para 97)

- There is no specific period of limitation prescribed in the Limitation Act, 1963, for an application under the IBC, before the Adjudicating Authority (NCLT). An application for which no period of limitation is provided anywhere else in the Schedule to the Limitation Act, is governed by article 137 of the Schedule to the said Act. Under article 137 of the Schedule to the Limitation Act, the period of limitation prescribed for such an application is three years from the date of accrual of the right to apply. (Para 100)

- There can be no dispute with the proposition that the period of limitation for making an application under section 7 or 9 of the IBC is three years from the date of accrual of the right to sue, that is, the date of default. (Para 101)

- There can be no dispute with the proposition of law that limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be adduced. (Para 106)

- It is well settled, that a judgment is a precedent for the issue of law that is raised and decided and not any observations made in the facts of the case. (Para 109)

- In this case, admittedly there were fresh documents before the Adjudicating Authority (NCLT), including a letter of offer dated 3-3-2017 for one-time settlement of the dues of the corporate debtor to the financial creditor, upon payment of Rs. 5.5 crores. The appellant bank has also relied upon financial statements up to 31-3-2018 apart from the final judgment and order dated 27-3-2017 and the subsequent Recovery Certificate dated 25-5-2017 which constituted

cause of action for initiation of proceedings under section 7 of the IBC. (Para 110)

- It is not necessary for this Court to examine the relevance of all the documents filed by the appellant bank pursuant to its interim applications. Suffice it to mention that the documents enclosed with the applications and the pleadings in the supporting affidavits, made out a case for computation of limitation afresh from the dates of the relevant documents. It would also be pertinent to note that the reasons for the execution of the documents are irrelevant. It is not the case of the respondents, that any of those documents were extracted through coercion. (Para 112)

- As per section 18 of Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing a fresh period of limitation from the date on which the acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgement must be made before the relevant period of limitation has expired. (Para 113)

- It is well settled that entries in books of account and/or balance sheets of a corporate debtor would amount to an acknowledgement under section 18 of the Limitation Act. (Para 118)

- The finding of the NCLAT that there was nothing on record to suggest that the 'corporate debtor' acknowledged the debt within three years and agreed to pay debt is not sustainable in law, in view of the Statement of Accounts/Balance sheets/Financial Statements for the years 2016-2017 and 2017-2018 and the offer of One-Time Settlement referred to above including in particular, the offer of One-Time Settlement made on 3-3-2017. (Para 126)

- Section 18 of the Limitation Act speaks of an acknowledgement in writing of liability, signed by the party against whom such property or right is claimed. Even if the writing containing the acknowledgement is undated, evidence might be given of the time when it was signed. The explanation clarifies that an acknowledgement may be sufficient even though it is accompanied by refusal to pay, deliver, perform or permit to enjoy or is coupled with claim to set off, or is addressed to a person other than a person entitled to the property or right. 'Signed' is to be construed to mean signed personally or by an authorised agent. (Para 127)

- In the instant case, Rs. 111 lakhs had been paid towards outstanding interest on 28-3-2014 and the offer

of One-Time Settlement was within three years thereafter. In any case, NCLAT overlooked the fact that a Certificate of Recovery had been issued in favour of appellant bank on 25-5-2017. The corporate debtor did not pay dues in terms of the Certificate of Recovery. The Certificate of Recovery in itself gives a fresh cause of action to the appellant bank to institute a petition under section 7 of IBC. The petition under section 7 of IBC was well within three years from 28-3-2014. (Para 128)

- In effect, the instant Court, approved the proposition that an application under section 7 or 9 of the IBC may be time-barred, even though some other recovery proceedings might have been instituted earlier, well within the period of limitation, in respect of the same debt. However, it would have been a different matter, if the applicant had approached the Adjudicating Authority after obtaining a final order and/or decree in the recovery proceedings, if the decree remained unsatisfied. Instant Court held that a decree and/or final adjudication would give rise to a fresh period of limitation for initiation of the Corporate Insolvency Resolution Process. (Para 130)

- As observed, on a conjoint reading of the provisions of the IBC, it is clear that a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings under section 7 of the IBC. (Para 132)

- It is not in dispute that the respondent No. 2 is a corporate debtor and the appellant bank, a financial creditor. The question is, whether the petition under section 7 of the IBC has been instituted within 3 years from the date of default. 'Default' is defined in section 3(12) to mean 'non-payment' of a debt which has become due and payable whether in whole or any part and is not paid by the corporate debtor. (Para 133)

- It is true that, when the petition under section 7 of IBC was filed, the date of default was mentioned as 30-9-2013 and 31-12-2013 was stated to be the date of declaration of the account of the corporate debtor as NPA. However, it is not correct to say that there was no averment in the petition of any acknowledgement of debt. Such averments were duly incorporated by way of amendment, and the Adjudicating Authority rightly looked into the amended pleadings. (Para 134)

- As observed above, the appellant bank filed the Petition under section 7 of the IBC on 12-10-2018. Within three months, the appellant bank filed an application in the NCLT, for permission to place additional documents on record including the final judgment and order/

decree dated 27-3-2017 and the Recovery Certificate dated 25-5-2017, enabling the appellant bank to recover Rs. 52 crores odd. The judgment and order/decree of the DRT and the Recovery Certificate gave a fresh cause of action to the appellant bank to initiate a petition under section 7 of the IBC. (Para 135)

- On or about 5-3-2019, the appellant bank filed another application for permission to place on record additional documents including *inter alia* financial statements, Annual Report etc. of the period from 1-4-2016 to 31-3-2017, and again, from 1-4-2017 to 31-3-2018 and a letter dated 3-3-2017 proposing a One-Time Settlement. This application was also allowed on 6-3-2021. The Adjudicating Authority, took into consideration the new documents and admitted the petition under section 7 of the IBC. (Para 136)

- Even assuming that documents were brought on record at a later stage, the Adjudicating Authority was not precluded from considering the same. The documents were brought on record before any final decision was taken in the petition under section 7 of IBC. (Para 137)

- A final judgment and order/decree is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of Recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the Recovery Certificate. (Para 138)

- The appellant bank was thus entitled to initiate proceedings under section 7 of the IBC within three years from the date of issuance of the Recovery Certificate. The petition of the appellant bank, would not be barred by limitation at least till 24-5-2020. (Para 139)

