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INSOLVENCY AND BANKRUPTCY JOURNAL

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INSTITUTE OF INSOLVENCY PROFESSIONALS
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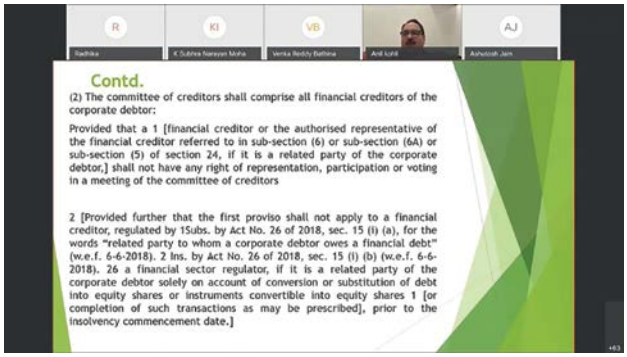
NEWS FROM THE INSTITUTE

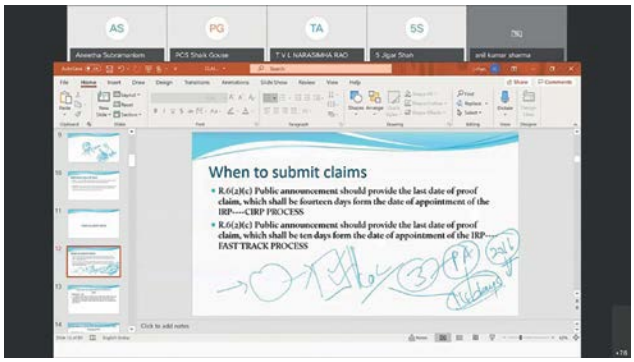
Workshops

S. No	Date	Subject
1	6th February, 2021	Leadership and Entrepreneurship Skills for IPs
2	27th February, 2021	Procedural Aspects on challenges faced during CoC meeting and verification of claims
3	13th March, 2021	Managing corporate debtor as a going concern
4	27th March, 2021	Guide for CIRP Admission Applications

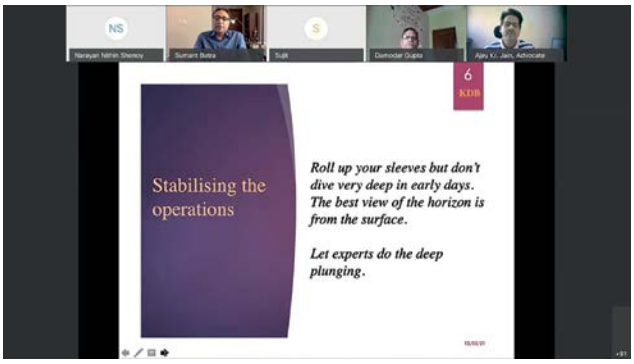
Leadership and Entrepreneurship Skills for IPs I February 6, 2021



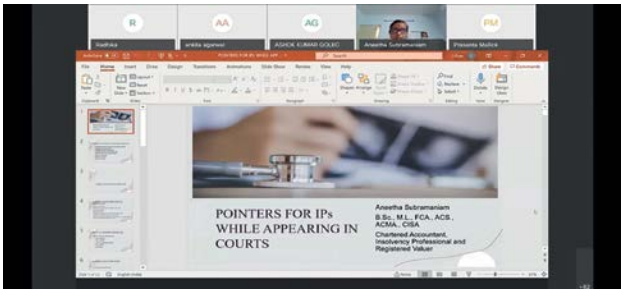
Workshop I Procedural Aspects on challenges faced during CoC meeting and verification of claims I February 27, 2021 I 10:00 AM - 05:00 PM IST



Workshop I Managing Corporate Debtor as a Going Concern I Saturday, March 13, 2021 I 10:00 AM to 05:00 PM



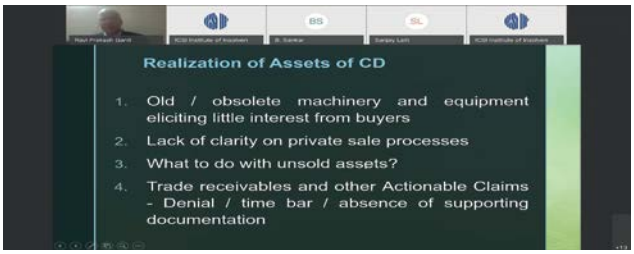
Workshop I Guide for CIRP Admission Applications I March 27, 2021



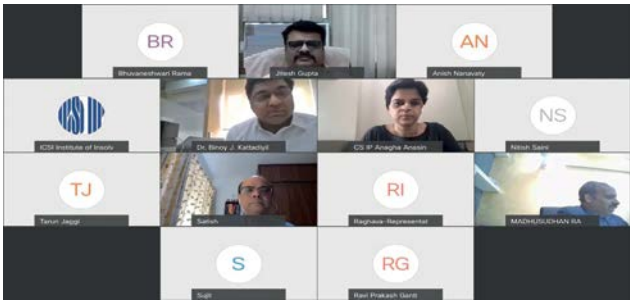
Round-table Discussion

S. No	Date	Subject
1	13th February, 2021	Issues pertaining to Liquidation Process under IBC
2	18th March, 2021	Statement of Best Practices on CoC Meetings

Round-table Discussion I Issues pertaining to Liquidation Process under IBC I February 13, 2021 I 11:00 AM - 01:00 PM



Round-table Discussion I Statement of Best Practices on COC Meetings I March 18, 2021 I 02:00 PM



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- **Phoenix ARC (P.) Ltd. *v.* Ketulbhai Ramubhai Patel**
(2021) 124 taxmann.com 90 (SC) • P-25

Section 5(8) read with section 5(7) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Facility agreement was executed between borrower 'D' and lender 'L' - Corporate debtor was not a party to facility agreement - It was borrower who was to repay loan - Thereafter, Board of Directors of corporate debtor passed a Resolution to provide an undertaking to effect that 100 per cent of its shareholding in GEL shall not be disposed of so long as any amounts were due and payable and outstanding under financial assistance proposed to be

provided by lender to borrower - Accordingly, a pledge agreement was executed between corporate debtor and lender by which agreement, shares of GEL were pledged as a security and a deed of undertaking was also executed by corporate debtor in favour of lender - Whether since only security was created by corporate debtor in shares of GEL and there was no liability to repay loan taken by borrower on corporate debtor, pledge agreement executed subsequent to facility agreement was security in favour of lender who at best will be secured creditor qua corporate debtor and not financial creditor qua corporate debtor - Held, yes (Paras 30 and 31)

- **Ramesh Kymal *v.* Siemens Gamesa Renewable Power (P.) Ltd.**
  (2021) 124 taxmann.com 226 (SC) • P-45

Section 10A of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Suspension of initiation of - Whether object of legislation by inserting section 10A has been to suspend operation of sections 7, 9 and 10 in respect of defaults arising on or after 25-3-2020 i.e. date on which Nationwide lockdown was enforced disrupting normal business operations and impacting economy globally - Held, yes - Whether section 10A clearly bars filing of application for initiation of CIRP of a corporate debtor at instance of eligible applicant in respect of default arising on or after 25-3-2020 and shall not operate in respect of any default committed prior to 25-3-2020 - Held, yes - Whether thus, bar created is retrospective as cut-off date has been fixed as 25-3-2020 while newly inserted section 10A introduced through Ordinance has come into effect on 5-6-2020 - Held, yes - Whether however, retrospective bar on filing of applications for commencement of CIRP during stipulated period does not extinguish debt owed by corporate debtor or right of creditors to recover it - Held, yes (Paras 24 and 26)

- **Committee of Creditors of AMTEK Auto Limited *v.* Dinkar T Venkatasubramanian**
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Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Resolution plan - Approval of - Whether upon approval of a resolution plan by CoC under section 30(4), role of Adjudicating Authority under section 31(1) is limited to checking whether resolution plan meets requirements as provided in section 30(2) and whether resolution plan has provisions of its effective implementation - Held, yes -Whether there is no scope for negotiations and discussion after approval of resolution plan by CoC in term of IBC - Held, yes. (Para 26)

Section 61 of the Insolvency And Bankruptcy Code, 2016, read with Section 2(b) of the Contempt Of Courts Act, 1971 - Corporate person's adjudicating authorities - Appeals and Appellate Authority - Whether contempt jurisdiction is to be exercised with circumspection - Held, yes - Whether acceptance or rejection of a plea on merits is distinct from whether a party is in breach of order of court - Held, yes - Whether disobedience of an order must be wilful before it constitutes contempt and a wilful breach must appear clear by conduct of a party and not by implication - Held, yes - Whether exercise of legal rights and remedies would not constitute contempt - Held, yes - Whether where Court relegated matter to NCLT to decide upon application for approval of resolution plan within a fortnight and NCLT passed an order approving resolution plan submitted by DVI, DVI having taken recourse to its appellate remedy before NCLAT under provisions of section 61, it did not constitute contempt - Held, yes. (Para 32)

- **Upendra Choudhury *v.* Bulandshahar Development Authority**
  (2021) 127 taxmann.com 24 (SC) • P-70

Section 11 read with section 18 of the Real Estate (Regulation and Development) Act, 2016 and Article 32 of the Constitution Of India - Functions and duties of promoter- Petitioner buyer filed petition under article 32, seeking cancellation of all agreements with respondent Development Authority and refund of money to purchasers; or in alternative to ensure that construction was carried out and that premises were handed

over within a reasonable time - Petitioner also sought a forensic audit, an investigation by CBI and by other authorities such as Serious Fraud Investigation Office and Enforcement Directorate - However, it was found that writ petition under article 32 had been filed by a singular home buyer without seeking to represent entire class of home buyers - All buyers may not seek a cancellation and refund of consideration - Apart from this aspect, petitioner sought other reliefs in aid of primary relief, including constitution of a Committee presided over by a former Judge of this Court for purpose of handling projects of developer where moneys had been taken from home buyers - However, entertaining a petition of this nature would involve court in virtually carrying out a day to day supervision of a building project - There were specific statutory provisions holding field and adequate provisions had been made in statute to deal with filing of a complaint and for investigation in accordance with law - Whether therefore, in view of statutory framework, both in terms of civil and criminal law and procedure and fact that there was no reason to assume that petitioner represented a class, petition under article 32 could not have been entertained - Held, yes (Paras 6, 7 and 8)

- **Phoenix ARC (P.) Ltd. *v.* Spade Financial Services Ltd.**
  (2021) 124 taxmann.com 24 (SC) • P-72

Section 5(*8*) read with sections 5(*24*) and 21, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - A company 'Spade' had granted inter corporate deposit to corporate debtor and its subsidiary AAA had purchased developmental rights in a project of corporate debtor - Spade and AAA filed their claims as financial creditors in CIRP of corporate debtor - NCLT had held that AAA and Spade had to be excluded from Committee of Creditors (CoC) formed in relation to Corporate Insolvency Resolution Process (CIRP) initiated against corporate debtor - In appeal, NCLAT by impugned order held that Spade and AAA were financial creditors but NCLT rightly excluded both Spade and AAA from participation in CoC as they were related parties of corporate debtor - Appellant (Phoenix), financial creditor of corporate debtor, challenged decision of NCLAT holding Spade and AAA as financial creditors - Whether since commercial arrangements between Spade and AAA, and corporate debtor were collusive in nature, they would not constitute a 'financial debt' under section 5(8) and, hence, Spade and AAA were not financial creditors of corporate debtor - Held, yes - Whether since 'AA' who was in control of Spade and AAA held positions in corporate debtor, AA, Spade and AAA were related parties of corporate debtor under section 5(24) during relevant period when transactions on basis of which Spade and AAA claimed their status as financial creditors took place - Held, yes - Whether therefore, decision of NCLAT, inasmuch as it referred to Spade and AAA as financial creditors, was to be set aside and decision of NCLAT, inasmuch as it referred to Spade and AAA as related parties of corporate debtor under section 5(24), was to be affirmed - Held, yes (Paras 52, 61, 62, 65 and 97)

Section 21 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Committee of Creditors - Whether where a financial creditor seeks a position on CoC on basis of a debt which was created when it was a related party of corporate debtor, exclusion which is created by first proviso to section 21(2) must apply - Held, yes - Whether while default rule under first proviso to section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from CoC, those related party financial creditors that cease to be related parties in order to circumvent exclusion under first proviso to section 21(2), should also be considered as being covered by exclusion thereunder - Held, yes - Whether on facts under heading 'Corporate insolvency resolution process - Financial debt', since transactions between Spade and AAA on one hand, and corporate debtor on other hand, which gave rise to their alleged financial debts were collusive in nature, there existed a deeply entangled relationship be-

tween Spade, AAA and corporate debtor, when alleged financial debt arose and while their status as related parties might no longer stand, pervasive influence of AAA (promoter/ director of corporate debtor) over these entities was clear, and allowing them in CoC would definitely affect other independent financial creditors - Held, yes - Whether thus, decision of NCLAT, inasmuch as it excluded Spade and AAA from CoC in accordance with first proviso of section 21(2) was to be affirmed - Held, yes (Paras 91, 95, 96 and 97)

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P.K. MALHOTRA

ILS (RETD.) AND FORMER LAW SECRETARY (MINISTRY OF LAW & JUSTICE, GOVT. OF INDIA)

From Chairman's Desk

Once you have no problem making mistakes, admitting them, and correcting them, hardly any mistake will happen.

As we complete the second month of this New Year 2021, there is a sense of an increasing realisation of new and tremendous possibilities emerging before us which were perhaps non-existent and unexplored earlier. In a somewhat gloomy environment, we must see this silver lining. The COVID-19 situation necessarily entailed a trade-off between sustaining lives and livelihoods in the short term, and being a responsible state, the natural chose with India was to focus on preserving its human lives since the economy can recover from this shock, but a human life once lost can never be restored. In fact, the price paid for temporary economic restrictions which is in the form of temporary GDP decline has been dwarfed by the value placed on human life. The national policy response (to the pandemic) is rightly been seen as a reiteration of our insistence to stick to the *humane* principle which believes in preserving life of the subjects. Today, as we analyse with the wisdom of hindsight, we find all good reasons to be happy since we did succeed in minimising loss of human life by adopting some urgent measures. The nation had no prior experience of dealing with such a situation, but the determination and our solemn resolve to focus on the priorities paid us rich dividends. The policy makers, who thought on their feet, took all necessary

steps to sustain human lives including the announcement of a 40-day lockdown (which was intended to scale up the necessary medical and para-medical infrastructure for active surveillance, expanded testing, contact tracing, isolation and management of cases, and educating citizens about social distancing, masks, *etc*). The lockdown period provided the Government with time to put in place fundamental resources required to deal with the pandemic. This strategy has come to be recognised as `5 T' strategy *viz.*, Test, Track, Trace, Treat and Technology. Subsequently, the required resources to prevent spread of the pandemic in the form of PPE kits, masks and sanitizers were also expanded at a fast pace.

As a nation we saw a severe economic downturn due to this pandemic, but our sense of resilience kept-up our belief in our capability to bounce back (with glory). The trends of a V-shaped recovery are now visible with a stable macro-economic situation aided by a stable currency, comfortable current account, burgeoning forex reserves, and encouraging signs in the manufacturing sector output. It may not be an exaggeration to suggest that the nation is reaping the *lockdown dividend* from its brave, preventive measures adopted at the onset of the pandemic. The farsightedness and maturity of our policy makers and the alacrity with which they acted clearly display that *we did not waste the crisis*, and have worked to bring in reforms in such a way that saved both `lives' as well as `livelihoods'. Therefore, we can now shift our focus from the short-term pain (created by the crisis) to the potential for long-term gains engendered by the policy response.

As the things are getting back to normal, we see the facility of physical hearing being made available before the NCLTs. The NCLT has *vide* its order dated 23rd February 2021 decided to resume physical hearing of cases from 1st March 2021. However, in order to prevent any prejudice being caused to any party, it is clarified that if a party expresses difficulty *vis-a-vis* physical hearing, then such party may be permitted to appear *via* video conferencing.

This month also witnessed another very important question of law which got settled by Hon'ble Supreme Court's judgment. The issue pertained to the application of section 10A to a section 9 application which was filed before 5 June 2020 with date of default being dated 30th April 2020 (*i.e.*, after 25th March 2020). The legal contention raised (in the appeal) was to the effect that usage of expression "*shall be filed*" (in section 10A) itself indicates that the provision is prospective in nature, and therefore, it applies to those applications which have been filed

after 5th June 2020 (when the provision was inserted). Overruling this contention and clarifying on the provision, it was held that the date of 25th March 2020 has consciously been provided by the legislature in the recitals to the Ordinance and Section 10A, since it coincides with the date on which the national lockdown was declared in India due to the onset of the COVID-19 pandemic. Reference was also made to the language of the proviso to section 10A which stipulates that *no application shall ever be filed* for the initiation of the CIRP *for the said default occurring during the said period*. The expression *shall ever be filed* thus makes it clear that the intent of the legislature is to bar institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25th March 2020 for a period of six months, extendable up to one year as notified. The rules of interpretation and construction (of statutes) require us to construe the substantive part of a provision harmoniously with the proviso and the explanation (if any). Furthermore, the embargo contained in section 10A has to be given a purposive construction which advances the object which sought to be achieved.

While the journey of IBC has been full of challenges for all stakeholders, but the rewards received in return (in the form of beginning of a new era of reform) are far more fulfilling and enriching. I am reminded of a saying that *no one has ever achieved anything truly significant in any sphere of life without being absolutely devoted to what they are doing*. Therefore, it is only our commitment and devotion to keep working to achieve the solemn objective encapsulated in the preamble of the legislation (IBC) that within this short period of the existence of this legislation we have succeeded in not only making a complete departure from the unyielding past practices by laying down a safe road for the future, but the crossroads encountered on the way are also being dealt with in a manner so that we succeed in reaching the desired destination.

I thank all the professional members for being not only committed and disciplined in discharging their responsibilities under the Code, but also being a friend, philosopher and guide to your own IPA, ICSI IIP.

I encourage and appreciate the IPA which has been consistently organising webinars, workshops and round-tables and taking-up different relevant subjects (under IBC) for a discussion. I believe that it helps in providing a platform for some constructive and fruitful discussions to take place amongst different stakeholders.

Your guidance is invaluable for the growth of our IPA. Please keep showering it on us!

DR. BINOY J. KATTADIYIL
MANAGING DIRECTOR
ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

Managing Director's Message

It is in challenging times that human genius and ingenuity unfold

The entire humanity is undergoing a phase of *uncertainty*. Uncertainty essentially signifies state of things where only the terrain is unknown, but there are constant changes taking place. The flip side is that uncertainty is the best time period for those who have a vision. Such people who look for an opportunity are indeed able to turn them into reality. In fact, it is very well known to humanity that the greatest possibilities in life have been explored during uncertainties. So, looking at the silver lining now, the actions that the pandemic COVID-19 has compelled us to take would perhaps not been taken otherwise. The pace at which our vaccination drive is being carried on is also appreciable. Ever since the Government started inoculation drive with health-workers (from January 16), and then expanding to frontline workers, the vaccination shall soon be opened for persons above 45 years of age.

The Government has been very diligently spearheading and guiding all of us in terms of the actions that are needed to

minimise risks due to the pandemic. Several actions have also been undertaken by the Government and the RBI in order to minimise the financial stress due to the Covid-19, but what also needs to be emphasised is that when one runs a large business entity (or an organisation) one thing that you should always remind yourself is that the results of your results are not restricted to you only. They have a direct impact (in some cases a ripple effect) on a thousand (or even more) people who are involved or otherwise connected with the business that you run. Therefore, the integrity with which you discharge your functions or deal with any challenging situation will definitely have an impact on others. Besides this, once the organisation has grown in size, such challenges multiply and so does the impact of its actions on others. The underlying idea is to equip oneself with a clarity of mind and purpose. A clear mind which is capable of perceiving the situation and actions taken in the right earnest.