- While it is true that default in payment of a debt triggers the right to initiate the Corporate Resolution Process, and a petition under section 7 or 9 of the IBC is required to be filed within the period of limitation prescribed by law, which in this case would be three years from the date of default by virtue of section 238A of the IBC read with article 137 of the Schedule to the Limitation Act, the delay in filing a petition in the NCLT is condonable under section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above sections 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC. (Para 140)

- Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. There is no reason, why an offer of One-Time Settlement of a live claim,

made within the period of limitation, should not also be construed as an acknowledgement to attract section 18 of the Limitation Act. Be that as it may, the Balance Sheets and Financial Statements of the corporate debtor for 2016-2017, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the appellant bank in May 2017. The NCLT rightly admitted the application by its order dated 21-3-2019. (Para 141)

- To sum up, it is opined that an application under section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the corporate debtor as NPA, if there were an acknowledgement of the debt by the corporate debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years. (Para 142)

- Moreover, a judgment and/or decree for money in favour of the financial creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the financial creditor, would give rise to a fresh cause of action for the financial creditor, to initiate proceedings under section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the corporate debtor to the financial debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid. (Para 143)

- There is no bar in law to the amendment of pleadings in an application under section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under section 7 of the IBC in Form-1. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the appellant bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. It is viewed that the decision of the Adjudicating Authority to entertain and/or to allow the request of the appellant bank for the filing of additional documents with supporting pleadings,

and to consider such documents and pleadings did not call for interference in appeal. (Para 144)

- For the reasons discussed above, the impugned judgment and order is unsustainable in law and facts. The appeal is accordingly allowed, and the impugned judgment and order of the NCLAT is set aside. (Para 145)

CASE REVIEW

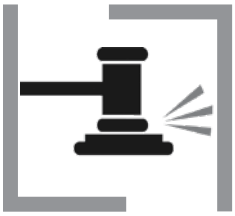
C. Shivakumar Reddy v. *Dena Bank* (2020) 114 taxmann.com 219/158 SCL 375 (NCLAT - New Delhi) (para 145) *set aside*.

CASES REFERRED TO

Jignesh Shah v. *Union of India* (2019) 109 taxmann.com 486/156 SCL 542 (SC) (para 29), *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. India Ltd.* (2019) 109 taxmann.com 395/156 SCL 397 (SC) (para 29), *Sesh Nath Singh* v. *Baidyabati Sheoraphuli Co-operative Bank Ltd.* (2021) 125 taxmann.com 357 (SC) (para 36), *Laxmi Pat Surana* v. *Union Bank of India* (2021) 125 taxmann.com 394 (SC) (para 36), *Asset Reconstruction Co. (India) Ltd.* v. *Bishal Jaiswal* (2021) 126 taxmann.com 200/166 SCL 82 (SC) (para 36), *Nazir Mohamed* v. *J. Kamala* 2020 SCC Online SC 676 (para 53), *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 118 taxmann.com 323 (SC) (para 55), *Munshi Lal* v. *Hira Lal* AIR 1947 All 74 (FB) (para 58), *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 80), *P. Mohanraj* v. *Shah Bros. Ispat (P.) Ltd.* (2021) 125 taxmann.com 39 (SC) (para 82), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 83), *Popatlal Shah* v. *State of Madras* AIR 1953 SC 274 (SC) (para 89), *Arcelormittal (India) (P.) Ltd.* v. *Satish Kumar Gupta* (2018) 98 taxmann.com 99/50 SCL 354 (para 95), *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 102), *Vashdeo R. Bhojwani* v. *Abhyudaya Co-operative Bank Ltd.* (2019) 109 taxmann.com 198/156 SCL 539 (SC) (para 104), *Balkrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan* AIR 1959 SC 798 (para 104), *Khan Bahadur Shapoor Fredoom Mazda* v. *Durga Prasad Chamaria* AIR 1961 SC 1236 (para 117), *Bengal Silk Mills Co.* v. *Ismail Golam Hossain Arif* AIR 1962 Cal 115 (para 118), *Padam Tea Co.* In re AIR 1974 Cal 170 (para 118), *South Asia Industries (P.) Ltd.* v. *General Krishna Shamsher Jung Bahadur Rana* ILR (1972) 2 Delhi 712 (para 118), *Hegde Golay Ltd.* v. *State Bank of India* ILR 1987 Kar 2673 (para 118), *Reliance Asset Reconstruction Co. Ltd.* v. *Hotel Poonja International (P.) Ltd.* 2021 SCC Online SC 289 (para 123) and *Ferro Alloys Corpn. Ltd.* v. *Rajhans Steel Ltd.* 1999 SCC Online Pat. 1196 (para 129).

Rajesh Kumar Gautam, AOR, **Anant Gautam**, Adv., **Nipun Sharma** and **Madhur Tewatia**, Advs. *for the Appellant*. **Goutham Shivshankar**, AOR *for the Respondent*.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 129 taxmann.com 60 (SC)



(2021) 129 taxmann.com 132 (SC)

SUPREME COURT OF INDIA

Pratap Technocrats (P.) Ltd. *v.* Monitoring Committee of Reliance Infratel Ltd.

DR. DHANANJAYA Y. CHANDRACHUD AND M.R. SHAH, JJ.

CIVIL APPEAL NO. 676 OF 2021†

AUGUST 10, 2021

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - Whether once resolution plan in respect of corporate debtor is approved by 100 per cent voting share of Committee of Creditors (CoC), exclusion of certain financial debts and hence, exclusion of certain financial creditors from CoC will be of no consequence; resolution plan continues to be approved with 100 per cent majority even after their exclusion - Held, yes (Para 42)

FACTS

- The Corporate insolvency Resolution Process (CIRP) of the corporate debtor was initiated by an order of the NCLT and Resolution Professional (RP) was appointed.
- The RP invited 'Expression of Interest' (EoI) from prospective resolution applicants. The resolution plan submitted by resolution applicant was one 'RD' taken forward as a preferred resolution plan on the basis of its 'feasibility, viability and implementability'. Upon due verification of its eligibility under section 29A, said resolution applicant was declared a successful resolution applicant. The resolution plan was approved with a 100 per cent voting share of the CoC.
- An application was submitted under section 30(6), seeking the approval of the resolution plan by the NCLT.
- In the course of deciding upon the approval plan, the NCLT noted that Doha Bank, which was one of the financial creditors of the corporate debtor, had instituted proceedings challenging the admission of the claims of a few other creditors and a proceeding to impugn the decision of the RP to recognize the indirect lenders of the corporate debtor as financial creditors.
- The NCLT by its order *set aside* the inclusion of banks (State Bank of India, Bank of India, UCO Bank, Syndicate Bank, Oriental Bank of Commerce and Indian Overseas Bank) from the CoC. Similarly, on the same analogy, various indirect creditors of the corporate debtor had also been excluded.

- The appellant, operational creditors had alleged that the exclusion of the indirect creditors would have significant implications on the distribution of funds under the resolution plan, if not on the validity of the plan.

HELD

- The jurisdiction which has been conferred upon the Adjudicating Authority in regard to the approval of a resolution plan is statutorily structured by sub-section (1) of section 31. The jurisdiction is limited to determining whether the requirements which are specified in sub-section (2) of section 30 have been fulfilled. This is a jurisdiction which is statutorily-defined, recognised and conferred, and hence cannot be equated with a jurisdiction in equity, that operates independently of the provisions of the statute. The Adjudicating Authority as a body owing its existence to the statute, must abide by the nature and extent of its jurisdiction as defined in the statute itself. (Para 26)

- The Adjudicating Authority and the Appellate Authority cannot extend into entering upon merits of a business decision made by a requisite majority of the CoC in its commercial wisdom. Nor is there a residual equity based jurisdiction in the Adjudicating Authority or the Appellate Authority to interfere in this decision, so long as it is otherwise in conformity with the provisions of the IBC and the Regulations under the enactment. (Para 39)

- Once the requirements of the IBC have been fulfilled, the Adjudicating Authority and the Appellate Authority are duty bound to abide by the discipline of the statutory provisions. It needs no emphasis that neither the Adjudicating Authority nor the Appellate Authority have an unchartered jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework. (Para 41)

- In the present case, the resolution plan has been duly approved by a requisite majority of the CoC in conformity with section 30(4). Whether or not some of the financial creditors were required to be excluded from the CoC is of no consequence, once the plan is approved by a 100 per cent voting share of the CoC. The jurisdiction of the Adjudicating Authority was confined by the provisions of section 31(1) to determining whether the requirements of section 30(2) have been fulfilled in the plan as approved by the CoC. As such, once the requirements of the statute have been duly fulfilled, the decisions of the Adjudicating Authority is in conformity with law. (Para 42)

CASE REVIEW

Pratap Technocrats (P.) Ltd. v. Monitoring Committee of Reliance Infratel Ltd. (2021)

128 taxmann.com 431 (NCLAT - New Delhi) (para 9) *affirmed* **(See Annex)**.

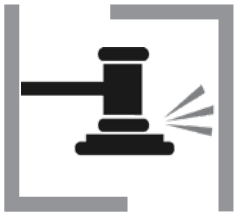
CASES REFERRED TO

Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 11), *Committee of Creditors of Essar Steel (India) Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 11), *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 31) and *Maneka Gandhi* v. *Union of India* (1978) 1 SCC 248 (para 41).

Rajat Sehgal, AOR, **Tapan Masta**, **Mrs. Vandana Anand**, **Gautam Swarup**, **Mandavya Kapoor**, **Kartikeya Jaiswal**, and **Ms. Gunjan Jindal**, Advs. *for the Petitioner.* **Saurav Panda**, **Vaijayant Paliwal**, **Ms. Charu Bansal**, **Ms. Prabh Simrran Kaur**, Adv., **Ms. Ankita Mandal**, and **S.S. Shroff**, AOR *for the Respondent.*

† Arising out of order in *Pratap Technocrats (P.) Ltd. v. Monitoring Committee of Reliance Infratel Ltd.* (2021) 128 taxmann.com 431 (NCLAT - New Delhi)

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 129 taxmann.com 132 (SC)



(2021) 130 taxmann.com 418 (Madras)

HIGH COURT OF MADRAS

Kotak Mahindra Bank Ltd. v. K. Bharathi

SANJIB BANERJEE, CJ. AND
P.D. AUDIKESAVALU, J.
W.P. NO. 12957 OF 2021
AUGUST 5, 2021

Section 60 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Whether in insolvency proceedings, it is for NCLT to decide whether matter before it ought to be decided or not, whether any injunction operates or impedes progress of matter before it; parties cannot be asked to approach High Court for it to hand-hold NCLT and guide it through its proceedings - Held, yes - Whether NCLT would do well to confine itself to its area of specialisation and deal with matter in accordance with law without waiting for High Court to extend any advice or assistance, which High Court, in any event, is not obliged to extend - Held, yes (Paras 6 and 7)

E. Omprakash, S.C. and **Ilayaraja Perumal** *for the Petitioner.* **P.S. Raman,** S.C., **Ms. G.M. Oviya, Thiyambak J. Kannan, Mrs. V. Uma,** Official Assignee and **M. Vasantha Kumar,** Dy. Official Assignee *for the Respondent.*

ORDER

Sanjib Banerjee, CJ. - The writ petition is directed against an order dated March 26, 2021 passed by the National Company Law Tribunal, Chennai, though the prayer is couched somewhat differently and a direction has been sought on the tribunal to proceed with a matter pending before it.

2. The petitioner claims to be a financial creditor of the corporate debtor in the NCLT proceedings and there is a dispute between the petitioner and the first respondent herein. The first respondent herein, according to the petitioner, is the mother-in-law of the sixth respondent, who is said to be the principal promoter and the human agency in control of the second respondent corporate debtor.

3. Ms. G.M. Oviya, learned counsel, appears for the third and fifth respondents and supports the petitioner herein.

4. It appears that in proceedings in this court to which the petitioner herein was not a party, the charge created in respect of a property in favour of the petitioner herein by the corporate debtor was called into question and some observations made by a Single Bench. An appeal has been preferred by the first respondent herein from the relevant order to question the order of the Single Bench, including the said observations. The first respondent is represented by Mr. P.S. Raman, learned senior counsel, who says that it is her right to have the order passed by the Single Bench *set aside* and if the NCLT decides

the matter before it on the basis of the observations of the Single Bench, the first respondent may be seriously prejudiced thereby. It is the further submission of the first respondent that the NCLT has adjourned the matter till August 26, 2021 and what the first respondent proposes to contend before the NCLT is that it would be improper to proceed with the NCLT proceedings without the appeal preferred by the first respondent being disposed of.