All efforts are being made by the government and the concerned agencies to minimise the economic loss suffered by different business entities. This includes steps taken to support their continued existence. This was a much needed step keeping in view the fact that there is a definite financial stress caused by the pandemic. While the deadline for suspension of IBC provisions is not very far (24th March 2021), and there is a definite-noticeable improvement in the financial condition of several sectors in the economy, the shape that the road ahead (towards economic recovery) is perhaps not very easy to predict. Nevertheless, the jurisprudence is continuously being developed on the basis of landmark judgments being delivered by the authorities under the Code. In a judgment delivered this month (1st February 2021) in the matter of *Phoenix Arc Private Ltd. v. Spade Financial Services Ltd.* (2021) 124 taxmann.com 24 (SC), a three-judge bench of Hon'ble SC made it abundantly clear that a collusive transaction cannot be the basis of creation of a *financial debt* under IBC. Thus, such a party cannot be included in the CoC. In arriving at this outcome, the Apex Court relied heavily on the purposive construction of the provisions keeping in view the objective of the legislation. The judgment in definitely a welcome step in the ongoing process of *ironing out the creases* in a legislation like the IBC which is of a recent vintage and has been put to rigorous testing in a short span of time. In the words of the SC, *the definition of 'related party' under the IBC is significantly broad. The intention of the legislature in adopting such a broad*

definition was to capture all kinds of inter-relationships between the financial creditor and the corporate debtor.

The other very important issue which was raised and settled by Hon'ble SC was concerning the timings of existence of such relationship, *i.e.*, if such a relationship existed prior to the commencement of CIRP proceedings. In other words, whether the relatedness could merely have existed in the past, or whether it must continue *in praesenti.* While answering this question, the Court clarified that the exclusion under first proviso to section 21(2) is related not to the debt, but to the relationship existing between a related party FC and the CD. Therefore, an FC which *in praesenti* is not a related party, would not be debarred from being a member of the CoC. However, the Court made it clear that in cases wherein such related party FC divests itself of its shareholding or ceases to become a related party in a business for the sole purpose of participating in the CoC, such an FC would fall under first proviso to section 21(2) and shall be debarred from participating in the CoC.

It is heartening to see that the IBC provisions are getting their true interpretation and any attempt made to defeat the purpose of law is being dealt with appropriately. Needless to mention that in respect of economic laws the courts do recognise a need to give a free hand to the Government.

Though we have been meeting regularly over the virtual platform, I eagerly wait to meet you all in person.

Please take a very good care of yourself and your near and dear ones!

INTERVIEW

DR. MAMTA BINANI

National President (2016) of The Institute of Company Secretaries of India

Recently, we took interview of Dr. Mamta Binani who is not only the first Insolvency Professional (IP) registered with IBBI, but also amongst the most renowned fellow members of ICSI. We asked about her overall experience as an Insolvency Professional as also whether it was challenging to manage different professions together. We also requested Dr. Binani to help us with her advice to the budding professional members. An excerpt of the elaboration provided by her is reproduced below for the readers:

Dr. Mamta Binani: It was trying times. A Resolution Professional (RP) whose position resembled that of a child born out of the womb (of an enacted legislation) was endowed with an important duty, *viz.*, facilitating 'rebirth' of the corporate debtor. This clarion call comes with its own severe pangs as it not only involves dealing with chiselled minds and documents, but also heaps of prejudices, which sometimes eclipsed all rays of hope.

The IBC resolution journey started with the case of '***Synergies Dooray Automotive Limited***' - a much dissected and talked about case in the earlier days of working of IBC. Like a Golden Quadrilateral which is aiming and moving ahead to join dots so that it can give this nation a robust road network and

therefore each dot assumes that much more significance, the IBC gives by law this humongous opportunity to rebuild lost fates, lost livelihoods and repair despair by giving a chance to join the remnants and give it a shape. A selected few gets the huge blessing to perform this sacred act to steer the resolution process in IBC. Synergies Dooray was one such opportunity that was given to me by the Almighty.

Four financial creditors. Not many operational creditors. 1800 odd employees depending on the lifeline of the Corporate Debtor and 1 promoter who has not been able to pay the promised dues and whose Company has been in the gallows for many-many years as a Sick Company and registered in the BIFR. IBC process starts. No precedent to look back. No judicial pronouncements to refer to. No set formats and practices to rest or rely upon. The society just starting to read about the enactment, the Adjudicating Authority just about as fresh as this legislation itself and the Regulators sensitising its officers about the working aspects of the law.

The utmost task imbibed and etched in the hearts of all is 'Resolution, Revival and Rehabilitation'. The functions and tasks embodied in the law begins from the office of Resolution Professional. Claim verification, which seems to be one of the most mundane tasks becomes a nightmarish experience. The clouds of litigation sets in from the 27th day of the CIRP initiation date. On one hand, the zeal to take the matter to a logical conclusion and eyes firmly set on the target being 'resolution', and on the other hand, combating forces of high tides and set mindsets.

Each action and each email from the RP inviting an interlocutory application from one of the financial creditor against the RP. An RP who is not a naïve professional and comes with her own skill sets and prodigy and a tag of being in a public office. Each case gets filed with she being named as a respondent but for the outside world, it means being the 'accused'. Trial starts, not only in the Benches of the Tribunal but also outside the bounded and butted walls of the Tribunal....the media trial and the trial of the professional fraternity and so many others, whose voice the RP could clearly hear though murmured. Those were testing times, when it is like the '*whole outside universe v. the RP*'.

Questions raised one after another. The professional expertise gained over the years kept on telling her that the string of actions taken by her, emanating from the Code, not only capturing the letter but also the spirit was correct. The gargantuan arguments in the Tribunal by the other side, trying to prove everything as gravely incorrect, mischievous and *mala-fide*. So much so that she (IP) also got the designation of being called a mere 'Postman'. Those tribulations will always remain etched in her memory.

After all the exchanges in CoC meetings, Tribunal, so many calls from different foras inflicting injections of uncomfortable questions, not only from India but also abroad, she kept her foot firm on the ground, held her head high with dignity and honesty, kept her heart intact with passion towards the lives that were meandering. Only 2 things gave her full courage, one was the conviction that she has not made any intentional error and had the confidence that she has not even made any judgemental error. Second was the fact that keeping a hawk's eye view on *resolution*, she was able to see some light at the end of the tunnel. She felt like a doctor who was trying to cure a cancer patient by giving

chemotherapy and curative therapies. The scheme of resolution was given by the parent company and there came in another wave of controversy as to how a parent company should be allowed to bail out a company under distress and that too at a price offered which is far less than the amount admitted towards claims. The narrative of hair-cut started and with sudden progression, the narrative changed to 'bald' cut. The majoritarian was swaying with the *hair cut v. bald cut* and the amount of hair getting lost forever in the process.

There was another set of people which was thinking that if the business is still viable with matching cash flows, and commercially, if there is a trade-off between the liquidation value and resolution value and the resolution value is fetching much higher than the liquidation value, then this should be and must be given a chance to survive and be of value not only to the economy of the nation but to the immediate set of stakeholders who depend solely on the proceeds of the Company.

Looking at this trade-off, this set of financial creditors decides to go for this leap of faith and takes a commercial call. The resolution plan gets the seal and stamp of the Committee of Creditors by 75 plus percentage and the RP with a gleeful and joyous heart, submits the same to the Tribunal for its approval. All within 180 days from the CIRP initiation date. After its share of pain and tribulations, it finally gets a nod and one chapter closes but only to open a can of worms for the RP. New set of allegations comes in from different corners, outside the judicial forum. Her name becomes a taboo to be mentioned in public forums. Her name gets struck-off from speaking and teaching assignments. Guests suddenly become hesitant to share dais. No one proposes her name for any important Committees and so much more. Her spouse and professional advisers get very much a similar treatment. All this in spite of the fact that the judicial forum not only approved the Resolution Plan but also showered accolades on the working of the RP and absolved her of all allegations in clear terms.

She withstood all of it with no questions asked. Well wishers suggested for filing defamation suits *etc*. No assignments came by. No quotes were sought and it so seemed to people on the fence that her career as an Insolvency Professional met with a fatal accident at the very beginning of it. She did not get shaken. Appeal proceedings started and media became active yet again. She with a firm faith on judiciary waited for the final order and when it came, tears rolled down her cheeks for the first time in the course of this process. She was nowhere found at fault.

Synergies Dooray Automotive Limited will always remain etched in the history of the Insolvency & Bankruptcy Code and the creditors who showed the courage to give a new lease of life to an ailing company will always be thanked by the thousands of visible beneficiaries and so many invisible mouths which is being fed by the workers who earns their livelihood from the Company.

Kudos to the most important economic legislation which the Country has been endowed with, post independence and it becomes our ardent duty to live up to the expectations of this great legislation, with uprightness, governance, complete dedication and wisdom.

It is with this background that I wish to express (by borrowing the words of Dr.

(CS) M.S. Sahoo, Chairman, IBBI, that the profession of Insolvency Professional is a `***Profession of Professions***'. It is a great responsibility endowed by the legislation and is akin to that of a Doctor. Knowledge and professional acumen is something which is a pre-requisite and what takes the centre stage is governance, zeal, passion and the art of always remaining on the toes, to always remain live to the situation and instead of being reactive.... to be active at all times.

A professional institute or a professional body comes so much to the aid of a professional. The *ICSI Institute of Insolvency Professionals* is doing an exceptionally good work in not only regulating the professionals, its conduct but also taking proactive steps in furthering the educative horizon and is bringing forth the best practices in the field. The team is extremely well knit and its reach out programs and workshops are worth a mention. I feel elated to be a part of its formative years.

There is enough and more for the professionals, be it any sector or field; this has been my firm view. Everyone has space for himself or herself. The honing and polishing of skill sets has to be a constant feature. There are new age concepts that are always being mulled by the Regulators and the Legislative bodies which only showcases their sensitivity to the Law and the ever changing needs of a dynamic society. The concepts like *Pre-pack, Cross border insolvency, section 29A, sale of a corporate debtor as a going concern while in liquidation, group insolvency etc.* have only tested the elasticity of the Law and its constituents. We, as professionals, being the brain and the heart of this law hold the centre stage and also the back stage, whose importance can only be hugely over-emphasised. It will not be at all an exaggeration to mention that an Insolvency Professional's zeal and understanding is akin to the role played by the mother or father of the family, who steers the family ahead in spite of all odds and remains stead fast, having its ultimate goal in the mind.

A pointed question has been asked, which is, *how do we manage two professions?* A human brain and mind can handle so much that it is beyond anyone's comprehension. There is nothing which limits oneself except one's own self. My mantra is `*just go ahead and conquer yourself.....there is so much still left untapped.*' The base of any work or relation, howsoever big or small it is, is a balanced and logical bent of mind, understanding the subject and being sensitive about the purpose and letter of law and its basic tenets and the practical side of it. Rest all finds its place and falls in place. Believe me. Just have faith in yourself and everything can be handled with joy and peace. Governance and no-procrastination give the requisite base to work wonders. The Universe only gives back what we give to it. Just be armed with honesty, grit, determination, sense of profound purpose, dignity for self and for others, resilience, humility.....and go ahead. Enjoy the climb to the mountains as much as we long to enjoy being on top of it.

India is poised for a giant leap. The law makers' ability to give its ears to the needs of the society gives the much desired impetus. The drivers of the economy have also understood that it is a world where the concept of `*Live and let live' works*! Who says that we are not there! We are the force and also the drivers of the force!

●●●

Insight!

Voluntary Liquidation

PRADEEP KATHURIA

B. Com., Company Secretary, Insolvency Professional, Registered Valuer

"It is the spirit and not the form of law that keeps justice alive."

- Earl Warren

I. INTRODUCTION

With the advent of Insolvency and Bankruptcy Code (IBC), 2016, a uniform, comprehensive Code was introduced which encompassed all companies, partnerships, and individuals (other than financial firms). Its primary goal is to consolidate the Insolvency resolution process into a fast track for all companies, partnerships and individuals (other than financial firms).

Now the IBC not only enables the insolvency proceedings of the insolvents but also the code contains provisions for solvent entities that want to themselves surrender their business and refrain from carrying on their business. To be eligible for voluntary liquidation, the solvent entity must be in a state to pay off its debts.

The Central Government on 30th March 2017 notified Section 59 of the Insolvency and Bankruptcy Code 2016. The section 59 of

the Code contains provisions for Voluntary Liquidation of the Corporate Persons. The provisions of section 59 actually came into effect from 1st April 2017. Thereafter on 31st March 2017, the Insolvency and Bankruptcy Board of India (IBBI) *vide* its notification notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 which came into effect from 1st April 2017.

II. VOLUNTARY LIQUIDATION

The Insolvency and Bankruptcy Board of India (IBBI) has notified Section 59 which deals with Voluntary Liquidation, meanwhile the Voluntary Liquidation process in use before IBC, was Companies Act 1956 and Companies Act 2013. Voluntary Liquidation is when a company self imposes upon itself to wind up and dissolve itself after approval of its shareholders. It generally happens when company turns insolvent and is unable to pay off its liabilities.

Now, the government *vide* its Notification has repealed the provision of Voluntary Liquidation under Companies Act 1956 and Companies Act 2013 vide notification dated March 31, 2017 and May 28, 2016, respectively.

The Companies Act 1956 had 38 Sections and Companies Act 2013 had 20 Sections which dealt with Voluntary Liquidation and in the plain reading, the IBC 2016, *vide* Chapter V of Part II consists only of one Section i.e. Section 59, which deals with voluntary liquidation but Provisions of sections 35 to 53 of Chapter III and Chapter VII also applies to Voluntary Liquidation proceedings for corporate persons with such modifications as may be necessary.

III. PRESENT SCENARIO AFTER THE APPLICABILITY OF THE IBC, 2016

The present scenario after the applicability of the insolvency and bankruptcy code 2016 is that the cases pending before high court shall continue to be dealt with by the High Court even after the applicability of the code. All cases filed on and after 1st April 2017 shall be governed by the provisions of the insolvency and bankruptcy code and shall be dealt with by NCLT only.

IV. WHO CAN APPLY FOR VOLUNTARY LIQUIDATION?

A corporate person who intends to liquidate itself voluntarily provided it has not committed any defaults may initiate voluntary liquidation proceedings under the provisions of section 59 of the Insolvency and Bankruptcy Code 2016. Therefore, any company or LLP which has not defaulted in payment and possesses the capacity to repay its debts in full may apply for voluntary liquidation.

Corporate Persons: *Section 3(7) of the Insolvency and Bankruptcy Code, 2016 defines and includes Corporate Persons as a Company Registered under the Companies Act, 2013 includes companies incorporated under previous company law and a Limited Liability Partnership registered under the Limited Liability Partnership Act, 2008. However, it excludes entities who are financial service provide*

V. PRE-REQUISITES FOR OPTING VOLUNTARY LIQUIDATION

The process for voluntary liquidation is

simple and less detailed but it can only be adopted on satisfying the following prerequisites:

1. The company having no debts or it will be able to pay off its debts from the proceeds of the assets sold during voluntary Liquidation.
2. The company in not being liquidated with an intention to defraud any person.

VI. PRE-LIQUIDATION COMPLIANCES

The code contains a few compliances which are to be undertaken before the commencement of the voluntary liquidation process. The pre compliances are mandatory for commencing the liquidation process under the code. The pre-liquidation compliances are as follows:

1. Declaration of Solvency (DOS)

The Directors of the Company in majority shall submit a declaration of solvency (DOS) supported by an affidavit quoting that they have made detailed inquiry into the affairs of the Company and have arrived at the opinion that the company has no debts or that the Company will be able to pay off its debts from the liquidation estate in full. They shall also affirm that the company is not liquidated to defraud any person. The declaration provided by the directors shall contain the following as attachment:

- Audited financial statements along with records of business operations for the previous two years or for the period since incorporation, whichever is later.
- A valuation report of the assets of the company, if any prepared by the registered valuer.

2. Members Approval

The members of the company shall within four weeks of filing declaration of solvency pass a Special Resolution (SR) in General Meeting stating that the company be liquidated voluntarily. The members shall also appoint an insolvency professional to act as liquidator.

3. Creditors Approval

Where the company to be liquidated voluntarily owes a debt to any person, then in such a situation approval from creditors representing two third (2/3rd) in value of the debt of the company shall be obtained within seven days of the passing of the special resolution by members.

4. Communication to ROC and IBBI

After obtaining approval from members and creditors for undergoing voluntary liquidation, the company shall intimate about the resolutions passed to Registrar of Companies (ROC) and IBBI within seven days of receiving approval from members and creditors.

VII. WHEN DOES VOLUNTARY LIQUIDATION COMMENCE?

On receipt of the required approvals, the voluntary liquidation process shall be deemed to commence from the date on which special resolution is passed by the members along with the approval of creditors.

EFFECT OF LIQUIDATION

From the liquidation commencement date, the corporate person shall cease to carry on the business. The corporate person shall carry business only for the beneficial winding up of the same. Even after the liquidation also, the corporate person shall continue to exist till it is finally dissolved as per the provisions of the code.

VIII. VOLUNTARY LIQUIDATION: THE PROCESS

The detailed process for voluntary liquidation as per the IBC code and its accompanying regulations are as follows:

1. Appointment of Liquidator

The members of the Company shall after furnishing the Declaration of Solvency pass special resolution for the appointment of Insolvency Professional as liquidator to undertake the voluntary liquidation process. Only eligible insolvency professional shall be appointed as liquidator.

2. Preliminary Report

The Liquidator shall submit a Preliminary Report to the Corporate Person within 45 days from the liquidation commencement date, detailing the Capital structure, estimates of its assets and liabilities, the proposed plan of action and the estimated liquidation costs etc.

3. Engagement of Professionals

A liquidator may engage professionals to assist him in discharging of his duties, obligations and functions but he shall not engage a professional who is relative, related party of the Corporate person or has served as an auditor to the corporate person at any time during the five years preceding the liquidation commencement date.

CASE LAW: In the matter of Mr. Tarun Jaggi, IP (Order dated March 20, 2020)

The Disciplinary Committee (DC) observed that the Mr. Jaggi failed to make public announcement within the time prescribed under in the voluntary liquidation of processes of two companies and engaged an auditor, who were statutory auditors of the company before commencement of voluntary liquidation. It imposed a monetary penalty of Rs. 1, 00,000 on Mr. Jaggi.

4. Public Announcement by Liquidator

Within five days from the appointment, the liquidator shall make a public announcement of his appointment. By the public announcement, the liquidator shall request the stakeholders to submit their claims by the last date which shall be a term of thirty days to be counted from the liquidation commencement date. The public announcement shall be published in one English and one regional language newspaper which is in wide circulation at the place of registered office as well as on the corporate person's website and on the website designated by the Board for this purpose, if any.

5. Submission of Proof of Claim by Creditors

Once the public announcement is made by the liquidator, all persons who claim to be stakeholders of the corporate person shall submit and prove their claim for debts within the provided time limit. The persons claiming to be the creditors or stakeholders of the corporate creditor are required to submit their proof of claim in the prescribed forms as mentioned in the code along with annexing the required documents.

6. Verification of Claims

The liquidator on receipt of claims shall verify the claims received within a period of thirty days dates to be counted from the last date by which claims were required to be submitted by the creditors. The liquidator while verifying the received claims may either accept or reject the received claims. Also, the liquidator may ask for any other additional information from the claimants while verifying their claims.

7. Preparation of list of Stakeholders

After verifying the received claims, the liquidator shall prepare a list of stakeholders keeping into account the claims received and accepted by him. The list shall be prepared within forty-five days which shall be counted from the last date for receipt of the claim.