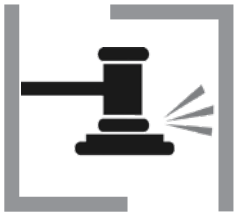
5. In the order dated March 26, 2021 passed by the NCLT, the following observation is made in the penultimate paragraph thereof:

> "The Insolvency and Bankruptcy Code, 2016 (IBC) is time bound. ... The complexities in this matter and pending litigations before various courts have been major impediment in conducting CIRP. Since the matter is pending before the Division Bench of the Hon'ble High Court of Madras, all the parties shall place this matter before Hon'ble High Court for direction whether this Adjudicating Authority can proceed as per IBC Rules and Regulations and what shall be the fate of CP/709/2018 pending on the file of this Adjudicating Authority."

6. Quite obviously, the NCLT, Chennai has sought to pass the buck. The order may also seen to be irreverent and verging on the contumacious to remind this court that while the NCLT functions on a time bound basis, the time element may not apply to court proceedings. To such extent, the NCLT may do well to stay within the bounds of its authority and adhere to the limits of propriety in conformity with the superior authority that this court exercises. It is for the NCLT to decide whether the matter before it ought to be decided or not, whether any injunction operates or impedes the progress of the matter before it and the parties cannot be asked to approach this Court for this Court to hand-hold the NCLT and guide it through its proceedings. Indeed, the order and the part thereof extracted above betrays the total non-application of mind in that all the parties before the NCLT were not, and could not have been, parties to the proceedings pending before the Division Bench of this Court and, to such extent, the parties before the NCLT, who are not parties to the proceedings pending in this court, could not have been left to the vagaries of a matter to which they were not parties.

7. The NCLT would do well to confine itself to its area of specialisation and deal with the matter in accordance with law without waiting for any advice or assistance from this Court which this Court, in any event, is not obliged to extend.

8. W.P.No.12957 of 2021 is disposed of with the above observations. There will be no order as to costs.



(2021) 130 taxmann.com 423 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Rajesh Goyal v. Babita Gupta

JARAT KUMAR JAIN, JUDICIAL MEMBER AND

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

I.A. NOS. 2166 OF 2020 AND 1323 OF 2021†

COMPANY APPEAL (AT) (INS.) NO. 1056 OF 2019

AUGUST 13, 2021

Section 12, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and rule 11 of the National Company Law Appellate Tribunal Rules, 2016 - Corporate insolvency resolution process - Time limit for completion of - Allottee-financial creditors moved an application under section 7 for initiation of CIRP against corporate debtor an Infrastructure Company - NCLT admitted application - Thereafter, promoter preferred an appeal which was decided by NCLAT by order dated 5-2-2020, holding concept of reverse CIRP and directing promoter to cooperate with IRP, to disburse amount as financial creditor and timelines were set - Thereafter, appeal was filed by promoter to seek extension of timelines stipulated in judgment dated 5-2-2020, due to outbreak of COVID-19 - NCLAT vide order dated 4-3-2021, disposed of application allowing to extend timelines envisaged in order dated 5-2-2020, without altering, substituting or modifying its structural terms - Applicant promoter filed instant application seeking clarification of order dated 4-3-2021 - It was submitted that revised timeline proposed by applicant in Chart was up to 15-1-2021, as same was based on assumption that order would be passed around 15-1-2021, however, since order was passed on 4-3-2021 i.e. after 48 days from proposed exclusion date, therefore, exclusion for period when order was passed i.e. 4-3-2021, may be granted, otherwise it would cause irreparable loss - Whether in view of above facts, applicant would be entitled to get revised timeline with exclusion up to 4-3-2021, for completion of project - Held, yes (Paras 9 and 11)

CASE REVIEW

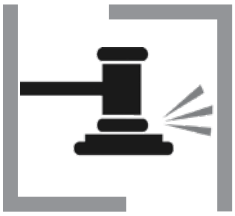
Rajesh Goyal v. *Babita Gupta* (2021) 130 taxmann.com 422 (NCLAT - New Delhi) (para 16) *Modified* **(See Annex).**

Abhijeet Sinha and **Saurabh Jain** *for the Applicant.* **Praful Jindal**, **Rajesh Gupta**, **Anubhav Mehrotra**, **Pravesh Bahuguna**, **Sumesh Dhawan**, **Ms. Vatsala Kak**, **Sudeep Kumar Shrotriya**, **Rishabh Jain**, **Abhindra Maheshwari**, **Rupesh Kumar**, **Kumar Anurag Singh**, **Zain A. Khan**, **Nishant Piyush**, **Ram Sharma**, **Amandeep Singh**, **Rudreshwar Singh**, **Gautam Singh** and **Manoj Kumar** *for the Respondent.*

† Arising Out of order of NCLAT, New Delhi in *Rajesh Goyal* v. *Babita Gupta* (2021) 130 taxmann.com 422.

FOR FULL TEXT OF THE JUDGMENT SEE

(2021) 130 taxmann.com 423 (NCLAT - New Delhi)



(2021) 130 taxmann.com 421 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Parag Sheth v. Sunil Kumar Agarwal

JARAT KUMAR JAIN, JUDICIAL MEMBER AND
DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 1055 OF 2020†
AUGUST 13, 2021

Section 20 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Management of operations of corporate debtor as going concern - Appellant was appointed as Interim Resolution Professional (IRP) in respect of corporate debtor - Existing insurance of assets of corporate debtor was with insurance company 'IFFCO', which was going to lapse - Appellant thus, had entered into a new contract with another insurance company for insurance of assets of corporate debtor, for which he paid higher insurance premium - Whether section 20(2)(b) authorizes IRP to enter into contracts before commencement of CIRP - Held, yes - Whether however, in instant case appellant had entered into a new contract after commencement of CIRP without approval of CoC, same was in violation to section 20 - Held, yes (Para 19)

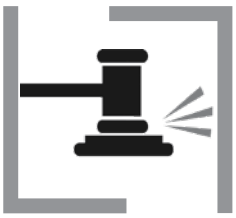
CASE REVIEW

Parag Sheth v. *Sunil Kumar Agrawal* (2021) 130 taxmann.com 420 (NCLT - Ahd.) (para 19) *affirmed* **(See Annex)**.

Ms. Natasha Dhruman, Adv. *for the Appellant*. **Pratik Thakkar** and **Atul Sharma**, Advs. *for the Respondent*.

† Arising out of order of NCLT, Ahd. in *Parag Sheth v. Sunil Kumar Agarwal* (2021) 130 taxmann.com 420.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 130 taxmann.com 421 (NCLAT - New Delhi)



(2021) 130 taxmann.com 442 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Ravi Ajit Kulkarni v. State Bank of India

JUSTICE A.I.S. CHEEMA, OFFICIATING CHAIRPERSON AND
DR. ALOK SRIVASTAVA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NOS. 316 AND 317 OF 2021†
AUGUST 12, 2021

Section 95, read with sections 96 and 99, of the Insolvency and Bankruptcy Code, 2016 read with rules 11 and 44 of the National Company Law Tribunal Rules, 2016 - Individual/firm's insolvency resolution process - Application by creditor - Whether once application under section 95 is filed, Adjudicating Authority has to act on it, and following principle of natural justice, it has to give limited notice to debtor/personal guarantor - Held, yes - Whether limited notice has to be only to secure presence of debtor/personal guarantor referring to Interim Moratorium which has commenced so that when Resolution Professional is appointed, they may provide material in their favour as per section 99(2) - Held, yes - Whether before appointment of Resolution Professional, debtor is not allowed to raise disputes, however, if debtor raises dispute on merit, same may be adjudicated only after receipt of report from Resolution Professional under section 99 - Held, yes - Whether stage for considering default arrives when matter is taken up under section 100 - Held, yes (Paras 42, 44 and 47)

CASE REVIEW

SBI v. *Ravi Ajit Kulkarni* (2021) 130 taxmann.com 441 (NCLT - Mum.)(para 49) *reversed.* (**See Annex**)

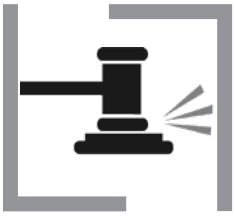
CASES REFERRED TO

Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 6), *Innovative Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 6) and *Lalit Kumar Jain* v. *Union of India* (2021) 127 taxmann.com 368 (SC) (para 10).

Krishnendu Datta, Sr. Adv., **G. Aniruth Purusothaman**, **Ravi Raghunath** and **Kunal Kanungo**, Advs. *for the Appellant.* **Ayush J. Rajani**, PCA and **Ms. Sandhya Iyer**, Adv. *for the Respondent.*

† Arising out of order of NCLT, Mum. in *SBI* v. *Ravi Ajit Kulkarni* (2021) 130 taxmann.com 441

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 130 taxmann.com 442 (NCLAT - New Delhi)



(2021) 130 taxmann.com 440 (NCLT - Chennai)

NATIONAL COMPANY LAW TRIBUNAL, CHENNAI BENCH

Siva Industries and Holdings Ltd., *In re*

R. SUCHARITHA, JUDICIAL MEMBER AND

ANIL KUMAR B., TECHNICAL MEMBER

MA/43/CHE/2021 IBA/453/2019 IA/647/IB/2020 & 586/CHE/2021

AUGUST 12, 2021

Section 12A of the Insolvency and Bankruptcy Code, 2016, read with regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Withdrawal of application - Whether Adjudicating Authority is required to be vigilant in considering settlement plan in relation to section 12A and is only required to permit unprejudiced settlement plan to succeed - Held, yes - CIRP in case of corporate debtor was admitted and IRP was appointed - Initially two resolution plans were received, however both of them were withdrawn - After this a third resolution plan was received which did not receive consent of Committee of Creditors (CoC) - Soon after, promoter of corporate debtor, although ineligible to submit a resolution plan tried to restructure loans under pretext of a settlement proposal - However, purported plan was not a settlement simpliciter as envisaged under section 12A, rather, it was a business restructuring plan - Further, as per settlement Plan, there was no final offer made by promoter of corporate debtor and also no acceptance made by CoC in this regard - Whether therefore, there being ambiguity of terms of settlement and no finality having been reached between promoter of corporate debtor and CoC as per settlement proposal, order for withdrawal of CIRP could not have been passed - Held, yes (Paras 21, 22, 27 and 28)

CASE REVIEW

Arun Kumar Jagatramka v. *Jindal Steel and Power Ltd.* (2021) 125 taxmann.com 244/165 SCL 652 (SC) (para 24); *Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC (India) Ltd.* (2021) 125 taxmann.com 360/166 SCL 678 (SC) (para 24); *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 24); *India Resurgence Arc (P.) Ltd.* v. *Amit Metaliks Ltd.* (2021) 127 taxmann.com 610 (SC) (para 24); *Lalit Kumar Jain* v. *Union of India* (2021) 127 taxmann.com 368 (SC) (para 24); *Shweta Vishwanath Shirke* v. *Committee of Creditors* (2019) 109 taxmann.com 30 (NCL-AT) (para 24); *Brilliant Alloys (P.) Ltd.* v. *S. Rajagopal* 2018 SCC OnLine SC 3154 (para 24); *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567 (SC)

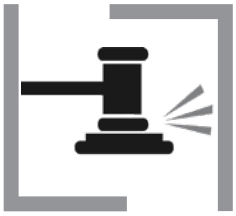
(para 24); *Shaji Purushothaman* v. *Union Bank of India* (Company Appeal (AT) (Insolvency) No. 921 of 2019 - NCLAT, dated 6-9-2019) (para 24); *Satyanarayan Malu* v. *SBM Paper Mills Ltd.* (2019) 105 taxmann.com 217 (NCLT-Mum.) (para 24); *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 24) and *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 24) *distinguished*.

CASES REFERRED TO

Arun Kumar Jagatramka v. *Jindal Steel & Power Ltd.* (2021) 125 taxmann.com 244/165 SCL 652 (SC) (para 4), *Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC (India) Ltd.* (2021) 125 taxmann.com 360/166 SCL 678 (SC) (para 4), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 4), *India Resurgence Arc (P.) Ltd.* v. *Amit Metaliks Ltd.* (2021) 127 taxmann.com 610 (SC) (para 4), *Lalit Kumar Jain* v. *Union of India* (2021) 127 taxmann.com 368 (SC) (para 4), *Shweta Vishwanath Shirke* v. *Committee of Creditors* (2019) 109 taxmann.com 30 (NCL-AT) (para 4), *Brilliant Alloys (P.) Ltd.* v. *S. Rajagopal* 2018 SCC Online SC 3154 (para 4), *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567 (SC) (para 4), *Shaji Purushothaman* v. *Union Bank of India* (Co. Appeal (AT) (Insolvency) No. 921 of 2019, dated 6-9-2019) (para 4), *Satyanarayan Malu,* v. *SBM Paper Mills Ltd.* (2019) 105 taxmann.com 217 (NCLT-Mum.) (para 4), *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 4) and *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 4).