Further, the list of stakeholders can be modified from time to time, as required and the same can be made available for inspection by the persons who submitted proofs of claim; by members, partners, directors and guarantors of the Corporate Person and shall be displayed on the website of the Corporate person.

8. Realisation of Assets of Corporate Person

Once the list of stakeholders is finalized, the liquidator shall commence with realizing the assets of the corporate person. The liquidator shall himself or with the assistance of a registered valuer ascertain the value of the assets of the corporate debtor and thereafter initiate the sale of the assets in the prescribed mode and manner as approved by the corporate person. The liquidator shall also initiate a recovery process to realize all the assets and the dues of the corporate person within due time. If there remains any uncalled amount from any contributory then the liquidator shall call for the same also at the time of realization.

9. Opening of Separate Bank Account of Corporate Person

The liquidator shall along with realizing the assets of the corporate person open a separate bank account in a scheduled bank especially for the voluntary liquidation for receiving all money due to the corporate person. The bank account name shall contain "in voluntary liquidation" as part of the name. The liquidator shall deposit all money including cheques and demand draft received by him as liquidator of the corporate person ion the bank account. All payments made by the liquidator above Rupees five thousand shall be made by cheque or through online banking transaction only.

10. Distribution of the Realized Proceeds

Once the assets of the corporate person are realized and the bank account is opened, the liquidator shall the distribute the proceeds obtained by realizing the

assets of the corporate person within a period of six months to be counted from the date of receipt of the amount among the stakeholders.

Prior to distributing the proceeds, the liquidator shall deduct the liquidation cost incurred by him. During the distribution of assets if the liquidator comes across any asset that cannot be readily or advantageously sold due to its peculiar nature or any other condition then the liquidator can with the approval of corporate person distribute the same within the stakeholders.

11. Completion of Liquidation

The Liquidator is need to complete the liquidation process of the Corporate person within 12 months from the liquidation commencement date, however if the liquidation process continue for more than 12 months, the liquidator shall hold a meeting of the contributories of the Corporate person within 15 days from the end of the 12 months and shall present an Annual Status Report indicating the progress in liquidation. The Annual Status Report shall enclose the audited accounts of the liquidation showing receipts and payment pertaining to liquidation since the liquidation commencement date.

12. Preparation of Final Report

After the distribution of the assets of the corporate person, the liquidator shall draft a final report of the liquidation process incorporating the audited accounts of the liquidation along with the report. Once the report is prepared by the liquidator, it shall be sent to the concerned registrar of companies, NCLT and to the Insolvency and bankruptcy board as well.

13. Application for Dissolution of Corporate Person

Once the affairs of the corporate person have been completely wound up and its assets have been realized and distributed among the stakeholders, the liquidator shall then file an application to the concerned adjudicating authority for dissolution of the corporate person.

The concerned adjudicating authority shall on receipt of the application filed by the liquidator shall pass a dissolution order in favour of the corporate person stating that the corporate person shall stand dissolved from the date of the order.

IX. CHALLENGES FACED BY LIQUIDATOR DURING VOLUNTARY WINDING UP OF LIMITED LIABILITY PARTNERSHIP (LLP)

The process of voluntary winding up of Company and LLP is same in all respect, however, there are some challenges which the liquidator faces during the voluntary winding up:

a) **Mode of intimation to ROC;** regarding the commencement of liquidation and appointment of liquidator is not available in case of LLP.

b) **Status of LLP after commencement of voluntary winding up;** after the commencement of liquidation process, the status of Company shown as "Under Liquidation" but in case of LLP it shows as "Active" instead of "under liquidation"

X. CONCLUSION

To encourage the process of voluntary winding up, Government had acquainted New Regulations as the procedure of voluntary winding up under Companies Act, 1956/2013 was time intriguing The code delegates that insolvency professionals are to be appointed as Liquidators, such a move is welcome by corporate and professionals.

The Code and Regulations provide a favorable framework for companies and limited liability partnerships. Though the process remains almost similar to previous rule, but the major change has taken place in initiation of winding up process. Earlier, company or any of its creditors could file a voluntary winding up petition but now company, directors; designated partners can initiate the winding up process. Moreover, approval of creditors representing two thirds of corporate debt is mandatory under the code for initiating voluntary winding up proceeding.

Now every company who proposes to wind up is incumbent to follow IBC, 2016. The Code is quite inclusive and broader as against Companies Act, 1956/2013. It is awaited that code would help in defeating delays and intricacies involved in the process due to involvement of four adjudicating authorities, High Court, Company Law Board, Board for Industrial and Financial Reconstruction and Debt Recovery Tribunal, earlier, when compared to NCLT now. It would also lessen the burden on courts as all the litigation will be filing under this code.

(2021) 124 taxmann.com 90 (SC)

SUPREME COURT OF INDIA

Phoenix ARC (P.) Ltd. *v.* Ketulbhai Ramubhai Patel

ASHOK BHUSHAN, R. SUBHASH REDDY AND M.R. SHAH, JJ.

CIVIL APPEAL NO. 5146 OF 2019†

FEBRUARY 3, 2021

Section 5(8), read with section 5(7), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Facility agreement was executed between borrower 'D' and lender 'L' - Corporate debtor was not a party to facility agreement - It was borrower who was to repay loan - Thereafter, Board of Directors of corporate debtor passed a Resolution to provide an undertaking to effect that 100 per cent of its shareholding in GEL shall not be disposed of so long as any amounts were due and payable and outstanding under financial assistance proposed to be provided by lender to borrower - Accordingly, a pledge agreement was executed between corporate debtor and lender by which agreement, shares of GEL were pledged as a security and a deed of undertaking was also executed by corporate debtor in favour of lender - Whether since only security was created by corporate debtor in shares of GEL and there was no liability to repay loan taken by borrower on corporate debtor, pledge agreement executed subsequent to facility agreement was security in favour of lender who at best will be secured creditor qua corporate debtor and not financial creditor qua corporate debtor - Held, yes (Paras 30 and 31)

FACTS

- The lender 'L' advanced to 'DL' a financial facility of Rs. 40

crores repayable in 72 structured monthly instalment under a Facility Agreement dated 12-5-2011.

- The Board of Directors of 'D', the corporate debtor passed a Resolution on 26-7-2011 to give non-disposal undertaking in favour of 'L' whereby Board was authorised to provide an undertaking to the effect that 100 per cent of its shareholding in GEL shall not be disposed of so long as any amounts were due and payable and outstanding under the financial assistance proposed to be provided by 'L' to the borrower.
- On 10-1-2012 a pledge agreement was executed between 'D' and 'L' by which agreement 40,160 shares of GEL were pledged as a security and a deed of undertaking was also executed by 'D' in favour of 'L'.
- By an agreement dated 30-12-2013 'L' assigned all rights, title and interest in the financial facility including any security, interest therein in favour of 'P'. The borrower 'DL' failed to repay as per agreed terms dated 12-5-2011.
- On 31-8-2018, Bank of Baroda filed company petition before the Adjudicating Authority under section 7 to initiate CIRP in respect of the corporate debtor which was admitted and the CIRP was initiated.
- The appellant filed its claim for an amount of Rs. 83.49 crores with the respondent/resolution professional. The resolution professional *vide* e-mail dated 20-9-2018 expressed an opinion that as per the pledge agreement submitted by the appellant, the corporate debtor's liability was restricted to pledge of the shares only.
- The appellant thereafter filed a Miscellaneous Application before the NCLT, seeking a direction to the respondent/resolution professional to admit the claim of the appellant as a financial debt with all consequential benefits including voting rights in the Committee of Creditors (CoC) of the corporate debtor. The appellant stated that pledge of the shares by the corporate debtor was in essence a guarantee for financial debt and, therefore, appellant was a financial creditor of the corporate debtor.
- The NCLT held that the applicant's status as financial creditor of the corporate debtor was not proved in the light of section 5(8) and accordingly, passed an order rejecting the Miscellaneous Application filed by the appellant.
- On appeal, the NCLAT dismissed the appeal of the appellant holding that pledge of shares in question did not amount to disbursement of any amount against the consideration for the time value of money and it did not fall within sub-clause (*f*) of sub-section (8) of section 5.
- On appeal to the Supreme Court:

HELD

- First, the transaction in question on the basis of which the appellant claims to be treated as financial creditor qua corporate debtor needs to be noted. (Para 14)
- The Facility Agreement dated 12-5-2011 was executed between 'DL' and 'L'. The corporate debtor was not a party to the Facility Agreement. It was DL, the borrower who was to repay the loan of Rs. 40 crores. Schedule IV of Facility Agreement is 'Security Creation' which is a part of the Facility Agreement. (Para 15)
- Item No. 3 of Schedule IV, is Pledge of 100 per cent equity shares together with all accretions thereon of the GEL. There is second *pari passu* charge on all current assets of the GEL as per Schedule IV. (Para 16)
- The pledge agreement dated 10-1-2012 was entered into between the corporate debtor and 'L'. Schedule II contains details of the securities which are 40,160 shares of GEL. The corporate debtor has pledged in favour of lender, the securities, the clauses of the pledge agreement clearly describe the nature of the security created by the pledge agreement. (Para 17)
- The shares of GEL were pledged with 'L' as security. The Deed of Undertaking which was given on the same day, i.e., 10-1-2012 is also to the same effect. (Para 18)
- Whether the corporate debtor owed any financial debt to the appellant so as to treat the appellant as financial creditor is the question to be answered. The definition of 'financial debt' as contained in section 5(8) contains the expressions 'means' and 'includes'. The definition begins with the words 'financial debt' means 'a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes'... The main part of the definition, thus, provides that financial debt means a debt 'which is disbursed against the consideration for the time value of money'. The definition in the second part gives instances which also includes financial debt. The appellant in his submission has relied on section 5(8)(*i*) to support his claim that the appellant is the financial creditor. The appellant has referred both sub-clause (*b*) and sub-clause (*i*) and submits that credit facility which was extended to the borrower is referable to section 5(8)(*b*) and the corporate debtor pledged his share to give indemnity for credit facility and which is in a sense of guarantee. The debt is a financial debt within the meaning of section 5(8)(*i*) and the appellant is the financial creditor. There can be no dispute that credit facility given by the assignor to borrower by Facility Agreement dated 12-5-2011 is a credit facility which can be covered under section 5(8)(*b*). A bare perusal of section 5(8)

(*i*) indicates that it contemplates amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (*a*) to (h) of clause (*8*). Sub-clause (*i*) uses two expressions 'guarantee' and 'indemnity' for any of the items referred to in sub-clauses (*a*) to (*h*). (Para 21)

- Chapter VIII of the Indian Contract Act, 1872 deals with 'Of Indemnity and Guarantee'. Section 124 defines 'Contract of indemnity' and section 126 defines 'Contract of guarantee' which is relevant for the present case. (Para 22)

- As clear from the definition a contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The present is not a case where the corporate debtor has entered into a contract to perform the promise, or discharge the liability of borrower in case of his default. The pledge agreement is limited to pledge 40,160 shares as security. The corporate debtor has never promised to discharge the liability of borrower. The Facility Agreement under which the borrower was bound by the terms and conditions and containing his obligation to repay the loan security for performance are all contained in the Facility Agreement. A contract of guarantee contains a guarantee 'to perform the promise or discharge the liability of third person in case of his default'. Thus, key words in section 126 are contract 'to perform the promise', or 'discharge the liability', of a third person. Both the expressions 'perform the promise' or 'discharge the liability' relate to 'a third person'. The Pledge Agreement dated 10-1-2012 does not contain any contract that the promise which was made by the borrower in the Facility Agreement dated 12-5-2011 to discharge the liability of debt of Rs. 40 crores is undertaken by the corporate debtor. It was the borrower who had promised to repay the loan of Rs. 40 crores in Facility Agreement dated 12-5-2011 and it was borrower who had undertaken to discharge the liability towards lender. The Pledge Agreement dated 10-1-2012 does not contain any contract that corporate debtor has contracted to perform the promise, or discharge the liability of the third person. The Pledge Agreement is limited to pledge of 40,160 shares of GEL only. It has been noticed above that in the Facility Agreement there is a Security Creation by way of Schedule IV in which 100 per cent equity shares of GEL were pledged by the borrower and second *pari passu* charge on all current assets of the GEL was also created as security for loan. It transpires that since some shares of GEL were also with the corporate debtor who is subsidiary Company of DL, the same was also pledged with the lender as additional security by a subsequent agreement dated 10-1-2012. (Para 23)

- The Pledge Agreement and undertaking given, entered between assignor and corporate debtor cannot be termed as contract of guarantee within the meaning of section 126. (Para 24)
- The expression 'pledge' is separately dealt with in the Indian Contact Act, 1872. (Para 25)
- The word 'guarantee' and 'indemnity' as occurring in section 5(8)(*i*) has not been defined in the Code. Section 3 of sub-section (37) of the Code provides that words and expressions used but not defined in the Code but defined in the Indian Contract Act, 1872 shall have the meanings respectively assigned to them. (Para 26)
- In *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited* v. *Axis Bank Limited*, (2020) 114 taxmann.com 656 (SC), it was held that a person having only security interest over the assets of corporate debtor, even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor, would not be covered by the financial creditors as per definitions contained in sub-sections (7) and (8) of section 5. What has been held by this Court as noted above is fully attracted in the instant case where corporate debtor has only extended a security by pledging 40,160 shares of GEL. The appellant at best will be secured debtor qua above security but shall not be a financial creditor within the meaning of section 5 of sub-sections (7) and (8). (Para 30)
- The present is a case where only security was created by the corporate debtor in 40,160 shares of GEL, there was no liability to repay the loan taken by the borrower on the corporate debtor. At best the Pledge Agreement and agreement of undertaking executed on 10-1-2012, that is, subsequent to Facility Agreement, is security in favour of Lender-Assignor who at best will be secured creditor qua corporate debtor and not the financial creditor qua corporate debtor. (Para 31)
- It may be noticed that the Appellate Tribunal has dealt with section 5(8)(*f*) while rejecting the claim of the appellant as to be the financial creditor. It appears that the submission based on section 5(8)(*i*) was not addressed before the Appellate Tribunal which has now been pressed. Thus, the decision of the Resolution Professional as approved by the NCLAT as correct is upheld. The appellant is not financial creditor of the corporate debtor. Hence, Miscellaneous Application was rightly rejected by the Adjudicating Authority. It is however, made clear that observations made in this judgment are only for deciding the claim of the appellant as the financial creditor within the meaning of section 5(7) and section 5(8) and shall have no bearing on any other proceedings undertaken by the

appellant to establish any of its right in accordance with law. Thus, there is no merit in this appeal. The appeal is dismissed. (Para 32)

CASE REVIEW

Phoenix ARC (P.) Ltd. v. *Ketulbhai Ramubhai Patel* (2021) 124 taxmann.com 89 (NCL -AT) (para 32) *affirmed* (***See Annex***).

Jagjivandas Jethalal v. *King Hamilton & Co.* (1931) 33 Bom LR 709 (Bom.) (para 28) *distinguished*.

Jaypee Infratech Ltd. v. *Axis Bank Ltd.* (2020) 114 tamann.com 656 (SC) (para 30) *followed*.

CASES REFERRED TO

Jaypee Infratech Ltd. v. *Axis Bank Ltd.* (2020) 114 taxmann.com 656 (SC), *Jagjivandas Jethalal* v. *King Hamilton & Co.* (1931) 33 Bom LR 709 (Bom.) (para 27), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 29) and *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 29).

Pai Amit, AOR *for the Appellant.* **Ms. Ami Jain**, Adv., **Ms. Anushree Prashit Kapadia**, **Ms. Praveena Gautam**, **Varun Singh**, AORs, **Ashutosh Choudhary**, **Manish Kumar Choudhary**, Advs. and **Ms. Namita Choudhary**, AOR and *for the Respondent.*

JUDGMENT

Ashok Bhushan, J. - This appeal under section 62 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "Code") has been filed questioning the judgment of the National Company Law Appellate Tribunal, New Delhi dated 9-4-2019 dismissing the Company Appeal filed by the appellant. The Company Appeal was filed by the appellant against order dated 22-2-2019 of National Company Law Tribunal, Mumbai Bench rejecting the Miscellaneous Application filed by the appellant under Section 60(5)(*c*) of the Code holding that the appellant is not the financial creditor of the corporate debtor, Doshion Veolia Water Solutions Private Limited.

2. Brief facts of this case for deciding this appeal are:

L & T Infrastructure Finance Company Limited advanced the financial facility to Doshion Limited, a Company incorporated and registered under the Companies Act, 1956. A Facility Agreement dated 12-5-2011 was executed between the Doshion Limited (borrower) and L & T Infrastructure Finance Company Limited (lender) advancing to the borrower a financial facility of Rs. 40 crores repayable in 72 structured monthly instalments. Schedule IV of the facility agreement dealt with "Security Creation". The Board of Directors of Doshion Veolia Water Solutions Private Limited (corporate debtor) passed a Resolution on 26-7-2011 to give Non-Disposal Undertaking in favour of L & T Infrastructure Finance Company Limited whereby Board was authorised to provide an undertaking to the effect that 100% of their shareholding in Gondwana Engineers Limited (GEL) shall not be disposed of so long as any amounts were due and payable and outstanding under the financial assistance proposed to be provided by L&T Infra to borrower. On 10-1-2012 a Pledge Agreement

was executed between Doshion Veolia Water Solutions Private Limited and L&T Infrastructure Finance Company Limited by which agreement 40,160 shares of Gondwana Engineers Limited were pledged as a security. On 10-1-2012 a deed of undertaking was also executed by Doshion Veolia Water Solutions Private Limited in favour of L&T Infrastructure Finance Co. Ltd. By agreement dated 30-12-2013 L&T Infrastructure assigned all rights, title and interest in the financial facility including any security, interest therein in favour of Phoenix ARC Pvt. Ltd., the appellant under section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The borrower, Doshion Limited failed to repay as per agreed terms dated 12-5-2011. The appellant issued a notice dated 19-2-2014 and recalled the financial facility. The appellant filed O.A. No. 325 of 2016 before the Debts Recovery Tribunal, Ahmedabad which is said to be pending.

3. On 31-8-2018, Bank of Baroda filed Company Petition No. CP(IB)1752/MB/2017 before the Adjudicating Authority under section 7 of the Code to initiate the corporate insolvency resolution process in respect of the Doshion Veolia Water Solutions Private Limited (Corporate Debtor). By order dated 31-8-2018, the Adjudicating Authority admitted the Company Petition and the corporate insolvency resolution process began. The respondent was appointed as the Interim Resolution Professional of the corporate debtor which was later confirmed as the Resolution Professional of the corporate debtor. Pursuant to the commencement of corporate insolvency resolution process in respect of the corporate debtor, the appellant filed its claim for an amount of Rs. 83,49,85,667/- with the respondent. The respondent *vide* email dated 20-9-2018 expressed an opinion that as per the Pledge Agreement submitted by the appellant, the corporate debtor's liability was restricted to pledge of the shares only. The respondent sought further documents in respect of the appellant's claim. Although additional documents were submitted by the appellant, the respondent by email dated 23-11-2018 reiterated the earlier view.

4. The appellant filed M.A.No.1514 of 2018 before the National Company Law Tribunal, Bench at Mumbai in Company Petition No. CP(IB)1752/MB/2017 seeking a direction to the respondent to admit the claim of the appellant as a financial debt with all consequential benefits including voting rights in the Committee of creditors of the corporate debtor. The appellant stated that pledge of the shares by the corporate debtor was in essence a guarantee for financial debt and, therefore, appellant was a financial creditor of the corporate debtor. The Resolution Professional *vide* email dated 4-12-2018 rejected the claim of the appellant as financial creditor of the corporate debtor on the ground that there was no separate Deed of Guarantee in favour of the Assignor. The respondent filed an affidavit in reply before the Adjudicating Authority. After hearing the parties, the Adjudicating Authority passed an order dated 22-2-2019 rejecting the Miscellaneous Application filed by the appellant. The Adjudicating Authority held that the applicant's status as financial creditor of the corporate debtor is not proved in the light of Section 5(8) of the Code.

5. Aggrieved by the judgment of the Adjudicating Authority, the appeal was filed by the appellant before the Appellate Tribunal. The Appellate Tribunal held that pledge of shares in question do not amount to "disbursement of any amount against the consideration for the time value of money" and it do not fall within sub-clause (*f*) of sub-section (8) of section 5 as suggested by the learned counsel for the appellant. The Appellate Authority finding no merit in the appeal, dismissed the appeal. Aggrieved by the judgment of the Appellate Tribunal, the appellant has filed the present appeal.

6. We have heard Shri K.V. Vishwanathan, learned senior counsel for the appellant, Ms. Ami Jain, learned counsel for the respondent. We have also heard learned counsel for the Bank of Baroda as intervenor.

7. Shri K.V. Vishwanathan, learned senior counsel, submits that the appellant is a financial creditor within the meaning of Section 5 sub-section (8)(*i*) of the Code. He submits that liability of the corporate debtor, who is surety, is co-extensive to that of debtor and the creditor has full rights to pursue his liability against the surety even before the creditor. There is a debt which is payable by the corporate debtor to the appellant and for securing that debt, the corporate debtor has created a security interest in favour of the Assignor that is L&T Infrastructure Ltd. The L&T Infrastructure Ltd. having assigned all its rights and obligations to the appellant *vide* Assignment dated 30-12-2013, the appellant has stepped into the shoes of L&T Infrastructure Ltd. The parent Company of corporate debtor Doshion Ltd. took a credit facility from the predecessor of the appellant and the corporate debtor undertook a liability by creating a security interest in the form of shares of Gondwana Engineers Limited. The present case is covered by Section 5(8)(*b*) read with 5(*i*), not accepting the appellant as financial creditor would have effect of leaving the appellant effectively remediless inasmuch as the appellant cannot enforce the guarantee during the subsistence of moratorium period and once the resolution plan is passed without any redress to the appellant in the Financial Plan, the said resolution plan would be binding upon the appellant whereupon the appellant shall be gravely prejudiced since nothing could then be recoverable from the corporate debtor. The corporate debtor in effect has provided a guarantee to L&T Infrastructure Ltd. whereby the corporate debtor guarantees L&T Infrastructure the debts due from Doshion Ltd. and in case of non-payment, a charge subsisted upon the 100% shareholding of Gondwana Engineers Ltd. As the corporate debtor has secured the payment of the loan, the liability of corporate debtor to L&T Infrastructure became coextensive to that of Doshion Ltd. under section 128 of the Indian Contract Act, 1872 which, *inter alia,* financial creditor to the appellant herein and the loan was advanced for interest and the said loan was secured by the corporate debtor.

8. Learned counsel further submits that the judgment of this Court in *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd.* v. *Axis Bank Ltd.* (2020) 114 tamann.com 656 (SC), relied by the learned counsel for the respondent is distinguishable from the facts of the present case. He submits that any security that would permit the right of action against the third party that is not the borrower,

would amount to guarantee. The mere fact that corporate debtor has not borrowed money from the appellant, it cannot absolve the corporate debtor from its liability as guarantor. He submits that term guarantee is not to be understood narrowly and it has to be understood to include any security created by third party to secure repayment of financial debt including a pledge of shares. The pledge of shares by corporate debtor to secure the loan advanced to the parent Company of the corporate debtor amounts to a guarantee. He lastly submits that judgment of Anuj Jain needs to be clarified to the effect that it has been rendered in a specific facts scenario which does not apply to the present case at all.

9. Ms. Ami Jain, learned counsel, appearing for the respondent submits that the appellant is not a creditor of any nature whatsoever of the corporate debtor. The appellant has no right of recovery of any debt from the corporate debtor and has a limited right of enforcing and realising the value of its security in the shape of the shares held by the corporate debtor in its subsidiary, that is, Gondwana Engineers Ltd. which is pledged with the appellant as a security for the loan given to its parent Company, *viz.* Doshion Ltd. in accordance with the Pledge Agreement dated 10-1-2012. The pledge is not, in any manner, a guarantee under the Contract Act. Section 5(8)(*i*) of the Code takes within its sweep only any liability arising out of a guarantee for any of the items referred to in sub-clauses (*a*) to (*h*) of Section 5(8) of the Code, and not any other instrument in the nature of a guarantee. The pledge of shares cannot be equated with the guarantee as both are absolutely different in terms of their ramification and implication. The corporate debtor has not entered into any contract of guarantee with the appellant to perform the promise, or discharge the liability of a third party in case of his default. In the event of default by the borrower, the appellant has the limited right to realise the money by sale of shares pledged without requiring the corporate debtor to perform the promise, or discharge the liability as no promise is given by the corporate debtor to repay the debt recoverable from the borrower.

10. Learned counsel for the respondent submits that the National Company Law Tribunal has rightly rejected the claim of the appellant as financial creditor. It is further submitted that the appellant has already initiated proceedings at the Debt Recovery Tribunal, Ahmedabad for realisation of its dues which is an admitted fact. In the Code nowhere pledge is mentioned. The appellant cannot claim their pledge agreement dated 10-1-2012 as guarantee as there is no Deed of Guarantee on the record. The Code does not deal with recovery.

11. Learned counsel appearing for Bank of Baroda/Intervenor referring to objects and reasons of Insolvency and Bankruptcy Code contends that the purpose and object of the Code is entirely different. It is not a mechanism for recovery of any amount. The appellant has already moved to Debt Recovery Tribunal, Ahmedabad.

12. We have considered the submissions of the learned counsel for the parties and have perused the records.

13. The only question to be considered in this appeal is as to whether the appellant

is a financial creditor within the meaning of section 5(8) of the Code on the strength of pledge agreement dated 10-1-2012 and Deed of Undertaking dated 10-1-2012 entered into with L&T Infrastructure.

14. We may first notice the transaction in question on the basis of which the appellant claims to be treated as financial creditor *qua* corporate debtor.

15. The Facility Agreement dated 12-5-2011 was executed between the Doshion Ltd. and the L&T Infrastructure Finance Company Ltd. The corporate debtor was not a party to the Facility Agreement. It was the Doshion Ltd., the borrower who was to repay the loan of Rs. 40 crores. Schedule-IV of Facility Agreement is "Security Creation" which is a part of the Facility Agreement, is as follows:

"SCHEDULE-IV

SECURITY CREATION

The Facility (together with all principal interest, liquidated damages, fees costs, charges, expenses and other monies and all other amounts stipulated and payable to the Lender) shall be secured by:

1. Second *pari passu* charge on all current assets of the Borrower.
2. Second *pari passu* charge on all current assets of Gondwana Engineers Limited (GEL).
3. Pledge of 100% equity shares together with all accretions thereon of the GEL.
4. Personal guarantee of promoters of DL namely Ashit Dhirajilal Doshi, Dhirajilal Shivlal Doshi and Rakshit Dhirajlal Doshi.
5. Debt Service Reserve Account (DSRA) in the form of LC/BG for 3 months of interest and principal payments.
6. Demand Promissory Note.

If, at any time during the subsistence of the Facility, the Lender is of the opinion that the security provided by the Borrower has become inadequate to cover the Facility then outstanding, then, on the Lender advising the Borrower to that effect, the Borrower shall provide and furnish to the Lender, to the satisfaction of the Lender, such additional security as may be acceptable to the Lender to cover such deficiency."

16. Item No. 3 of Schedule IV, as noted above, is Pledge of 100% equity shares together with all accretions thereon of the GEL. There is Second *pari passu* charge on all current assets of the GEL as per Schedule IV.

17. The Pledge Agreement dated 10-1-2012 was entered into between the corporate debtor and L&T Infrastructure Finance Co. Ltd. Schedule II contains details of the Securities which are 40,160 shares of GEL. The corporate debtor has pledged in favour of lender, the securities, the Clauses of the Pledge Agreement clearly describe the nature of the security created by the Pledge Agreement. It is relevant to notice clause 2(*iii*) which is to the following effect:

"2(*iii*) The Obligors hereby agree and confirm that the pledge created/to

be created in terms of this Agreement shall be a continuing security for the payment of the Secured Obligations and the due performance by the Obligors of their obligations hereunder."

18. The shares of GEL were pledged with L&T Infrastructure as security. The Deed of Undertaking which was given on the same day, *i.e.*, 10-1-2012 is also to the same effect.

19. Now, we may look into the provisions of the Insolvency and Bankruptcy Code, 2016 relevant for the present controversy. Part II of Chapter I of the Code deals with Insolvency Resolution Liquidation for Corporate Persons. Section 5 is the definition clause. Section 5(7) defines "financial creditor" in the following words:

"Section 5(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;"

20. What is `financial debt' is defined in section 5(8) which is to the following effect:

"Section 5(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(*a*) money borrowed against the payment of interest;

(*b*) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(*c*) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(*d*) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(*e*) receivables sold or discounted other than any receivables sold on non-recourse basis;

(*f*) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(*g*) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(*h*) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(*i*) the amount of any liability in respect of any of the guarantee or indemnity for

any of the items referred to in sub-clauses (*a*) to (*h*) of this clause;"

21. Whether the corporate debtor owed any financial debt to the appellant so as to treat the appellant as financial creditor is the question to be answered. The definition of 'financial debt' as contained in section 5(8) contains the expressions "means" and "includes". The definition begins with the words "financial debt" means 'a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes'... The main part of the definition, thus, provides that financial debt means a debt "which is disbursed against the consideration for the time value of money". The definition in the second part gives instances which also includes financial debt. Learned counsel for the appellant in his submission has relied on section 5(8)(*i*) to support his claim that the appellant is the financial creditor. Learned counsel for the appellant has referred both sub-clause (*b*) and sub-clause (*i*) and submits that credit facility which was extended to the borrower is referable to section 5(8)(*b*) and the corporate debtor pledged his share to give indemnity for credit facility and which is in a sense of guarantee. The debt is a financial debt within the meaning of section 5(8)(*i*) and the appellant is the financial creditor. There can be no dispute that credit facility given by the Assignor to borrower by Facility Agreement dated 12-5-2011 is a credit facility which can be covered under section 5(8)(*b*). A bare perusal of section 5(8)(*i*) indicates that it contemplates amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (*a*) to (*h*) of clause (8). Sub-clause (*i*) uses two expressions "guarantee" and "indemnity" for any of the items referred to in sub-clauses (*a*) to (*h*).

22. Chapter VIII of the Indian Contract Act, 1872 deals with "Of Indemnity and Guarantee". Section 124 defines "Contract of indemnity" and section 126 defines "Contract of guarantee". Section 126 which is relevant for the present case is as follows:

> "Section 126. "*Contract of guarantee", "surety", "principal debtor" and "creditor".*—A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."

23. As clear from the definition a contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The present is not a case where the corporate debtor has entered into a contract to perform the promise, or discharge the liability of borrower in case of his default. The Pledge Agreement is limited to pledge 40,160 shares as security. The corporate debtor has never promised to discharge the liability of borrower. The Facility Agreement under which the borrower was bound by the terms and conditions and containing his obligation to repay the loan security for performance are all contained in the

Facility Agreement. A contract of guarantee contains a guarantee "to perform the promise or discharge the liability of third person in case of his default". Thus, key words in Section 126 are contract "to perform the promise", or "discharge the liability", of a third person. Both the expressions "perform the promise" or "discharge the liability" relate to "a third person". The Pledge Agreement dated 10-1-2012 does not contain any contract that the promise which was made by the borrower in the Facility Agreement dated 12-5-2011 to discharge the liability of debt of Rs. 40 crores is undertaken by the corporate debtor. It was the borrower who had promised to repay the loan of Rs. 40 crores in Facility Agreement dated 12-5-2011 and it was borrower who had undertaken to discharge the liability towards lender. The Pledge Agreement dated 10-1-2012 does not contain any contract that corporate debtor has contracted to perform the promise, or discharge the liability of the third person. The Pledge Agreement is limited to pledge of 40,160 shares of GEL only. We have noticed above that in the Facility Agreement there is a Security Creation by way of Schedule IV in which 100% equity shares of GEL were pledged by the borrower and second *pari passu* charge on all current assets of the GEL was also created as security for loan. It transpires that since some shares of GEL were also with the corporate debtor who is subsidiary Company of Doshion Ltd. the same was also pledged with the lender as additional security by a subsequent agreement dated 10-1-2012.

24. The Pledge Agreement and undertaking given, entered between Assignor and corporate debtor cannot be termed as contract of guarantee within the meaning of Section 126.

25. The expression "pledge" is separately dealt with in the Indian Contract Act, 1872. Section 172 defines 'pledge' in the following words:

> "Section 172. "*Pledge", "pawnor", and "pawnee" defined.*— The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called "pawnee".:"

26. The word 'guarantee' and 'indemnity' as occurring in section 5(8)(*i*) has not been defined in the Code. Section 3 sub-section (37) of the Code provides that words and expressions used but not defined in the Code but defined in the Indian Contract Act, 1872 shall have the meanings respectively assigned to them.

27. Learned counsel for the appellant has referred to a judgment of the Bombay High Court in the *Indian Law Reports, Jagjivandas Jethalal* v. *King Hamilton & Co.* (1931) 33 Bom LR 709, which was case arising out of the suit filed to enforce an equitable mortgage of an immovable property. The defendants as owners of the immovable property in question created an equitable mortgage upon it as sureties for the firm of Sarda & Sons who owed money to the plaintiff. The Bombay High Court had occasion to consider Section 126 of the Indian Contract Act in the above case. Noticing the arguments based on section 126 of the Indian Contract Act raised by the respondent, the Bombay High Court noticed following at page 684:

" ……. Mr. Desai's answer to that is that the defendants here were not sureties. He relies on section 126 of the Indian Contract Act which provides that a "contract of guarantee" is a contract to perform the promise or discharge the liability of a third person in case of his default, and the person who gives the guarantee is called the "surety". Mr. Desai says that here there was no personal obligation on the defendants to pay anything: they merely handed over their property as security, and that being so, there was no contract to perform the promise or discharge the liability of a third person. Then he says that in section 135, which provides that a contract between the creditor and the principal debtor by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety unless the surety assents to such contract, th word "surety" must have the same meaning as in section 126, and therefore a person who merely deposits the documents as security is not a surety within section 135. There may possibly be something in that argument on the wording of the sections, but it has been held often that the Indian Contract Act is not exhaustive, and, therefore, one has to consider apart from the Act what the general is."

28. The Bombay High Court although observed that on plain reading of Section 126, there may be some substance in the submission of Mr. Desai but Bombay High Court proceeded to examine the general law. The judgment of the Bombay High Court relied by the learned counsel for the appellant was on its own facts and has no bearing on interpretation of section 5(8)(*i*) with reference to section 126 of the Indian Contract Act.

29. The learned counsel for the respondent has placed heavy reliance on two-Judge Bench judgment of this Court in *Axis Bank Ltd.* (*supra*). One of the issues which came before this Court was as to whether the respondent (lenders of JAL) could be financial creditors of the corporate debtor JIL on the strength of the mortgages created by corporate debtor as collateral securities of its holding Co. JIL. In the above case, the AXIS Bank had lent finance to Jaiprakash Associates Ltd. (JAL), the holding company, Jaypee Infratech Ltd. (JIL) had mortgaged several properties as collateral securities for the loans and advances made by the Axis Bank to JAL. Interim Resolution Professional has rejected the claim of the Asix Bank to be recognised as financial creditor of corporate debtor (JIL). The National Company Law Tribunal has approved the decision of Interim Resolution Professional rejecting the claim of Axis Bank as financial creditor against which appeal was filed before the Appellate Tribunal which was allowed. The corporate debtor had filed an appeal before this Court in which appeal one of the issues was as to whether the Axis Bank can be recognised as financial creditor of the corporate debtor on the strength of the mortgaged by the JIL, corporate debtor of its holding Co. JAL. This Court after noticing the facts, noted rival submissions of the parties on the above issue in detail. The two earlier judgments of this Court, namely, *Swiss Ribbons (P)*

Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 and *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) were extensively noted. Paragraphs 46 to 50.2 contain elaborate discussion regarding the essentials of "financial debt" and "financial creditor" which are to the following effect:

> "46. Applying the aforementioned fundamental principles to the definition occurring in section 5(8) of the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (*a*) to (*f*) of section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per Sub-clauses (*g*) and (*h*) of section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (*a*) to (*h*). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (*a*) to (*i*) of section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said Sub-clauses (*a*) to (*i*) of section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money.

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

48. It is also evident that what is being dealt with and described in section 5(7) and in section 5(8) is the transaction *vis-*

a-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.

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

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

50. A conjoint reading of the statutory provisions with the enunciation of this Court in *Swiss Ribbons* (*supra*), leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression `financial creditor' is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its

own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

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

50.2 Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description of `secured creditor' by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of `financial creditors' as per the definitions contained in Sub-sections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of `debt' Under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a `financial debt' within the meaning of Section 5(8) of the Code."

30. This Court held that a person having only security interest over the assets of corporate debtor, even if falling within the description of `secured creditor' by virtue of collateral security extended by the corporate debtor, would not be covered by the financial creditors as per definitions contained in sub-section (7) and (8) of section 5. What has been held by this Court as noted above is fully attracted in the present case where corporate debtor has only extended a security by pledging 40,160 shares of GEL. The appellant at best will be secured debtor *qua* above security but shall not be a financial creditor within the meaning of Section 5 sub-sections (7) and (8).

31. Mr. Vishwanathan tried to distinguish the judgment of this Court in *Jaypee Infratech Ltd.* (*supra*) by contending that the above judgment has been rendered in the specific facts scenario which does not apply to the present case at all. Shri Vishwanathan submits that in *Jaypee Infratech Ltd.* case (*supra*) corporate debtor had created mortgage for the loan obtained by the parent Company and no benefit of such loan has been received by the corporate debtor whereas in the present case corporate debtor has been the direct and real beneficiary of the loan advanced by Assignor to the parent Company of the corporate debtor. The above point as contended by the learned counsel does not commend us. The present is also a case where only security was created by the corporate debtor in 40,160 shares of GEL, there was no liability to repay the loan taken by the borrower on the corporate debtor in the present case. At best the Pledge Agreement and Agreement of undertaking executed on 10-1-2012, that is, subsequent to Facility Agreement, is security in favour of Lender-Assignor who at best will be secured creditor *qua* corporate debtor and not the financial creditor *qua* corporate debtor.

32. We may notice that the Appellate Tribunal has dealt with section 5(8)(*f*) while rejecting the claim of the appellant as to be the financial creditor. It appears that the submission based on section 5(8)(*i*) was not addressed before the Appellate Tribunal which has now been pressed before us. We, thus, uphold the decision of the Resolution Professional as approved by the NCLAT as correct. The appellant is not financial creditor of the corporate debtor. Hence, Miscellaneous Application was rightly rejected by the Adjudicating Authority. We, however, make it clear that observations made by us in this judgment are only for deciding the claim of the appellant as the financial creditor within the meaning of section 5(7) and 5(8) of the Code and shall have no bearing on any other proceedings undertaken by the appellant to establish any of its right in accordance with law. We, thus, do not find any merit in this appeal. The appeal is dismissed. No costs.

ANNEX

(2021) 124 taxmann.com 89 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Phoenix ARC (P.) Ltd.

v.

Ketulbhai Ramubhai Patel

JUSTICE S.J. MUKHOPADHAYA, CHAIRPERSON
AND A.I.S. CHEEMA, JUDICIAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 325 OF 2019
APRIL 9, 2019

Rajshekhar Rao, **Pai Amit** and **Karthik Sundar**, Advs. *for the Appellant*. **Ms. Ami Jain**, Adv. and **S.R. Jariwala**, C.A. *for the Respondent*.