Sanjeev Kumar, **Anshul Sehgal**, Advs., **Arvindh Pandian**, Sr. Adv., **Avinash Krishnan Ravi**, Adv., **Satish Parasaran**, Sr. Adv., **Subhang P. Nair** and **M.L. Ganesh**, Advs. *for the Appearing Parties.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 130 taxmann.com 440 (NCLT - Chennai)



(2021) 130 taxmann.com 419 (NCLT - Kolkata)

NATIONAL COMPANY LAW TRIBUNAL, KOLKATA BENCH

State Bank of India v. Tantia Constructions Ltd.

RAJASEKHAR V.K., JUDICIAL MEMBER AND

HARISH CHANDER SURI, TECHNICAL MEMBER

IA NO. 1840 (KB) OF 2019 CP (IB) NO.148 (KB) OF 2018

AUGUST 12, 2021

Section 31, read with section 3(6), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution plan - Approval of - Applicant and corporate debtor entered into a Joint Venture Agreement (JVA) for completing construction of pumping stations, which was later revised vide a supplementary agreement - Applicant on coming to know that corporate debtor had been admitted into CIRP, submitted its claim before Resolution Professional (RP) - However, RP replied that claim could not be accepted - Hence, applicant filed instant application seeking a direction upon RP to include its claim and, pending disposal of application, direct that no resolution plan be considered or approved - Whether since it was an ongoing project and final accounts could have been drawn up either at stage of invitation of claims or stage of approval of resolution plan, hence RP should have made provision for a contingency in case corporate debtor owed any dues to applicant after finalization of accounts, which it had failed to do - Held, yes - Whether RP could not have denied applicant's claim while at same time admitting liability in capacity of Resolution Professional in books of account - Held, yes - Whether applicant having knocked on doors of this Adjudicating Authority seeking a determination of its claim, even before approval of Resolution Plan, its claim was to be included with dues payable to operational creditors - Held, yes (Paras 4 and 4.10)

CASES REFERRED TO

Swiss Ribbons v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 2.12), *Prasad Gemplex* v. *Star Agro Marine Exports (P.) Ltd.* (2019) 107 taxmann.com 46 (NCLAT - New Delhi) (para 2.12), *Indian Overseas Bank* v. *D.C. Industrial Services (P.) Ltd. (In Liquidation)* (IA (IB) No. 1832/KB/2019, dated 16-4-2021) (para 2.12), *Bengal Silk Mills Co.* v. *Ismail Golam Hossain Ariff* AIR 1962 Cal. 115 (para 3.7), *Kashinath Shankarappa* v. *New Akot Cotton Ginning and Pressing Co. Ltd.* AIR 1951 Nag. 255 (para 3.7) and *Ghanshyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 (SC) (para 4.7).

Rishav Banerjee, **Ritoban Sarkar** and **Ms. Madhuja Barman**, Advs. *for the Applicant.* **Ratnanko Banerji**, Sr. Adv., **Deep Roy**, Adv. and **Kshitiz Chawchcharia** *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 130 taxmann.com 419 (NCLT - Kolkata)

Representation of correct facts and correcting misapprehensions

Under the Insolvency and Bankruptcy Code, upon initiation of Corporate Insolvency Resolution Process (CIRP) all the powers of the Board of Directors are vested with the Insolvency Professional. Insolvency Professional is required to keep the business of the corporate debtor until the Committee of Creditors (CoC) draws up a resolution plan or liquidation of Corporate Debtor. During the CIRP an Insolvency Professional makes several communication with the suspended board of directors, banks, stakeholders, authorities etc. An Insolvency Professional must not communicate any information, report etc. or associated with communication of any such information, where he believes that the information contains a materially false or misleading statement; contains statement or information provided recklessly or omits or obscures required information where such omission or obscurity would be misleading. Further, an Insolvency Professional drafts various important documents such as Information Memorandum, expression of interest, evaluation matrix etc. on the basis of which resolution plan are submitted by the resolution applicants and evaluated

by the CoC. Therefore, an Insolvency Professional must ensure that correct facts are mentioned in such documents.

An Insolvency Professional forms crucial pillar of entire Insolvency and Bankruptcy Code and success or failure of any CIRP depends largely on the Insolvency Professional. An Insolvency Professional must guide the CoC, employees of the corporate debtor and other stakeholders about the provisions of the IBC whenever there are any misapprehensions. He must ensure that the queries of stakeholders are resolved in timely manner.

During CIRP, on analysing the financial statements or forensic audit report an Insolvency Professional may come across preferential, undervalued, defrauding creditors or extortionate transactions. An Insolvency Professional must inform such transactions to concerned stakeholders and authorities. An Insolvency Professional must not obscure any material information from IBBI, adjudicating authorities and concerned stakeholders.

Code of Conduct

With reference to `Representation of correct facts and correcting misapprehensions', the Code of Conduct for Insolvency Professionals, specified under first schedule to Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 provides that:

`11. An insolvency professional must inform such persons under the Code as may be required, of a misapprehension or wrongful consideration of a fact of which he becomes aware, as soon as may be practicable.

12. An insolvency professional must not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder, as applicable.'

List of instances observed by the IBBI violating aforementioned clauses of the Code of Conduct for Insolvency Professionals

- An Insolvency Professional incorporated an LLP with the name "IBBI Insolvency Practitioners LLP" and its website "www.ibbi-ip.com" without any prior authorisation from the Board and gave a misleading impression that LLP has been incorporated by IBBI or in some way related to IBBI.
- A director of a company applied for IP registration with IBBI and during the scrutiny of testimonials pertaining to his experience by IBBI, it was found that the Company's website stated, "We are promoted by qualified Insolvency Professionals with accreditation from Insolvency and Bankruptcy Board of India" and "Empanelled with top financial institutions of India for recovery and insolvency related matters" which was misrepresentation of facts as none of the directors had obtained for IP registration.
- An Insolvency Professional included expression of interest after the last date of submission. He not only delayed issuance of provisional list of eligible prospective resolution applicants but also gave false

statement to IBBI that the same was posted on the website of the Corporate Debtor within timelines. There was violation of clause 12 of the code of conduct.

- An Insolvency Professional submitted different excuses for resignation as Resolution Professional before IBBI, CoC and NCLAT. Before the IBBI, he submitted that his resignation was on account of personal and health issues, whereas, in his resignation to the CoC it was stated that he was resigning as his bills towards the services provided remained unpaid. Contrariwise, before the NCLAT he stated that he was resigning due to preoccupation.