ORDER

1. The 'Corporate Insolvency Resolution Process' has been initiated against 'Doshion Water Solutions Pvt. Ltd.'- ('Corporate Debtor'). The Appellant filed Miscellaneous Application under section 60(50) (*c*) of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) claiming it to be the 'Financial Creditor' and challenged the decision of the 'Resolution Professional'. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, held that the Appellant do not come within the meaning of 'Financial Creditor' and there is no assignment in its favour.

2. Learned counsel appearing on behalf of the Appellant submits that the shares have been pledged which have been assigned in favour of the Appellant. This amounts to raising money under the transaction having commercial effect on borrowings. He relied on Assignment Agreement dated 30th December, 2013 signed between 'L&T Infrastructure Finance Company Limited (as Assignor) and the Appellant- 'Phoenix ARC Private Limited' (as Assignee).

3. It is submitted that in terms of section 176 of the Indian Contract Act, the Appellant is entitled to file a suit against the owner *i.e.* the 'Corporate Debtor'.

4. We have heard Mr. Rajshekhar Rao, learned counsel appearing on behalf of the Appellant; Ms. Ami Jain, learned counsel appearing on behalf of the 'Resolution Professional' and Mr. S.R. Jariwala, Chartered Accountant on behalf of the 'Committee of Creditors'.

5. From the record, we find that 'L&T Infrastructure Finance Company Limited' and 'Doshion Water Solutions Pvt. Ltd.'- ('Corporate Debtor') executed a 'Facility Agreement' dated 12th May, 2011 in respect of the financial facility of Rs. 40,00,00,000/- . As per the 'Facility Agreement', the financial facility was to be repaid along with applicable interest at the applicable rate in 72 structured monthly instalments after the initial Moratorium period contemplated therein.

6. As per the 'Facility Agreement', repayment of the financial facility *inter alia* required to be secured by a pledge by 'Doshion Water Solutions Pvt. Ltd.'- ('Corporate Debtor') of 100% shares of 'Gondwana Engineers Ltd.' in favour of 'L&T Infrastructure Finance Company Limited'. The 'Facility Agreement' provided that the Borrower would continue to hold at least 50% of the equity capital of the 'Corporate Debtor' and the 'Corporate Debtor' would continue to hold at least 51% stake in the equity capital of 'Gondwana Engineers Ltd.'. The 'Corporate Debtor' was also required to provide the Board's Resolution to create a charge on the assets of 'Gondwana Engineers Ltd.', which, as a consequence, became the subsidiary of the 'Corporate Debtor'.

7. In view of the aforesaid agreement, the assignor and the 'Corporate Debtor' executed a 'Pledge Agreement' on 10th January, 2012 whereby the 'Corporate Debtor' pledged 40,160 shares of 'Gondwana Engineers Ltd.' in favour of the assignor as a security *inter alia* for repayment of the Financial Facility.

8. Thereafter, by 'Assignment Agreement' dated 30th December, 2013, 'L&T Infrastructure Finance Company Limited' assigned all rights, title and interest in the Financial Facility including any security interest therein, in favour of the Appellant- 'Phoenix ARC Private Limited'. In view of such Assignment Agreement dated 30th December, 2013, the Appellant- 'Phoenix ARC Private Limited' claimed to be the 'Financial Creditor'.

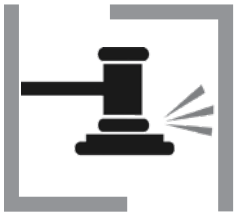
9. Section 5(7) defines 'Financial Creditor' and Section 5(8) defines 'Financial Debt'. From the 'pledged agreement', it is clear that the shares have been assigned and in case the shares or any part of them became subject matter of an attachment by a Court or otherwise tainted for any reason, the 'Corporate Debtor' is liable to replace the same with other securities acceptable to the Assignor. The 'Pledge Agreement' ensures the benefit of the Assignor and its successor in title.

10. In view of the aforesaid facts, we hold that the 'pledge of shares' in question do not amount to "disbursement of any amount against the consideration for the time value of money" and it do not fall within sub-clause (*f*) of sub-section (8) of Section 5 as suggested by the learned counsel for the Appellant.

11. So far as Section 176 of the Indian Contract Act is concerned, we hold that the creditors have right to file a suit but that does not mean that all the creditors who are not the 'Financial Creditors' or the 'Operational Creditors' have right to file any application under section 7 or section 9 of the 'I&B Code'.

12. We find no merit in this appeal. It is accordingly, dismissed. No cost.

† Arising out of order passed by NCLAT Delhi in *Phoenix ARC (P.) Ltd.* v. *Ketulbhai Ramubhai Patel* (2021) 124 taxmann.com 89.



(2021) 124 taxmann.com 226 (SC)

SUPREME COURT OF INDIA

Ramesh Kymal *v.* Siemens Gamesa Renewable Power (P.) Ltd.

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

CIVIL APPEAL NO. 4050 OF 2020†

FEBRUARY 9, 2021

Section 10A of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Suspension of initiation of - Whether object of legislation by inserting section 10A has been to suspend operation of sections 7, 9 and 10 in respect of defaults arising on or after 25-3-2020 i.e. date on which Nationwide lockdown was enforced disrupting normal business operations and impacting economy globally - Held, yes - Whether section 10A clearly bars filing of application for initiation of CIRP of a corporate debtor at instance of eligible applicant in respect of default arising on or after 25-3-2020 and shall not operate in respect of any default committed prior to 25-3-2020 - Held, yes - Whether thus, bar created is retrospective as cut-off date has been fixed as 25-3-2020 while newly inserted section 10A introduced through Ordinance has come into effect on 5-6-2020 - Held, yes - Whether however, retrospective bar on filing of applications for commencement of CIRP during stipulated period does not extinguish debt owed by corporate debtor or right of creditors to recover it - Held, yes (Paras 24 and 26)

FACTS

- The appellant had entered into various employment agreements/ incentive agreements with respondent company during his tenure as Chairman and Managing Director.
- The appellant claimed that a sum was due and payable to him pursuant to his resignation from all capacities held by him in respondent company. Accordingly, he submitted his resignation to the respondent and its parent entity, detailing the entitlements which he claimed under the Employment and Incentive Agreements.
- The respondent acknowledged receipt of the letter of resignation and requested the appellant to continue in employment beyond the 60 days' notice period stipulated in the Employment Agreement. The appellant agreed to continue to provide his services to the respondent till 30-4-2020. There was an exchange of communications between the parties and, according to the appellant, by an e-mail dated 27-3-2020, the respondent confirmed the payments which were due and payable to him under the letter of resignation . The appellant is stated to have

addressed a final reminder by an e-mail, three days prior to the extended notice period came to an end.

- On 28-4-2020, a termination letter was addressed to the appellant. The appellant issued a demand notice on 30-4-2020 in Form 3 of the IBC. The demand notice specified that the date of default was 30-4- 2020.
- On 11-5-2020, the appellant filed an application under section 9 on the ground that there was a default in the payment of his operational dues. During the pendency of the application, an Ordinance was promulgated by the President of India on 5-6-2020 by which section 10A was inserted into the IBC.
- The respondent filed an application seeking the dismissal of the appellant's application on the basis of the newly inserted provisions of section 10A.
- The NCLT upheld the submission of the respondent, holding that a bar had been created by the newly inserted provisions of section 10A.
- On appeal, the decision of NCLT was upheld by NCLAT.
- On appeal to the Supreme Court :

HELD

- Section 5(11) stipulates that the date on which a financial creditor, corporate applicant or operational creditor makes an application to the adjudicating authority for initiating the CIRP is the `initiation date'. Distinguished from this is the `insolvency commencement date', which is the date on which the application for initiating the CIRP under sections 7, 9 or 10, as the case may be, is admitted by the Adjudicating Authority. (Para 19)
- The substantive part of section 10A adverts to an application for the initiation of the CIRP. It stipulates that for any default arising on or after 25-3-2020, no application for initiating the CIRP of a corporate debtor shall be filed for a period of six months or such further period not exceeding one year `from such date' as may be notified in this behalf. The expression `from such date' is evidently intended to refer to 25-3-2020 so that for a period of six months (extendable to one year by notification) no application for the initiation of the CIRP can be filed. The submission of the appellant is that the expression `shall be filed' is indicative of a legislative intent to make the provision prospective so as to apply only to those applications which were filed after 5-6-2020 when the provision was inserted. Such a construction cannot be accepted. (Para 20)
- The date of 25-3-2020 has consciously been provided by the legislature in the recitals to the Ordinance and section 10A, since it coincides with the date on which the national

lockdown was declared in India due to the onset of the Covid-19 pandemic.(Para 21)

- The language of the provision is not always decisive to arrive at a determination whether the provision is applicable prospectively or retrospectively. (Para 22)

- Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of section 10A. The onset of the COVID-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25-3-2020 as the cut-off date. The proviso to section 10A stipulates that 'no application shall ever be filed' for the initiation of the CIRP 'for the said default occurring during the said period'. The expression 'shall ever be filed' is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25-3-2020 for a period of six months, extendable up to one year as notified. The explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25-3-2020. The substantive part of section 10A is to be construed harmoniously with the first proviso and the explanation. Reading the provisions together, it is evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25-3-2020; the embargo remaining in force for a period of six months, extendable to one year. Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of section 10A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25-3-2020 outside the pale of protection because the application was filed before 5-6-2020. (Para 23)

- It has already been clarified that the correct interpretation of section 10A cannot be merely based on the language of the provision; rather it must take into account the object of the Ordinance and the extraordinary circumstances in which it was promulgated. It must be noted, however, that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it. (Para 24)

- Section 10A does not contain any requirement that the Adjudicating Authority must launch into an enquiry into whether, and if so to what extent, the financial

health of the corporate debtor was affected by the onset of the COVID-19 pandemic. Parliament has stepped in legislatively because of the widespread distress caused by an unheralded public health crisis. It was cognizant of the fact that resolution applicants may not come forth to take up the process of the resolution of insolvencies, which would lead to instances of the corporate debtors going under liquidation and no longer remaining a going concern. This would go against the very object of the IBC. Hence, the embargo contained in section 10A must receive a purposive construction which will advance the object which was sought to be achieved by enacting the provision. Therefore, the contention of the appellant cannot be accepted. (Para 25)

- The date of the initiation of the CIRP is the date on which a financial creditor, operational creditor or corporate applicant makes an application to the adjudicating authority for initiating the process. On the other hand, the insolvency commencement date is the date of the admission of the application. This distinction is also evident from the provisions of sub-section (6) of section 7, sub-section (6) of section 9 and sub-section (5) of section 10. Section 7 deals with the initiation of the CIRP by a financial creditor; section 8 provides for the insolvency resolution by an operational creditor; section 9 provides for the application for initiation of the CIRP by an operational creditor; and section 10 provides for the initiation of the CIRP by a corporate applicant. NCLAT has explained the difference between the initiation of the CIRP and its commencement succinctly, when it observed that reading the two definition clauses in juxtaposition, it emerges that while the first *viz.* 'initiation date' is referable to filing of application by the eligible applicant, the later *viz.* 'commencement date' refers to passing of order of admission of application by the Adjudicating Authority. The 'initiation date' ascribes a role to the eligible applicant whereas the 'commencement date' rests upon exercise of power vested in the Adjudicating Authority. Adopting this interpretation would leave no scope for initiation of CIRP of a Corporate Debtor at the instance of eligible applicant in respect of Default arising on or after 25-3-2020 as the provision engrafted in section 10A clearly bars filing of such application by the eligible applicant for initiation of CIRP of corporate debtor in respect of such default. The bar created is retrospective as the cut-off date has been fixed as 25-3-2020 while the newly inserted section 10A introduced through the Ordinance has come into effect on 5-6-2020. The object of the legislation has been to suspend operation of sections 7, 9 & 10 in respect of defaults arising on or after 25-3-2020 *i.e.* the date on which Nationwide

lockdown was enforced disrupting normal business operations and impacting the economy globally. Indeed, the explanation removes the doubt by clarifying that such bar shall not operate in respect of any default committed prior to 25-3-2020. (Para 26)

- Thus, the view taken by the NCLAT for the reasons which have been set out earlier in the course of this judgment are agreeable. The conclusion of the NCLAT is affirmed and the appeal is accordingly dismissed. (Para 27)

CASE REVIEW

Ramesh Kymal v. *Siemens Gamesa Renewable Power (P.) Ltd.* (2020) 120 taxmann.com 452/(2021) 163 SCL 417 (NCLAT - Delhi) (para 27) *affirmed*.

CASES REFERRED TO

Sardar Inder Singh v. *State of Rajasthan* 1957 SCR 605 (para 21) and *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 25).

Goutham Shivshankar AOR *for the Appellant*. **Samudra Sarangi**, Adv., **Azmat Hayat Amanullah**, AOR **Ms. Shruti Raina** and **Ms. Srishti Khare**, Advs. *for the Respondent*.

JUDGMENT

Dr. Dhananjaya Y. Chandrachud, J. - The appellate jurisdiction of this Court under section 62 of the Insolvency and Bankruptcy Code, 2016 ("IBC") has been invoked to challenge the judgment and order of the National Company Law Appellate Tribunal ("NCLAT" or "Appellate Tribunal") dated 19 October 2020. The NCLAT affirmed the decision of the National Company Law Tribunal ("NCLT" or "Adjudication Authority") dated 9 July 2020, holding that in view of the provisions of Section 10A, which have been inserted by Act 17 of 2020 (the "Amending Act") with retrospective effect from 5 June 2020, the application filed by the appellant as an operational creditor under section 9 was not maintainable.

2. Some of the salient facts set out in the appeal are being adverted to in order to indicate the broad contours of the controversy. The issue involved raises a question of law. Hence, while setting out the facts as set up in the appeal, we need to clarify that the factual dispute has not arisen for adjudication.

3. The appellant claims that a sum of INR 104,11,76,479 is due and payable to him pursuant to his resignation "from all capacities held by him in the respondent in accordance with the various Employment Agreements/Incentive Agreements" entered into by him with the respondent during his tenure as Chairman and Managing Director. The appellant entered into an Employment Agreement with the respondent on 16 July 2009. Another Employment Agreement was entered into on 16 December 2013, effective from 1 January 2014, which superseded the previous agreement. The Employment Agreement dated 16 December 2013 was coupled with an Incentive Agreement signed on the same date. The Incentive Agreement is stated to have been amended and restated on 17 April 2015, along with a further amendment through a Side Letter dated

20 April 2015. Further, the new Employment Agreement was amended through a Letter Amendment No. 1 dated 17 April 2015.

4. On 21 January 2020, the appellant submitted his resignation to the respondent and its parent entity, detailing the entitlements which he claimed under the Employment and Incentive Agreements. On 28 January 2020, the respondent acknowledged receipt of the letter of resignation and requested the appellant to continue in employment beyond the 60 days' notice period stipulated in the Employment Agreement. According to the appellant, he agreed to continue to provide his services to the respondent till 30 April 2020. There was an exchange of communications between the parties and, according to the appellant, by an email dated 27 March 2020, the respondent confirmed the payments which were due and payable to him under the letter of resignation (except for point 12). The appellant is stated to have addressed a final reminder by an email dated 27 April 2020, three days' prior to the extended notice period came to an end.

5. On 28 April 2020, a termination letter was addressed to the appellant. The appellant issued a demand notice on 30 April 2020 in Form 3 of the IBC. The demand notice specified that the date of default was 30 April 2020.

6. On 11 May 2020, the appellant filed an application[1] under section 9 of the IBC on the ground that there was a default in the payment of his operational dues. During the pendency of the application, an Ordinance[2] was promulgated by the President of India on 5 June 2020 by which Section 10A was inserted into the IBC. Section 10A reads as follows:

> "10A. *Suspension of initiation of corporate insolvency resolution process*.—Notwithstanding anything contained in sections 7,9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:
>
> **Provided** that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.
>
> *Explanation* - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."

7. The respondent filed an application[3] seeking the dismissal of the appellant's application on the basis of the newly inserted provisions of Section 10A. The NCLT upheld the submission of the respondent, holding that a bar has been created by the newly inserted provisions of Section 10A. This decision has been upheld in appeal by the NCLAT.

8. The issue which falls for determination in this appeal is whether the provisions of Section 10A stand attracted to an application under section 9 which was filed before 5 June 2020 (the date on which the provision came into force) in

respect of a default which has occurred after 25 March 2020. Before proceeding to discuss the rival submissions, it is necessary to preface the discussion with reference to three significant dates which have a bearing on the present proceedings:

30 April 2020 - date of default as set up in Form 3;

11 May 2020 - date of institution of the application under section 9; and

5 June 2020 - date on which Section 10A was inserted in the IBC.

9. The date of default is crystallized as 30 April 2020 in the demand notice issued by the appellant in Form 3, which is prescribed under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The statutory form provides for a disclosure of the particulars of the operational debt. The disclosure which has been made by the appellant includes the amount claimed in default and the date of default, as tabulated below:

2.	Amount Claimed to be in Default and The Date on Which the Default Occurred (Attach the Workings for Computation of -*Default in Tabular Form)	INR 104,28, 76,479/- (Indian Rupees One Hundred and Four Crores Twenty Eight Lakhs Seventy Six Thousand Four Hundred and Seventy Nine only) as on 30-4-2020 along with interest @ 18% (eighteen per cent) p.a. till the date of realisation of entire payment.

10. Sub-Section (1) of Section 8 of IBC stipulates:

> "8. *Insolvency resolution by operational creditor*.—(1) an operational creditor may, on the occurrence of a default, deliver a demand notice of the unpaid operational debt or a 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."

Under section 9(1), the operational creditor may file an application before the Adjudicating Authority for initiating the Corporate Insolvency Resolution Process ("CIRP"), after the expiry of a 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 a notice of the dispute under sub-section (2) of section 8. The appellant having specified 30 April 2020 as the date of default, this appeal must proceed on that basis. It is necessary to make this clear at the outset because an attempt has been made during the course of the submissions by Mr. Neeraj Kishan Kaul, learned Senior Counsel appearing on behalf of the appellant, to submit that though the demand notice mentions the date of default as 30 April 2020, the "actual first date of default" was 21 January 2020 when the letter of resignation was tendered and that the "second date of default" was 23 March 2020 when the sixty days' notice period from the letter of resignation submitted by the appellant concluded. This attempt to set back the date of default to either 21 January 2020 or 23 March 2020 is plainly untenable for the reason that it is contrary to the disclosure made by the appellant

in the demand notice which has been issued in pursuance of the provisions of section 8(1) and section 9 of the IBC. The demand notice triggers further actions which are adopted towards the initiation of the insolvency resolution process. The question which needs to be resolved is whether section 10A would stand attracted to a situation such as the present where the application under section 9 was filed prior to 5 June 2020, when section 10A was inserted, and in respect of a default which has taken place after 25 March 2020.

11. Mr. Neeraj Kishan Kaul submits that:

(*i*) Section 10A creates a bar to the `filing of applications' under sections 7, 9 and 10 in relation to defaults committed on or after 25 March 2020 for a period of six months, which can be extended up to one year;

(*ii*) The Ordinance and the Act which replaced it do not provide for the retrospective application of Section 10A either expressly or by necessary implication to applications which had already been filed and were pending on 5 June 2020;

(*iii*) Section 10A prohibits the filing of a fresh application in relation to defaults occurring on or after 25 March 2020, once section 10A has been notified (*i.e.,* after 5 June 2020);

(*iv*) Section 10A uses the expressions "shall be filed" and "shall ever filed" which are indicative of the prospective nature of the statutory provision in its application to proceedings which were initiated after 5 June 2020; and

(*v*) The IBC makes a clear distinction between the "initiation date" under section 5(11) and the "insolvency commencement date" under section 5(12).

12. On the above premise, it has been submitted that section 10A will have no application. Mr. Kaul also urged that in each case it is necessary for the Court and the tribunals to deduce as to whether the cause of financial distress is or is not attributable to the COVID-19 pandemic. In the present case, it was asserted that the onset of COVID-19, which was the reason for the insertion of section 10A, has nothing to do with the default of the respondent to pay the outstanding operational debt of the appellant, which owes its existence even before the onset of the pandemic. Hence, it has been submitted that the event of default (30 April 2020) in the notice of demand cannot be read in isolation.

13. Opposing the above submissions, it has been urged by Mr. Gopal Jain, learned Senior Counsel on behalf of the respondent, that:

(*i*) The legislative intent in the insertion of section 10A was to deal with an extraordinary event, the outbreak of COVID-19 pandemic, which led to financial distress faced by corporate entities;

(*ii*) Section 10A is prefaced with a *non-obstante* clause which overrides sections 7, 9 and 10; and

(*iii*) Section 10A provides a cut-off date of 25 March 2020 and it is evident from the substantive part of the provision, as well as from the proviso and the explanation, that no application can be filed for the initiation of the CIRP for a default occurring on and after 25 March 2020, for a period of six months or as extended upon a notification.

14. The rival submissions can now be considered.

15. The financial distress caused by the outbreak of COVID19 provides the backdrop to the insertion of Section 10A. The underlying rationale for the insertion of Section 10A has been explained in the recitals to the Ordinance, which are extracted below:

> "...
>
> AND WHEREAS COVID-19 pandemic has impacted business, financial markets and economy all over the world, including India, and created uncertainty and stress for business for reasons beyond their control;
>
> AND WHEREAS *a nationwide lockdown is in force since 25th March,* 2020 to combat the spread of COVID-19 which has added to disruption of normal business operations;
>
> AND WHEREAS it is *difficult to find adequate number of resolution applicants to rescue the corporate person* who may default in discharge of their debt obligation;
>
> AND WHEREAS it is considered expedient to suspend under sections 7, 9 and 10 of the Insolvency and Bankruptcy Code, 2016 to prevent corporate persons which are *experiencing distress on account of unprecedented situation*. Being pushed into insolvency proceedings under the Court for sometime;
>
> AND WHEREAS it is considered expedient to exclude the *defaults arising on account of unprecedented situation* for the purposes of insolvency proceeding under this Code;"

(Emphasis supplied)

16. Section 10A is prefaced with a *non-obstante* provision which has the effect of overriding Sections 7, 9 and 10. Section 10A provides that:

(*i*) no application for the initiation of the CIRP by a corporate debtor shall be filed;

(*ii*) for any default arising on or after 25 March 2020; and

(*iii*) for a period of six months or such further period not exceeding one year from such date as may be notified in this behalf.

The proviso to Section 10A stipulates that "no application shall ever be filed" for the initiation of the CIRP of a corporate debtor "for the said default occurring during the said period". The explanation which has been inserted for the removal of doubts clarifies that Section 10A shall not apply to any default which has been committed under sections 7, 9 and 10 before 25 March 2020.

17. Section 10A makes a reference to the initiation of the CIRP. Clauses (11) and (12) of Section 5 of the IBC define two distinct concepts, namely:

(*i*) the initiation date; and

(*ii*) the insolvency commencement date.

18. The "initiation date" is defined in Section 5(11) in the following terms:

> "5(11) "initiation date" means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process;"

The expression "insolvency commencement date" is defined in Section 5(12) in the following terms:

> `5(12) "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be:'

19. Section 5(11) stipulates that the date on which a financial creditor, corporate applicant or operational creditor makes an application to the adjudicating authority for initiating the CIRP is the "initiation date". Distinguished from this is the "insolvency commencement date", which is the date on which the application for initiating the CIRP under sections 7, 9 or 10, as the case may be, is admitted by the Adjudicating Authority.

20. The substantive part of section 10A adverts to an application for the initiation of the CIRP. It stipulates that for any default arising on or after 25 March 2020, no application for initiating the CIRP of a corporate debtor shall be filed for a period of six months or such further period not exceeding one year "from such date" as may be notified in this behalf. The expression "from such date" is evidently intended to refer to 25 March 2020 so that for a period of six months (extendable to one year by notification) no application for the initiation of the CIRP can be filed. The submission of the appellant is that the expression "shall be filed" is indicative of a legislative intent to make the provision prospective so as to apply only to those applications which were filed after 5 June 2020 when the provision was inserted. Such a construction cannot be accepted.

21. The date of 25 March 2020 has consciously been provided by the legislature in the recitals to the Ordinance and Section 10A, since it coincides with the date on which the national lockdown was declared in India due to the onset of the Covid-19 pandemic. In *Sardar Inder Singh* v. *State of Rajasthan* 1957 SCR 605, the Rajpramukh promulgated the Rajasthan (Protection of Tenants) Ordinance (9 of 1949) on 21 June 1949 which, *inter alia*, provided for the reinstatement of tenants who had been in occupation on 1 April 1948 but had been subsequently dispossessed. When it was challenged before the Supreme Court, the Constitution bench, speaking through Justice T. L. Venkatarama Ayyar, relied on the recital in its preamble[4] while interpreting its provisions. The Court held that:

"11. In the present case, the preamble to the Ordinance clearly recites the state of facts which necessitated the enactment of the law in question, and Section 3 fixed the duration of the Act as two years, on an understanding of the situation as it then existed. At the same time, it conferred a power on the Rajpramukh to extend the life of the Ordinance beyond that period, if the state of affairs then should require it. When such extension is decided by the Rajpramukh and notified, the law that will operate is the law which was enacted by the legislative authority in respect of "place, person, laws, powers", and it is clearly conditional and not delegated legislation as laid down in Queen v. Burah ((1877-8) 5 IA 178, 180, 194, 195) and must, in consequence, be held to be valid...

(4) We shall next consider the contention that the provisions of the Ordinance are repugnant to Article 14 of the Constitution, and that it must therefore be held to have become void. In the argument before us, the attack was mainly directed against Sections 7(1) and 15 of the Ordinance. The contention with reference to Section 7(1) is that under that section landlords who had tenants on their lands on April 1, 1948, were subjected to various restrictions in the enjoyment of their rights as owners, while other landlords were free from similar restrictions. There is no substance in this contention. *The preamble to the Ordinance recites that there was a growing tendency on the part of the landholders to eject tenants, and that it was therefore expedient to enact a law for giving them protection; and for granting relief to them, the Legislature had necessarily to decide from what date the law should be given operation, and it decided that it should be from April 1, 1948*. That is a *matter exclusively for the Legislature* to determine, *and the propriety of that determination* is not open *to question in courts*. We should add that the petitioners sought to dispute the correctness of the recitals in the preamble. This they clearly cannot do. *Vide* the observations of Holmes, J. in Block v. Hirsh ((1920) 65 LEd 865: (1920) 256 US 135).

12. A more substantial contention is the one based on Section 15, which authorises the Government to exempt any person or class of persons from the operation of the Act. It is argued that section does not lay down the principles on which exemption could be granted, and that the decision of the matter is left to the unfettered and uncanalised discretion of the Government, and is therefore repugnant to Article 14. *It is true that section does not itself indicate the grounds on which exemption could be granted, but the preamble to the Ordinance sets out with sufficient clearness the policy of the legislature*; and as that governs section 15 of the Ordinance, the decision of the Government thereunder cannot be said to be unguided..."

(*Emphasis supplied*)

22. The language of the provision is not always decisive to arrive at a determination

whether the provision if applicable prospectively or retrospectively. Justice G.P. Singh in his authoritative commentary on the interpretation of statutes, Principles of Statutory Interpretation[5], has stated that:

> "In deciding the question of applicability of a particular statute to past events, the language used is no doubt the most important factor to be taken into account; but it cannot be stated as an inflexible rule *that use of present tense or present perfect tense is decisive of the matter that the statute does not draw upon past events for its operation*. Thus, the words "a debtor commits an act of bankruptcy" were held to apply to acts of bankruptcy committed before the operation of the Act. The words "if a person has been convicted" were construed to include anterior convictions. The words "*has made*", "has ceased", "has failed" and "has become", may denote events happening before or after coming into force of the statute and all that is necessary is that the event must have taken place at the time when action on that account is taken under the statute……And the word "is" though normally referring to the present often has a future meaning and may also have a past signification in the sense of "has been. *The real issue in each case is as to the dominant intention of the Legislature to be gathered from the language used*, the *object indicated, the nature of rights affected*, and the circumstances under which the statute is passed."

(Emphasis supplied)

23 Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10A. The onset of the COVID-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25 March 2020 as the cut-off date. The proviso to Section 10A stipulates that "no application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period". The expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25 March 2020 for a period of six months, extendable up to one year as notified. The explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25 March 2020. The substantive part of Section 10A is to be construed harmoniously with the first proviso and the explanation. Reading the provisions together, it is evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25 March 2020; the embargo remaining in force for a period of six months, extendable to one year. Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of Section 10A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25 March 2020 outside the pale of protection

because the application was filed before 5 June 2020.

24. We have already clarified that the correct interpretation of Section 10A cannot be merely based on the language of the provision; rather it must take into account the object of the Ordinance and the extraordinary circumstances in which it was promulgated. It must be noted, however, that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it.

25. Section 10A does not contain any requirement that the Adjudicating Authority must launch into an enquiry into whether, and if so to what extent, the financial health of the corporate debtor was affected by the onset of the COVID-19 pandemic. Parliament has stepped in legislatively because of the widespread distress caused by an unheralded public health crisis. It was cognizant of the fact that resolution applicants may not come forth to take up the process of the resolution of insolvencies (this as we have seen was referred to in the recitals to the Ordinance), which would lead to instances of the corporate debtors going under liquidation and no longer remaining a going concern. This would go against the very object of the IBC, as has been noted by a two-Judge bench of this Court in its judgment in *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC). Speaking through Justice Rohinton F Nariman, the Court held as follows:

"27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such re-organisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any

manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See *Arcelor Mittal (Arcelor Mittal (India) (P) Ltd.* v. *Satish Kumar Gupta,* (2018) 98 taxmann.com 99/150 SCL 354 (SC`)."

Hence, the embargo contained in Section 10A must receive a purposive construction which will advance the object which was sought to be achieved by enacting the provision. We are therefore unable to accept the contention of the appellant.

26. The date of the initiation of the CIRP is the date on which a financial creditor, operational creditor or corporate applicant makes an application to the adjudicating authority for initiating the process. On the other hand, the insolvency commencement date is the date of the admission of the application. This distinction is also evident from the provisions of sub-section (6) of Section 7, sub-section (6) of Section 9 and sub-section (5) of Section 10. Section 7 deals with the initiation of the CIRP by a financial creditor; Section 8 provides for the insolvency resolution by an operational creditor; Section 9 provides for the application for initiation of the CIRP by an operational creditor; and Section 10 provides for the initiation of the CIRP by a corporate applicant. NCLAT has explained the difference between the initiation of the CIRP and its commencement succinctly, when it observed:

"13. Reading the two definition clauses in juxtaposition, it emerges that while the first *viz.* `initiation date' is referable to filing of application by the eligible applicant, the later *viz.* `commencement date' refers to passing of order of admission of application by the Adjudicating Authority. The `initiation date' ascribes a role to the eligible applicant whereas the `commencement date rests upon exercise of power vested in the Adjudicating Authority. Adopting this interpretation would leave no scope for initiation of CIRP of a Corporate Debtor at the instance of eligible applicant in respect of Default arising on or after 25th March, 2020 as the provision engrafted in Section 10A clearly bars filing of such application by the eligible applicant for initiation of CIRP of Corporate Debtor in respect of such default. The bar created is retrospective as the cut-off date has been fixed as 25th March, 2020 while the newly inserted Section 10A introduced through the Ordinance has come into effect on 5th June, 2020. The object of the legislation has been to suspend operation of Sections 7, 9 & 10 in respect of defaults arising on or after 25th March, 2020 *i.e.* the date on which Nationwide lockdown was enforced disrupting normal business operations and impacting the economy globally. Indeed, the explanation removes the doubt by clarifying that such bar shall not operate in respect of any default committed prior to 25th March, 2020."

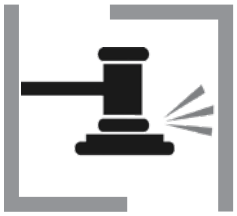
27. We are in agreement with the view which has been taken by the NCLAT for

the reasons which have been set out earlier in the course of this judgment. We affirm the conclusion of the NCLAT. The appeal is accordingly dismissed. There shall be no order as to costs.

28. Pending application(s), if any, stand disposed of.

† Arising out of order of NCLAT - New Delhi in *Ramesh Kymal v. Siemens Gamesa Ranewable Power (P.) Ltd.* (2020) 120 taxmann.com 452 (NCL-AT).

1. IBA/215/2020
2. Ordinance 9 of 2020 (the "Ordinance")
3. IA 395 of 2020
4. "Whereas with a view to putting a check on the growing tendency of landholders to eject or dispossess tenants from their holdings, and in the wider national interest of increasing the production of foodgrains, it is expedient to make provisions for the protection of tenants in Rajasthan from ejectment or dispossession from their holdings."
5. G.P. Singh, Principles of Statutory Interpretation (1st edn., Lexis Nexis 2015)



(2021) 124 taxmann.com 481 (SC)

SUPREME COURT OF INDIA

Committee of Creditors of AMTEK Auto Limited *v.* Dinkar T Venkatasubramanian

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

I.A. NO. 58156 OF 2020
CIVIL APPEAL NO. 6707 OF 2019
CONTEMPT PETITION (C) NO. 524 OF 2020

FEBRUARY 23, 2021

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Resolution plan - Approval of - Whether upon approval of a resolution plan by CoC under section 30(4), role of Adjudicating Authority under section 31(1) is limited to checking whether resolution plan meets requirements as provided in section 30(2) and whether resolution plan has provisions of its effective implementation - Held, yes -Whether there is no scope for negotiations and discussion after approval of resolution plan by CoC in term of IBC - Held, yes. (Para 26)

Section 61 of the Insolvency And Bankruptcy Code, 2016, read with Section 2(b) of the Contempt Of Courts Act, 1971 - Corporate person's adjudicating authorities - Appeals and Appellate Authority - Whether contempt jurisdiction is to be exercised with circumspection - Held, yes - Whether acceptance or rejection of a plea on merits is distinct from whether a party is in breach of order of court - Held, yes - Whether disobedience of an order must be wilful before it constitutes contempt and a wilful breach must appear clear by conduct of a party and not by implication - Held, yes - Whether exercise of legal rights and remedies would not constitute contempt - Held, yes - Whether where Court relegated matter to NCLT to decide upon application for approval of resolution plan within a fortnight and NCLT passed an order approving resolution plan submitted by DVI, DVI having taken recourse to its appellate remedy before NCLAT under provisions of section 61, it did not constitute contempt - Held, yes. (Para 32)

FACTS

- An application under section 7 of IBC was admitted by NCLT. One 'D' was appointed as Interim Resolution Professional. He was later confirmed as the Resolution Professional (RP).
- The RP published an advertisement inviting resolution plans from prospective resolution applicants. Resolution plans were submitted by Liberty House Group and DVI.
- On 6-3-2018, a revised plan submitted by Liberty House Group emerged as the highest evaluated plan, while DVI withdrew its plan.
- The Committee of Creditors (CoC) by a majority of 94.20 per cent approved the final revised plan of Liberty House Group on 2-4-2018. On 25-7-2018, the NCLT approved the resolution plan of Liberty House Group.
- Liberty House Group had failed to fulfill its obligations under the approved resolution plan and NCLT directed the reconstitution of the CoC for consideration of the resolution plan submitted by DVI. However, NCLT did not accede to the request for carrying out a fresh process by inviting the plans again.
- As a result the CoC filed an appeal before the National Company Law Appellate Tribunal (NCLAT). The appeal was limited to the extent of challenging the rejection of the prayer for inviting fresh applications from prospective applicants for submitting resolution plans. In the course of the proceedings before the NCLAT, DVI supported the plea of the CoC for restarting the process of inviting fresh applications for resolution plans. Accordingly, by its order dated 16-8-2019, NCLAT came to the conclusion that since more than 270 days had elapsed, an order of liquidation of the corporate debtor would have to ensue and accordingly directed the NCLT to pass appropriate orders of liquidation.
- On Civil Appeal before the Supreme Court, notice was issued and order of liquidation of the corporate debtor was stayed. The second

proviso to Section 12(3) of the IBC was amended with effect from 16-8-2019 by the Amending Act 26 of 2019 so as to stipulate a time limit of 330 days for the completion of the corporate insolvency resolution process from the insolvency commencement date. On 24-9-2019, Court accordingly directed the RP to invite fresh offers within a period of 21 days, following which the CoC was directed to take a 'final call in the matter' within two weeks.

- On 3-12-2019, the RP made a public announcement for inviting fresh resolution plans. Fresh resolution plans were submitted by four applicants, including DVI and LHG, and eventually on 6-1-2020, DVI was declared the highest evaluated resolution applicant. On 17-1-2020, DVI submitted its resolution plan together with a performance bank guarantee of Rs. 150 crores (representing the first tranche). On 18-1-2020, DVI submitted a revised resolution plan. The revised proposal of DVI was discussed in the 29th meeting of the CoC, following which certain revisions were sought from DVI.

- On 20-1-2020, when the proceedings came up before Supreme Court, an extension of two weeks was granted for finalizing the resolution plan. On 7-2-2020, DVI submitted an addendum along with its resolution plan dated 17-1-2020. On 10-2-2020, Court was apprised of the fact that a resolution plan was being voted upon by the members of the CoC in view of which an extension of one week was granted to finalise the resolution plan. On 11-2-2020, the resolution plan of DVI was approved by 70.07 per cent of the voting share of the CoC. On 19-2-2020, the RP filed an affidavit intimating it about the outcome of the voting. On 13-5-2020, the CoC filed an IA seeking approval of the resolution plan of DVI. On 8-6-2020, Supreme Court passed an order relegating the matter to the NCLT to decide upon the approval application within a fortnight. The time spent before the NCLT and Supreme Court was directed to be excluded for calculating the long stop date. An email was addressed to DVI on the same day by the RP to submit a performance bank guarantee for the balance of Rs. 150 crores by 15-6-2020. DVI filed an application before Supreme Court on 12-6-2020 seeking a modification of the order of 8-6-2020 for grant of a period of two months to it to examine and understand the impact of the onset of COVID-19 and to re-evaluate the resolution plan. Simultaneously, the RP filed an application before the NCLT on the same day seeking approval of the resolution plan submitted by DVI.

- On 18-6-2020, the IA filed by DVI was listed before Supreme Court when the order was passed that application made by the applicant for withdrawal of the offer was rejected and in case he indulged in such kind of practice, it will be treated as contempt of Court.

- Following the order of Supreme Court, the RP called upon DVI to submit a performance bank guarantee for a balance of Rs. 150 crores. In the meantime, on 30-6-2020 DVI moved its rectification application before Supreme Court on the ground that:

(*i*) No application had ever been filed by DVI seeking withdrawal of the order; and

(*ii*) DVI had never approached Supreme Court earlier for any relief including seeking an extension of time.