- An Insolvency Professional issued invitation for EoI with a requirement that the eligibility of resolution applicants shall be certified by a Chartered Accountant ("CA"). However, such a requirement was never approved by the CoC but was approved by only one financial creditor holding 83% voting share. The action of the RP is such that he has sided with the largest financial creditor and termed its decision as the decision of the CoC. The acts of the RP are attempts to mislead the IBBI and the Adjudicating Authority.

- An Insolvency Professional sought an extension of time to the AA, on the ground that he and the promoter were actively seeking out investors to formulate resolution plan and talks were in very advanced stage. However, there was no such talk except the effort by the RA to reach an OTS with sole FC. Therefore, RP obtained approval for extension of time by making a false statement to the AA.

- An Insolvency Professional accepted the claim of a creditor (say 'Mr. X') as financial creditor. Then he erred to reclassifying the status of Mr. X from 'Financial' to 'Operational Creditor'. The Adjudicating Authority vide its order declared Mr. X as financial creditor. Despite the order of Adjudicating Authority, the IP allowed voting on agenda for not considering Mr. X as financial creditor. The same was approved. Then in the next meeting the other CoC members ousted Mr. X from the CoC, as it was the only CoC member holding them back from successfully passing a withdrawal of CIRP resolution under section 12A of the Code. The resolution for withdrawal was passed with 100% voting share. Thus, the IP disregarded the order of the Adjudicating Authority and contravened clause 12 of the Code of Conduct.

- An Insolvency Professional made incorrect cost disclosure to the Insolvency Professional Agency as in respect of fees of valuers approved/ratified by CoC. The IP contravened clause 12 of the code of conduct.

- An Insolvency Professional failed to bring to the notice of the CoC that moratorium has been imposed on

the transfer of assets of CD during CIRP. The IP made payment of EMIs to the Bank and outstanding dues to the vendors/service providers of the CD pertaining to pre-CIRP period from the assets of the CD during CIRP and that too in preference to other creditors with the approval of CoC. The IP contravened clause 12 of the code of conduct.

- An Insolvency Professional in various communications with the stakeholders, used letterheads indicating his profession as an Advocate instead of an Insolvency Professional. There was violation of clause 12 of the code of conduct.

REFERENCES

IBBI - Handbook on Ethics for Insolvency Professionals: Ethical and Regulatory Framework

https://www.ibbi.gov.in/orders/ibbi

FAQs on Expression of Interest (EOI)

1. When shall Form-G be published?

As per CIRP Regulations 36A, a Resolution Professional within 75 days from the Insolvency Commencement Date shall publish brief particulars of the invitation for expression of interest in Form G.

2. Where shall Form-G be published?

Form-G shall be published:

(*i*) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the resolution professional, the corporate debtor conducts material business operations;

(*ii*) on the website, if any, of the corporate debtor;

(*iii*) on the website, if any, designated by the Board for the purpose; and

(*iv*) in any other manner as may be decided by the committee.

3. What should detailed invitation for expression of interest should contain?

The detailed invitation shall:

(*a*) specify the criteria for prospective resolution applicants, as approved by the committee in accordance with clause (*h*) of sub-section (2) of section 25;

(*b*) state the ineligibility norms under section 29A to the extent applicable for prospective resolution applicants;

(*c*) provide basic information about the corporate debtor as may be

required by a prospective resolution applicant for expression of interest; and

(*d*) not require payment of any fee or any non-refundable deposit for submission of expression of interest.

4. Whether Expression of Interest (EOI) received after the time specified in the invitation be accepted?

As per CIRP Regulations 36A(6), expression of Interest received after the time specified in the invitation of interest shall be rejected.

5. What are the undertakings that are to be provided by the applicants along with expression of interest?

Expression of Interest shall be accompanied by the following undertakings:

- an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (*h*) of sub-section (2) of section 25 *i.e. prospective* resolution applicant shall fulfil be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.
- an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under section 29A to the extent applicable
- an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process
- an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code
- an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.

6. When shall provisional list of eligible prospective resolution applicants be issued by the Resolution Professional?

The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.

Amendment Acts

The Insolvency and Bankruptcy Code (Amendment) Act, 2021[1] (hereinafter the 'amendment act') deemed to have come into force on the 4th day of April 2021, has been amended mainly to include into its ambit the Pre Pack Insolvency Resolution Process. Some of the changes are as follows, for a detailed amendment Bill please refer to The Insolvency and Bankruptcy Code (Amendment) Bill, 2021.

1. Section 4 of the IBC amended w.r.t pre-packaged insolvency resolution process of corporate debtors under Chapter III-A.

2. Definition of

   - Base resolution plan inserted
   - "Corporate applicant", "Initiation date", "Interim finance" amended to cover the pre-packaged insolvency resolution process also.
   - "Officer" amended to extend its application to Part II Chapter VI of the IBC.
   - "preliminary information memorandum", "pre-packaged insolvency resolution process costs", "pre-packaged insolvency commencement date"

3. Sections 11, 33, 34, 61, 65, 77, 208, 239, 240 & 240A amended and Sections 11A, 67A & 77A inserted.

4. Chapter III-A "*Pre-Packaged Insolvency Resolution Process*" inserted.

5. Ord. 3 of 2021 Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 is repealed.

Updates by Other Authorities

The following rules have been amended to the Income-tax Rules, 1962[2], by virtue of the Income-tax (24th Amendment) Rules, 2021.

- Rule 12AA (inserted)
- Rule 51B (inserted)

Please refer to the Amendment for further clarity

1. https://ibbi.gov.in/uploads/legalframwork/0150ec26cf05f06e66bd82b2ec4f6296.pdf
2. https://ibbi.gov.in//uploads/legalframwork/6b5b7a955a8478b086453692772de95d.pdf

"BREXIT" Impact on UK Insolvencies

1. INTRODUCTION

The UK's insolvency regime is one of the best in the world, according to the World Bank, returning money more quickly to creditors than other countries including Germany, France and the USA. The regime provides predictable, cost-effective, and fast outcomes for creditors and consequently encourages investment, which in turn promotes entrepreneurship, helps create and preserve jobs, and boosts the economy. The regime and the professionals, who work within it, are a vital part of the UK's position as an international centre for financial and professional services. The UK's domestic insolvency regime *i.e.* corporate insolvency procedures such as administration and liquidation, and personal insolvency procedures such as bankruptcy and Individual Voluntary Arrangements, are governed by UK law and will not be directly affected. However, the strength of the UK's insolvency and restructuring regime depends on its European effect and unless mechanisms are put in place to maintain the benefits of the European Insolvency Regulation and the Recast Regulation, there will be a significant detrimental impact on the economy.