HELD

- The application for rectification is premised on the assertion that there are two factual misconceptions contained in the order of this Court dated 18-6-2020. Firstly, the order proceeds on the basis that DVI in its IA of 12-6-2020 intended to withdraw from the resolution plan, which was not the case; and secondly, the order indicates that extensions of time for the submission of resolution plans were obtained on behalf of DVI, which is contrary to the record. The submission, in other words, is that DVI did not intend to resile from the resolution plan and only sought to highlight the financial impact of the COVID-19 pandemic on the economy, the auto industry and the viability of the corporate debtor. This submission has been reiterated by applicant when he urged that the application moved before this Court on 12-6-2020:

(*i*) was to consider finding solutions for the delay due to COVID-19;

(*ii*) force majeure was not pleaded; and

(*iii*) the only plea was for the extension of time. (Para 24)

- The record before this Court would however belie the critique of the order dated 18-6-2020 and of the submissions made by the applicant. The IA filed by DVI was styled as `an application for rectification', as its title indicates, but paragraph 1 states that it is `an application for clarification/modification of the order dated 8-6-2020'. On 8-6-2020, this Court had relegated the matter of approval of the resolution plan to the NCLT with a timeline of 15 days. In the IA filed by DVI purportedly for `clarification and modification', it was submitted that `due to COVID-19 pandemic DVI's resolution plan (as submitted and approved by the CoC) was unviable and not feasible in the present circumstances'. DVI submitted that when the proceedings came up on 8-6-2020 it had urged that its resolution plan was required to be relegated to the adjudicating authority to assess the impact of the pandemic on the economy, the auto industry and the financial health of the corporate debtor and to enable the parties to renegotiate the terms of the resolution plan. In other words, DVI sought to submit that the purpose of relegating the issue of approval of the resolution plan was to enable

a re-negotiation to take place before the resolution plans which have been approved by the CoC could be the subject matter of an approval of the adjudicating authority. Now, this submission of DVI cannot be accepted for two reasons: firstly, it is a settled principle of law that the record of the Court speaks for itself and the terms of a judicial order reflect what has been decided. The order of this Court dated 8-6-2020 indicates that since the fresh resolution plan had been passed by the CoC with the majority of 70 per cent, `the matter of IA' namely, IA 48906 of 2020 filed by the CoC was being relegated to the NCLT for passing `appropriate orders'. There is absolutely no indication in the order of the Court dated 8-6-2020 that the purpose of relegating the IA to the NCLT was to facilitate a fresh evaluation being made by DVI in regard to the impact of the pandemic on the economy, the auto industry and the health of the corporate debtor. DVI, in other words, has attempted to read into the order dated 8-6-2020 a basis which does not find expression in the terms of the order. Such an exercise is plainly impermissible. Secondly, section 31 of the IBC provides the requirements to be observed, before the adjudicating authority approves the resolution plan. (Para 25)

- The role of the adjudicating authority under sub-section (1) of section 31 comes into being upon the approval of the resolution plan by the CoC under sub-section (4) of section 30. The function which is assigned by the statute to the adjudicating authority is to determine whether the resolution plan which has been approved by the CoC meets the requirements of sub-section (2) of section 30. Upon being satisfied that the resolution plan meets those requirements, the adjudicating authority `shall by order approve the resolution plan'. Before passing an order of approval the adjudicating authority has to satisfy itself that the resolution plan has provisions for its effective implementation. In the backdrop of the above provisions, the order of this Court dated 8-6-2020 required the adjudicating authority to perform the functions which are entrusted to it under section 31 of the IBC. To suggest that the purpose of the order dated 8-6-2020 was to enable DVI to re-negotiate the resolution plan after assessing the impact of the pandemic is thus fundamentally flawed. It is flawed because this assertion is contrary to the plain terms of the record. It is flawed also because the submission is contrary to the nature of the function which is expected to be exercised by the adjudicating authority by the plain terms engrafted into the provisions of section 31. When DVI moved its application on 12-6-2020, it asserted that the timeline of 15 days has `resulted in practical difficulties for parties to enter into any meaningful discussions and negotiations'. To assert that there was any scope for negotiations

and discussions after the approval of the resolution plan by the CoC would be plainly contrary to the terms of the IBC. DVI, in its application stated that it was seeking a clarification/modification for, *inter alia*, the following reasons:

(*i*) Its management team was based out of the US and found it difficult to travel to India during the course of the pandemic;

(*ii*) The pandemic had a drastic impact on the business, revenue, assets and financial and operational health of the corporate debtor;

(*iii*) The meeting of the CoC dated 4-5-2020 recorded the performance updates of the corporate debtors bearing on its financial health;

(*iv*) The RP had on 3-6-2020 shared additional information with DVI, which was substantial in its significance;

(*v*) DVI's resolution plan was based on the financials of the corporate debtor prior to the COVID-19 pandemic;

(*vi*) The pandemic had materially and adversely impacted commercial assumptions underlying the business plan and financial proposal for revival of the corporate debtor;

(*vii*) The RP was requiring DVI to submit an additional bank guarantee pursuant to the resolution plan failing which DVI faced the threat of the invocation of the performance bank guarantee of Rs. 150 crores which it had submitted;

(*viii*) DVI even pleaded 'special equities'. The reference to special equities contains a distinct flavor of a ground being set up to injunct the invocation of the performance bank guarantee. DVI sought a period of two months to (*i*) assess the impact of the pandemic on the business and financial health of the corporate debtor; (*ii*) the consequential impact of these circumstances on the feasibility and viability of the resolution plan; and (*iii*) to allow parties to negotiate the terms of the resolution plan. It was in this backdrop, that the reliefs which were sought in the IA were to permit DVI a period of two months 'to examine and understand the impact of COVID-19 pandemic and the lockdown to discuss the terms of the resolution plan with the CoC'; and

(*ix*) DVI in its IA also sought a restraining order against the CoC and the RP from acting upon the existing resolution plan until the conclusion of the above process subject to it extending the existing bank guarantee. (Para 26)

◆ The order of this Court dated

18-6-2020 must be understood in the context of the IA which was moved by DVI. When the three judge Bench in its order dated 18-6-2020 observed that the `application made by the applicant for withdrawal of the offer is hereby rejected' it must be understood in the context of the plea which was setup by DVI. There can be no mistaking the fact that DVI, despite having submitted a resolution plan which had undergone discussion and revision before the CoC before being approved in the meeting of the CoC of 11-2-2020, was seeking to renege its applications to fulfill the resolution plan. The plea for being allowed to re-examine the impact of the pandemic and to re-negotiate the terms of the resolution plan makes it abundantly clear that DVI was not willing to fulfil the terms of the obligations which it had agreed. This is evident from the fact also that though DVI was obliged to furnish the second tranche of its performance bank guarantee of Rs. 150 crores, it was not ready to do so. On the contrary, apprehending a threat of the invocation of the first tranche of the bank guarantee of Rs. 150 crores, DVI pleaded special equities and sought a direction allowing it to keep the bank guarantee alive until the process of re-negotiation was completed in two months. This again was to overcome the consequence of the invocation of the bank guarantee arising from DVI's default. The prayer seeking a direction to allow DVI to extend the bank guarantee was artfully worded since the effect would be to restrain the invocation of the bank guarantee. But, for the purpose of the present application, this judgment is based on the record as it stands, which leaves no manner of doubt that DVI was seeking to renege on its commitments. When the order of this Court dated 18-6-2020 alludes to `the application made by the applicant for withdrawal of the offer', the reference is clearly to the substantive content of the IA which indicates that DVI was not ready to abide by the commitments made by it in the resolution plan. The latter part of the order dated 18-6-2020, placed DVI on notice that if it indulged in such kind of practices in the future, it was `to be treated as contempt of this Court in view of the various orders passed by this Court at his instance'. DVI submits that the orders of this Court were not passed at its instance since applications for the extension of time had earlier been granted on the request by the CoC. The list of dates filed by DVI indicate that DVI filed its Vakalatnama in the

appeal on 5-6-2020. However, there can be no manner of doubt that the extensions of time granted by this Court were to enable a due consideration of the proposals of resolution applicants of which DVI undoubtedly was an applicant. This is evident from the manner in which the proceedings unfolded. On 24-9-2019, this Court directed the RP to invite fresh offers within a period of 21 days. As a result of offers being received after the deadline under the invitation which was issued pursuant to the above directions, an IA was moved on 6-11-2019 seeking an extension of four weeks. On 13-11-2019, this Court directed that the consideration would be confined to five offers 'received within the time specified in the advertisement'. On 21-11-2019, the CoC sought a modification of the order of 13-11-2019 to correctly record that while five resolution applicants had responded to the fresh invitation by the RP only one resolution plan had been submitted before the last date of submission. The CoC sought liberty to consider the additional three resolution offers, one of which was the offer by DVI. It was in this context that on 2 December 2019, this Court partly allowed the application for modification by directing that fresh offers to be invited within thirty days. It was in pursuance of the order of this Court dated 2 December 2019 that a public announcement was made by the RP on 3-12-2019. DVI submitted undertakings under section 29A of the IBC and other documents on 6-12-2019. Fresh resolution plans were submitted by four entities including DVI on 31-12-2019. (Para 27)

- On 6-1-2020, the CoC declared DVI as the highest evaluated resolution applicant. DVI submitted a revised resolution plan dated 17-1-2020, following which the voting which was scheduled by the CoC on that day was cancelled. The revised proposal of the DVI was discussed in the 29th meeting of the CoC. On the same day - 20-1-2020 when the proceedings were listed before this Court it took note of the fact that the CoC was in the process of approving a resolution plan following which an extension of two weeks was granted. DVI submitted an addendum to the resolution plan on 7-2-2020. (Para 28)

- On 10-2-2020, the CoC sought an extension of a week for the resolution plan to be voted upon by the members of the CoC. On 11-2-2020, the resolution plan of DVI was approved and an affidavit was filed by the RP before this Court on 19-2-

2020 reporting the approval of DVI's resolution plan by the CoC. Appropriate directions were sought. This sequence of events leaves no manner of doubt that the extensions which were granted were to facilitate the process initially of inviting resolution applicants to submit their plans and later for the evaluation of the plans which had been submitted. After DVI was found to be the highest evaluated resolution applicant, extensions were sought and granted for the resolution plan to be finalized and voted upon by the CoC. Who sought an extension of time is really beside the point and is of subsidiary importance. Formally it may be true that the extensions were applied for by the CoC, with the RP having apprised this Court also of the approval granted to DVI's resolution plan. However, DVI was the beneficiary of the extensions which were granted by this Court. The extensions granted from time to time facilitated the consideration of the resolution plan submitted by DVI. DVI cannot be heard to contend that the order of this Court dated 8-6-2020 suffers from an error when the process of seeking extensions before this Court ultimately led up to the approval of its resolution plan. DVI's application for rectification, in other words, is an attempt to renege from the resolution plan which it submitted and to resile from its obligations. This is a devious attempt which must be disallowed. The rectification application must accordingly be dismissed. (Para 29)

- The premise of the contempt proceedings which has been initiated by the CoC is that despite the order of this Court dated 18-6-2020, DVI has by its conduct

  (*i*) Obstructed the implementation of the resolution plan; and

  (*ii*) Set up a plea in the teeth of the rejection of its IA by this Court on 18-6-2020. (Para 30)

- There can be no manner of doubt that

  (*i*) the contempt jurisdiction is to be exercised with circumspection;

  (*ii*) the acceptance or rejection of a plea on merits is distinct from whether a party is in breach of the order of court;

  (*iii*) the disobedience of an order must be wilful before it constitutes contempt;

  (*iv*) a wilful breach must appear clear by the conduct of a party not by implication; and

(*v*) the exercise of legal rights and remedies would not constitute contempt. (Para 31)

- It is to be noted that on 8-6-2020, this Court relegated the matter to the NCLT to decide upon the approval application within a fortnight. NCLT passed an order approving the resolution plan submitted by DVI on 9-7-2020. DVI having taken recourse to its appellate remedy before the NCLAT under the provisions of section 61 of the IBC does not constitute contempt. The plea of contempt however proceeds on the conduct of DVI. (Para 32)

- The provisions of the IBC are premised on a time bound process for the resolution of corporate insolvencies. Effectively, the conduct of DVI after the CoC approved the resolution plan on 11-2-2020 has thwarted the entire process, thus, bringing things to a stand-still. Alive to the realities of the situation, it has been stated before the Court that in the proceedings which are pending before the NCLAT, DVI shall not plead force majeure based on the outbreak of the COVID-19 pandemic. (Para 37)

- The issue which needs to be addressed is whether recourse to the contempt jurisdiction is valid and whether it should be exercised in the facts of this case. Undoubtedly, as has been noted earlier, the conduct of DVI has not been *bona fide*. The extension of time in the course of the judicial process before this Court enures to the benefit of DVI as a resolution applicant whose proposal was considered under the auspices of the directions of the Court. DVI attempted to resile from its obligations and a reading of its application which led to the passing of the order of this Court dated 18-6-2020 will leave no doubt about the fact that DVI was not just seeking an extension of time but a re-negotiation of its resolution plan after its approval by the CoC. Then again, despite the order of this Court dated 18-6-2020 rejecting the attempt of DVI, it continued to persist in raising the same pleas within and outside the proceedings before the NCLAT. The conduct of DVI is lacking in *bona fides*. The issue however is whether this conduct in raising the untenable plea and in failing to adhere to its obligations under the resolution plan can per se be regarded as a contempt of the order of this Court dated 18-6-2020. DVI was undoubtedly placed on notice of the order that should it proceed in such terms, it would invite the invocation of the contempt jurisdiction.

Having said that, it is evident that the order of this Court dated 18-6-2020 rejected the IA moved by DVI and as a necessary consequence, the basis on which the reliefs in the IA were sought. Therefore correctly, it has been now stated on behalf of the DVI that it will not set-up a plea of force majeure in view of the dismissal of its IA on 18-6-2020. However lacking in *bona fides* the conduct of DVI was, one must be circumspect about invoking the contempt jurisdiction as setting up an untenable plea should not in and by itself invite the penal consequences which emanate from the exercise of the contempt jurisdiction. Likewise, the default of DVI in fulfilling the terms of the resolution plan may invite consequences as envisaged in law. On the balance, it is viewed that it would not be appropriate to exercise the contempt jurisdiction of this Court. (Para 38)

- For the above reasons, our conclusions and directions are that :

  (*i*) There is no merit in the application for rectification moved by DVI;

  (*ii*) It is not expedient in the interest of justice to pursue the contempt proceedings. The Contempt Petition shall accordingly stand dismissed, subject to (*iii*) below;

  (*iii*) In terms of the submission which has been made by DVI before this Court and even otherwise, as a consequence of the dismissal of its IA on 18-6-2020, it shall not set-up a plea for force majeure in the proceedings which are pending before the NCLAT in appeal against the order of the NCLT approving the resolution plan; and

  (*iv*) The appeal filed by DVI against the approval of the resolution plan by the NCLT shall peremptorily be heard and disposed of by the NCLAT not later than within a period of one month from the date of the present judgment. (Para 39)

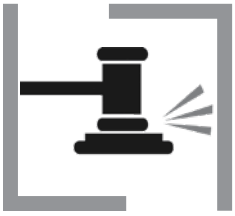
CASES REFERRED TO

Committee of Creditors of AMTEK Auto v. *Dinkar T Venkatsubramanian* (Civil Appeal No. 6707 of 2019, dated 18-6-2020) (para 7), *Committee of Creditors of AMTEK Auto* v. *Dinkar T Venkatsubramanian* (2019) 110 taxmann.com 28 (NCLT) (para 7) and *Committee of Creditors of AMTEK Auto Ltd.* v. *Dinkar T Venkatsubramanian* (I.A. No. 48906 of 2020, dated 8-6-2020) (para 11).

Tuhar Mehta, SG **Ms. Misha**, **Anoop Rawat**, **Siddhant Kant**, **Sagar Dhawan**, **Ms. Charu Bansal**, **Ms. Prabh Simran Kaur**, Advs.

and **S.S. Shraff**, AOR *for the Appellant.* **Gyanedra Kumar**, **Ms. Shikha Tandon**, **Sumit Attari**, **Ms. Akansha Sharma**, **Robin Grover**, Advs. **Dr. Abhishek Manu Singhvi**, Sr. Advs. **Ashish Prasad**, **Dinesh Pandekar**, **Chanakya Keswani**, **Arpan Behl**, **Sumant Batra**, **Sanjay Bhatt**, **Ms. Nihorika Sharma**, **Joydeep Mukherjee**, **Ms. Akansha Srivastava**, Advs. **Mefooz Ahsan Nazki**, **Robin Majumder**, AOR **Arvind Kumar Gupta**, **Ms. Heena Geroge**, Adv. **Ravinder Sadanand Chingale**, **P.S. Sudheer**, AOR **D.P. Singh**, **Ms. Sonam Gupta**, AOR **Ms. Ishita Jain**, **Anurag Tandon**, Advs. **Manish Paliwal**, **Vikas Kumar**, **Raghav Tiwari**, **Mayank Grover**, **Mayank Pandey** and **E.C. Agarawala**, AOR *for the Respondent.*

For Full Text of the Judgment see
(2021) 124 taxmann.com 481 (SC)



(2021) 127 taxmann.com 24 (SC)

SUPREME COURT OF INDIA

Upendra Choudhury *v.* Bulandshahar Development Authority

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

WRIT PETITION (CIVIL) NO 150 OF 2021

FEBRUARY 11, 2021

Section 11, read with section 18, of the Real Estate (Regulation and Development) Act, 2016 and Article 32 of the Constitution Of India - Functions and duties of promoter- Petitioner buyer filed petition under article 32, seeking cancellation of all agreements with respondent Development Authority and refund of money to purchasers; or in alternative to ensure that construction was carried out and that premises were handed over within a reasonable time - Petitioner also sought a forensic audit, an investigation by CBI and by other authorities such as Serious Fraud Investigation Office and Enforcement Directorate - However, it was found that writ petition under article 32 had been filed by a singular home buyer without seeking to represent entire class of home buyers - All buyers may not seek a cancellation and refund of consideration - Apart from this aspect, petitioner sought other reliefs in aid of primary relief, including constitution of a Committee presided over by a former

Judge of this Court for purpose of handling projects of developer where moneys had been taken from home buyers - However, entertaining a petition of this nature would involve court in virtually carrying out a day to day supervision of a building project - There were specific statutory provisions holding field and adequate provisions had been made in statute to deal with filing of a complaint and for investigation in accordance with law - Whether therefore, in view of statutory framework, both in terms of civil and criminal law and procedure and fact that there was no reason to assume that petitioner represented a class, petition under article 32 could not have been entertained - Held, yes (Paras 6, 7 and 8)

CASE REVIEW

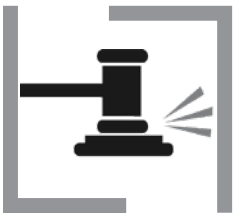
Shelly Lal v. *Union of India* (Writ Petition (Civil) No. 1390 of 2020, dated 7-1-2021) (para 5) - *followed*.

CASES REFERRED TO

Pawan Kumar Kushwaha v. *Lucknow Development Authority* (Writ Petition (Civil) No. 1001 of 2020, dated 20-11-2020) (para 3), *Shelly Lal* v. *Union of India* (Writ Petition (Civil) No. 1390 of 2020, dated 7-1-2021) (para 4), *Devendra Dwivedi* v. *Union of India* (2021) 123 taxmann.com 153/84 GST 606 (SC) (para 8), *Bikram Chatterji* v. *Union of India* (2020) 118 taxmann.com 510 (SC) (para 8) and *Bhupinder Singh* v. *Unitech Ltd.* (Civil Appeal No. 10856 of 2016, dated 20-1-2020) (para 8).

Manoj V. George, Adv., **Ms. Shilpa Liza George** , AOR **Ms. Akriti Jai**, **Panmei** and **Ms. Manju E. George**, Advs. *for the Petitioner.*

For Full Text of the Judgment see
(2021) 127 taxmann.com 24 (SC)



(2021) 124 taxmann.com 24 (SC)

SUPREME COURT OF INDIA

Phoenix ARC (P.) Ltd. *v.* Spade Financial Services Ltd.

DR. DHANANJAYA Y. CHANDRACHUD, INDU MALHOTRA AND INDIRA BANERJEE, JJ.