Currently, the Insolvency legislation in UK has insolvency proceedings involving companies or individuals with their centre of main interest (COMI) in an EU Member State being governed by Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 Proceedings (*Recast Regulation*). The Recast Regulation determines in which member state proceedings may be opened and the law which governs those proceedings and provides for the automatic recognition of proceedings between member states. By way of background, the Recast Regulation applies to certain specified insolvency proceedings, including an English administration, liquidation or voluntary arrangement. It does not apply to English receiverships, schemes of arrangement under Part 26 Companies Act, 2006, moratoria under Part A1 Insolvency Act, 1986 and restructuring plans under Part 26A Companies Act, 2006.

The Recast Regulation governs:

- The proper jurisdiction of insolvency proceedings (by reference to the debtor's centre of main interests (COMI) or any establishments). If a debtor's COMI is located in one member state, insolvency proceedings can only be opened in another member state if the debtor has an establishment there.
- The applicable law to be used in those proceedings (subject to exceptions, the law of the state of opening of the proceedings).
- The mandatory automatic recognition of those proceedings in other member states.
- Methods by which coordination and cooperation is to be, or may be, achieved within more than one member state and for insolvent groups of companies.

The Recast Regulation does not purport to harmonize domestic insolvency laws across the EU.

The UK left the EU on 31 January, 2020. However, as a result of the Withdrawal Agreement and its implementation in the UK, a transition period, during which the UK and EU continue to act for most purposes as if the UK were still a Member State, is in place until 11pm on 31 December, 2020. While the UK is still treated as a Member State, EU Regulations provide a clear framework for conducting cross-border insolvency proceedings.

2. POST BREXIT CROSS BORDER INSOLVENCIES

Throughout the transition period the Recast Regulation has continued to operate as between the UK and the remaining member states. The Withdrawal Agreement provides specifically in relation to the Recast Regulation that: "In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following provisions shall apply as follows: … (*c*) Regulation (EU) 2015/848 of the European Parliament and of the Council shall apply to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period."(Article 67(3), Withdrawal Agreement). Therefore, after the end of the Transition Period, the

Recast Regulation will continue to apply where the main proceedings were opened before the end of the Transition Period. However, this is not the case with respect to proceedings opened after the end of the Transition Period (new proceedings).

The English courts will have a wider jurisdiction to open insolvency proceedings where a debtor's COMI is in another member state than is currently the case and the courts of the remaining member states will no longer be prevented from opening main proceedings in respect of a debtor with its COMI in the UK. This makes it more likely that multiple (parallel) proceedings in relation to a single debtor will be seen. The remaining member states will not be obliged to recognize English insolvency proceedings (which would previously have been the subject of mandatory automatic recognition across the EU) and the UK will not be obliged to recognize proceedings in the remaining member states pursuant to the Recast Regulation. If a remaining member state will not recognize the UK insolvency proceedings, it may be necessary to open parallel insolvency proceedings in that jurisdiction.

In case of a NO-DEAL brexit, wherein there would be no withdrawal Agreement between UK and the other states, for cross border insolvencies without an EU element, the following cross border regimes will remain relevant, notwithstanding a "no deal" Brexit:

- the UNCITRAL Model Law on Cross Border Insolvency (the "Model Law") (implemented in the UK by the Cross Border Insolvency Regulations 2006 and in the US by Chapter 15 of the US Bankruptcy Code, for example)
- Section 426 Insolvency Act, 1986 (Section 426 Insolvency Act 1986 is relevant to requests for assistance from Ireland.)
- English common law.

The assistance in which a UK insolvency office holder might seek recognition or assistance from the courts of a remaining member's state will come from the domestic law of that member state (and hence will vary between member states). However, a small number of EU jurisdictions have adopted laws based on the Model Law (Greece, Romania, Slovenia, Poland) pursuant to which there is a mechanism in place by which foreign office holders (including from the UK) may seek recognition and assistance from the courts of those countries.

The Insolvency Act, 1986 provides that the courts having jurisdiction in relation to insolvency law in any part of the UK shall assist the courts having the corresponding jurisdiction in any other part of the UK or any relevant country or territory. The list of relevant countries and territories does not include any Member States. However, that may change in the future, presumably on the basis of reciprocity.

Reliance can also be placed on common law, with one of the leading authorities on the law of corporate insolvency in Scotland suggesting that there is no limit in principle to the type of help that may be requested in the UK to aid a foreign court and *vice versa*.

Following Brexit, the cross-border regime in insolvencies as between Member States and the UK has significantly changed and it will inevitably increase timing and costs of such proceedings, especially in the early days of applying "new" laws. Separate recognition applications will likely be needed by UK Insolvency Practitioners across each Member State where the debtors assets are situated whereas Insolvency Practitioners in EU Member States will have the advantage of a single application under the CBIR in the UK.

3. Conclusion

There will be no automatic recognition of Irish (or other EU member state) insolvency proceedings in the UK. Separate Court applications will be necessary in the UK Courts. This will add to the costs and will lead to delay, thus reducing the recovery for creditors. The UK are signatories to the UNCITRAL Model Law on Cross-Border Insolvency which deals with recognition, but only four EU members have adopted this mechanism. UK insolvencies, including schemes of arrangement will not benefit from the automatic recognition across EU member states that apply under the Insolvency Regulation. Other EU countries, including Ireland, have strong insolvency regimes. This will enable effective and efficient cross-border recoveries and restructurings, enhancing outcomes for creditors, lenders and employees, facilitating turnaround and rescue of viable businesses and enhancing the availability of credit.

The loss of the EU Insolvency Regulations will add to the complexity of European cross border insolvency cases. However, the challenges which this presents are not insurmountable. The insolvency profession successfully manages cross border cases involving non-EU borrowers and will be able to adopt the same practices when dealing with European cases going forward. Some UK/EU restructurings and insolvencies may be more challenging as a result but its seems likely that a body of expertise will soon develop as the courts in the UK and the remaining member states become familiar with the reality of cross border restructurings and insolvencies in a post-Brexit world.

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