CIVIL APPEAL NOS. 2842 & 3063 OF 2020†

FEBRUARY 1, 2021

Section 5(8), read with sections 5(24) and 21, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - A company 'Spade' had granted inter corporate deposit to corporate debtor and its subsidiary AAA had purchased developmental rights in a project of corporate debtor - Spade and AAA filed their claims as financial creditors in CIRP of corporate debtor - NCLT had held that AAA and Spade had to be excluded from Committee of Creditors (CoC) formed in relation to Corporate Insolvency Resolution Process (CIRP) initiated against corporate debtor - In appeal, NCLAT by impugned order held that Spade and AAA were financial creditors but NCLT rightly excluded both Spade and AAA from participation in CoC as they were related parties of corporate debtor - Appellant (Phoenix), financial creditor of corporate debtor, challenged decision of NCLAT holding Spade and AAA as financial creditors - Whether since commercial arrangements between Spade and AAA, and corporate debtor were collusive in nature, they would not constitute a 'financial debt' under section 5(8) and, hence, Spade and AAA were not financial creditors of corporate debtor - Held, yes - Whether since 'AA' who was in control of Spade and AAA held positions in corporate debtor, AA, Spade and AAA were related parties of corporate debtor under section 5(24) during relevant period when transactions on basis of which Spade and AAA claimed their status as financial creditors took place - Held, yes - Whether therefore, decision of NCLAT, inasmuch as it referred to Spade and AAA as financial creditors, was to be set aside and decision of NCLAT, inasmuch as it referred to Spade and AAA as related parties of corporate debtor under section 5(24), was to be affirmed - Held, yes (Paras 52, 61, 62, 65 and 97)

Section 21 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Committee of Creditors - Whether where a financial creditor seeks a position on CoC on basis of a debt which was created when it was a related party of corporate debtor, exclusion which is created by first proviso to section 21(2) must apply - Held, yes - Whether while default rule under first proviso to section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from CoC, those related party financial creditors that cease to be related parties in order to circumvent exclusion under first proviso to section 21(2), should also be considered as being

covered by exclusion thereunder - Held, yes - Whether on facts under heading 'Corporate insolvency resolution process - Financial debt', since transactions between Spade and AAA on one hand, and corporate debtor on other hand, which gave rise to their alleged financial debts were collusive in nature, there existed a deeply entangled relationship between Spade, AAA and corporate debtor, when alleged financial debt arose and while their status as related parties might no longer stand, pervasive influence of AAA (promoter/director of corporate debtor) over these entities was clear, and allowing them in CoC would definitely affect other independent financial creditors - Held, yes - Whether thus, decision of NCLAT, inasmuch as it excluded Spade and AAA from CoC in accordance with first proviso of section 21(2) was to be affirmed - Held, yes (Paras 91, 95, 96 and 97)

CASE REVIEW

Spade Financial Services Ltd. v. *Hari Krishan Sharma* (2021) 124 taxmann.com 23 (NCL-AT) (***See Annex***) *partly affirmed* (para 97).

CASES REFERRED TO

Swiss Ribbons (P.) Ltd. v *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 43), *Pioneer Urban Lands & Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 44), *Snook* v. *London & West Riding Investments Ltd.* (1967) 2 QB 786 (para 46), *Prem Chand Tandon* v. *Krishna Chand Kapoor* (1973) 2 SCC 366 (para 47), *Arcelor Mittal India (P.) Ltd.* v. *Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL 354 (SC)(para 54), *Abhay Singh Chautala* v. *CBI* (2011) 7 SCC 141 (para 86) and *R.S. Nayak* v. *A.R. Antulay* (Criminal Appeal No. 356 of 1983, dated 16-2-1984) (para 88).

Neeraj Kishan Kaul, Sr. Adv., **Suresh Dutt Dobhal**, **Shikhar Kumar**, **Deepak Joshi**, Advs., **Gaurav Agrawal**, AOR, **K.V. Viswanathan**, Sr. Adv., **Rohit Krishan Naagpal**, **R. Venkatraman**, **Dipanshu Gaba**, Advs. and **P.V. Yogeswaran**, AOR *for the Appellant.* **Sanjiv Sen**, Sr. Adv., **Abhishek Anand**, Adv., **Ms. Mithu Jain**, AOR and **Kunal Godhwani**, Adv. *for the Appearing Parties.*

For Full Text of the Judgment see
(2021) 124 taxmann.com 24 (SC)

Code and Conduct of Insolvency Professionals (Remuneration and costs)

1. Introduction

A code of conduct is a set of rules outlining the norms, rules, and responsibilities or proper practices of an individual party or an organisation. The code of conduct is generally based upon ethics and morality. At present, Code of Conduct is prescribed for all the professionals be it, doctors, Chartered Accountants, Company Secretaries, Lawyers, engineers etc.

Under the Insolvency and Bankruptcy Code, Insolvency Professional plays major role in the corporate insolvency resolution process and he is entrusted with all the powers of the Board/Management of Corporate Debtor. Therefore, for IPs also, the code of conduct has been codified.

The detailed code of conduct for Insolvency Professionals is prescribed in the first schedule to Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. Ten key points mentioned in code of conduct are (i) **Integrity and objectivity;** (ii) **Independence and impartiality;** (iii) **Professional competence;** (iv) **Representation of correct facts**

and correcting misapprehensions; (**v**) **Timeliness;** (**vi**) **Information management;** (**vii**) **Confidentiality;** (**viii**) **Occupation, employability and restrictions;** (**ix**) **Remuneration and costs and** (**x**) **Gifts and hospitality.**

In this chapter, we shall focus on one point i.e. "Remuneration and costs" of the Code of Conduct for Insolvency Professionals.

2. Remuneration and costs

An Insolvency Professional plays the significant role of cementing together the interests of Corporate Debtor and the creditors. An IP may hold role of Resolution Professional during Corporate Insolvency Resolution Process ("CIRP") and Liquidator during liquidation process.

Fee in case of corporate insolvency resolution process:

As per Section 5(13)(*b*) of the Insolvency and Bankruptcy Code, 2016 "insolvency resolution process costs" means the fees payable to any person acting as a resolution professional. As per Regulation 34 of the IBBI (Corporate Insolvency Resolution Process) Regulations, 2016, the Committee shall fix the fee to be paid to the resolution professional.

It is pertinent to mention that the quantum of fees has not been prescribed for Insolvency Professionals in respect of corporate insolvency resolution process. It may partly because of predominant economic theory that the market should lay down a price and partly because of logistical problems because no two CIRPs need the same standard and quantity of services or no two RPs provide homogenous services.

Fee in case of liquidation:

Section 34(8) of the Code provides that *"An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board."*

Regulation 39D of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that "*While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may, in consultation with the resolution professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33".*

As per Regulation 4(2) of the IBBI (Liquidation Process) Regulations, 2016, in case the fee of liquidator is not fixed by the CoC, the liquidator shall be entitled to a fee at the same rate as the resolution professional was entitled to during the corporate insolvency resolution process, for the period of compromise or arrangement under section 230 of the Companies Act, 2013 and as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation, as under:

Amount of Realisation / Distribution (In rupees)	Percentage of fee on the amount realised/distributed		
	in the first six months	in the next six months	thereafter
Amount of Realisation (exclusive of liquidation costs)			
On the first 1 crore	5.00	3.75	1.88
On the next 9 crore	3.75	2.80	1.41
On the next 40 crore	2.50	1.88	0.94
On the next 50 crore	1.25	0.94	0.51
On further sums realized	0.25	0.19	0.10
Amount Distributed to Stakeholders			
On the first 1 crore	2.50	1.88	0.94
On the next 9 crore	1.88	1.40	0.71
On the next 40 crore	1.25	0.94	0.47
On the next 50 crore	0.63	0.48	0.25
On further sums distributed	0.13	0.10	0.05

3. Code and Conduct

With reference to Remuneration and Cost of Insolvency Professional, the Code and Conduct of Insolvency Professional provides that:

- The remuneration should be charged in transparent manner;
- Remuneration should be reasonable reflection of the work necessarily and properly undertaken;
- Remuneration should not be inconsistent with the applicable regulations;
- An IP shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency;
- An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration;
- An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.

4. Recommendations of Bankruptcy Law Reforms Committee

As per the BLRC there should be no constraints on RP fees. In a competitive market for the insolvency professionals, the fees for managing the insolvency resolution process will converge to the fair market value for the size of the entity involved.

The Committee feels it is prudent to allow the market to develop and competition to drive charges of the RP rather than setting

these in the Code, or in regulations. In any competitive market, we expect that there will be a range of services available for a range of problems. However, there is one case that will require intervention. When the insolvency is brought for resolution well within time, there is typically a sizeable amount of assets that support the fees of insolvency resolution. On the other hand, this is not the case for an insolvency that is discovered at a late stage. In a typical situation, there will have been a build up of the leverage by the entity borrowing at higher rates to make payments. Or assets may have been sold or pledged for cash to make payments. Experience from other jurisdictions suggest that there will be cases of low or no asset entities which come to the Adjudicator for resolution. In this case, the Adjudicator can approach the Regulator to recommend an RP who will be appointed with the condition that her services will be offered at a minimum charge, paid for by the Regulator. The requirement to offer to serve in a minimum number of such cases will be part of the requirements of continuing registration for the insolvency professional.

5. IBBI's Circular on 'Fee and other Expenses incurred for Corporate Insolvency Resolution Process'

On 12th June, 2018, IBBI issued a circular on 'Fee and other Expenses incurred for Corporate Insolvency Resolution Process'. Following are the Key Highlights of the Circular:

- IP is directed to ensure that the fee payable to him, Insolvency Professional Entity, Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable;
- IP is directed to ensure that the fee or other expenses incurred by him are directly related to and necessary for the CIRP;
- IP is directed to ensure that the fee or other expenses are determined by him on an arms' length basis, in consonance with the requirements of integrity and independence;
- IP is directed to ensure that written contemporaneous records for incurring or agreeing to incur any fee or other expense are maintained;
- IP is directed to ensure that supporting records of fee and other expenses incurred are maintained at least for three years from the completion of the CIRP;
- IP is directed to ensure that approval of the Committee of Creditors (CoC) for the fee or other expense is obtained, wherever approval is required;
- IP is directed to ensure that all CIRP related fee and other expenses are paid through banking channel;
- IP is directed to ensure that no fee or expense other than what is permitted under the Code read with regulations made thereunder is included in the IRPC;
- IP is directed to ensure that no fee or expense other than the IRPC incurred by the IP is borne by the corporate debtor;

- IP is directed to disclose their fee and other expenses of in relevant form for their concluded and ongoing resolution process within a specified timeline;
- Insolvency Professional Agencies shall monitor the disclosures made by its IPs.

6. Judicial/Regulatory Rulings

- **Fee claimed by IRP should not be exorbitant**

  Case Title: Anurag Nirbhaya v. Anuj Maheshwari (Co. appeal (Insolvency) No. 1094/2019 dated, 14-10-2029)

  IRP claimed Rs. 12 Lakhs for the first month and Rs. 11 Lakhs per month for the period of rest of the two and half months and he was paid Rs. 6 Lakhs for the total period of three and half months. The AA observed that the exorbitant fee has been claimed by the IRP and stated that generally they allow fee @ Rs. 1 Lakh per month to the professionals.

- **RP should not ask for exaggerated insolvency resolution cost**

  Case Title: *Punjab national Bank v Divya jyoti Sponge Iron (P) Ltd* (2018) 96 taxmann.com 372 (NCLT-Kol.)

  The AA took notice of fixation of exaggerated insolvency resolution cost, inclusive of fixation of fee of RP in a lump sum manner by the CoC without applying its mind as regards to the fate of CD, the volume, nature and complexity of CIRP. It is observed that it is time to have legitimate guidelines or regulation in this regard so as to safeguard and to ensure the prospects and revival of a dying CD not be at the highest cost which canned be affordable by the CD. It hoped that IBBI would frame necessary regulations/ guidelines for fixation of fees and resolution cost by a RP.

- **RP should not allow firm where he is partner to raise invoices for his fees and out of pocket expenses**

  The Disciplinary Committee of IBBI found that an IP authorised and allowed Ernst & Young LLP to raise invoices for his fees and other out of pocket expenses for work undertaken by him as an IRP and RP in connection with CIRP Corporate Debtor, in contravention of provisions of the Code and regulations made thereunder. Given that the Code was a new law and he was following circular dated 16th January, 2018 in letter and spirit, effective the date of the circular, IBBI took lenient view and accordingly imposed a monetary penalty of one lakh rupees on the Insolvency Professional.

- **An IP should not charge abnormally high fee in relation to the services**

  The Disciplinary Committee of IBBI found that an IP attempted to charge abnormally high fee in relation to the services. Besides,

he acted malafide by seeking increase of his fee after approval of fee by the AA and displayed professional incompetence by using stale information for decision making. He, then IRP signed the term sheet with the applicant, who is not legally competent to appoint RP or fix his fee, and thereby attempted to deprive the CoC of its legitimate right to appoint a RP of its choice and fix his fee. The Disciplinary Committee suspended the registration of the IP for two years, directed the IP to undergo the pre-registration educational course and work for at least six months as an intern with a senior insolvency professional, at any time during the period of suspension.

- **Where the Liquidator fees has not been decided by the CoC, then the liquidator should not continue to charge the same fees during liquidation process which he was charging while acting as an RP**

  As per IBBI (Liquidation Process) Regulations, 2016, in cases where the Liquidator fees has not been decided by the CoC, then the liquidator is entitled to a fee as per the table provided in the Regulations. The Disciplinary Committee of IBBI found that an IP continued to charge the same fees during liquidation process which he was charging while acting as an RP. The Disciplinary Committee directed the IP to deposit the amount in the Liquidation Estate of CD which he has drawn without any authorization while acting as liquidator. However, the IP can claim liquidator fees as per IBBI (Liquidation Process) Regulations, 2016.

- **Fee paid to the professionals appointed on the direction of CoC should not be included as IRPC**

  The Disciplinary Committee of IBBI observed that Despite the IBBI Circular dated 12.06.2018 clearly stating that Insolvency Resolution Process Cost (IRPC) shall not include any expense incurred by a member of CoC or a professional engaged by them, the RP charged the fee of lender's legal counsel from the Insolvency Resolution Process Cost. Resolution Professional, on the direction of COC, finalized the appointment of a Professional to conduct second forensic audit. The fees should have been borne by the CoC members themselves but the same was included as IRPC. The Disciplinary Committee suspended the registration of IP for six months, directed to secure reimbursement of the amount which was paid to lender's legal counsel and professional for conducting second forensic audit and charged to IRPC.

7. REFERENCES

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

https://amlegals.com/insolvency-professional-fees-in-a-fix/#

FAQs on meetings of Committee of Creditors (CoC)

1. **Who shall constitute committee of creditors (CoC) and whom shall committee comprise of?**

   As per Section 21(1) of the code, the interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

   Further, as per Section 21(2), the committee shall comprise of all the financial creditors of the Corporate Debtor.

2. **How shall committee be set up where the Corporate Debtor has no financial debt or where all financial creditors are related parties of the corporate debtor?**

   In such case, the committee shall be in accordance with CIRP regulations. As per clause 16(2) of the said regulation the committee shall consist of following members-

   a. eighteen largest operational creditors by value: *Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;*

   b. one representative elected by all workmen other than those workmen included under sub-clause (a); and

   c. one representative elected by all employees other than those employees included under sub-clause (a)

3. **What kind of creditor a person will be considered if he is both a financial as well as operational creditor?**

   When any person is both a financial

creditor as well as an operational creditor, such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor.

4. When shall the first meeting of the committee be held?

As per clause 17(2) of CIRP Regulations, Interim Resolution Professional shall hold first meeting of committee **within seven days** of filing report certifying constitution of the committee to the Adjudicating Authority.

This report certifying constitution of committee has to filed within two days of the verification of claims received under sub-regulation (1) of regulation 12.

5. How many days prior the notice of the meeting should be sent and what should be the mode of sending notice?

As Regulation 19 of the CIRP Regulations a meeting of the committee **shall be called by giving not less than five days'** notice in writing to every participant, at the address it has provided to the resolution professional and such notice may be sent by hand delivery, or by post but in any event, be served on every participant by electronic means.

6. What shall be the quorum of the meeting?

As per Regulation 22 of the CIRP Regulations, a meeting of the committee shall be quorate if members of the committee representing at least thirty three percent of the voting rights are present either in person or by video conferencing or other audio and visual means.

7. Who shall receive the notice of the each meeting of the committee of creditors?

As per Regulation 24(3) of the CIRP Regulations, the resolution professional shall give notice of each meeting of the committee of creditors to-

a. Members of the committee of creditors including authorized representatives

b. members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

c. operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

8. Within what time period the minutes of the meeting should be circulated?

The Resolution Professional shall circulate the minutes of the meeting to all participants by electronic means within forty eight hours of the said meeting.

9. What actions shall not be taken without the prior approval of the committee of creditors in the meeting?

As per Section 28(1) of the Code the resolution professional, during

the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely: -

a. raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

b. create any security interest over the assets of the corporate debtor;

c. change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

d. record any change in the ownership interest of the corporate debtor;

e. give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

f. undertake any related party transaction;

g. amend any constitutional documents of the corporate debtor;

h. delegate its authority to any other person;

i. dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

j. make any change in the management of the corporate debtor or its subsidiary;

k. transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

l. make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

m. make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

10. How can voting be conducted by electronic means by the Resolution Professional?

As per Regulation 26 of the CIRP regulations, resolution professional shall provide each member of the committee the means to exercise its vote by either electronic means or through electronic voting system.

At the end of the voting period, the voting portal shall forthwith be blocked.

At the conclusion of a vote, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision, or abstained from voting.

The resolution professional shall circulate a copy of the record made to all participants by electronic means within twenty four hours of the conclusion of the voting.

11. In what capacity a financial Creditor may act where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors?

As per Section 21(6) of the Code , where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may-

a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

b) represent himself in the committee of creditors to the extent of his voting share;

c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

12. How can an Authorised Representative cast his vote in the meeting of creditors?

The authorised representative shall cast his vote in respect of each financial creditor or on behalf of all financial creditors he represents in accordance with the provisions of subsection (3) or sub-section (3A) of section 25A, as the case may be.

As per subsection (3) of section 25A, the authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions, Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share and if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.

Further, the authorised representative under sub-section (6A) of section 21 shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent. of the voting share of the financial creditors he represents, who have cast their vote.

Important developments having taken place in IBC

During the month of February, 2021

Copy of application filed for initiation of CIRP against the personal guarantor, to be provided online to IBBI

On 2nd February, 2021, IBBI vide its clarification circular mandates an applicant to provide a copy of the application filed under sub-section (1) of section 94 or sub-section (1) of section 95 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiation for insolvency resolution process of a personal guarantor to a corporate debtor, *inter alia*, to the Board for its record under Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019

IBBI circular may be viewed at: https://www.ibbi.gov.in/uploads/alframwork/8d-38ca4dc37264636b22daa2a3c637ba.pdf

Tribunals to start physical training w.e.f 1st March, 2021

All NCLT Benches shall start regular Physical hearing w.e.f. 1st March, 2021. In case any counsel/ representative of party expresses difficulty in physical hearing, he/ she may be permitted for virtual hearing. However, the benches as mentioned below in re-marks column shall remain attending the matters through Video Conference

NCLT notification may be viewed at:

https://www.ibbi.gov.in/uploads/legalfram-work/7e308ebbefee982c9895a8df0d540097.pdf

INSOLVENCY IN SINGAPORE

Singapore's system of insolvency laws comprises procedures for liquidation as well as rehabilitative debt restructuring procedures. The main types of proceedings within the latter category are judicial management and schemes of arrangement. The key statute governing insolvency and corporate rescue mechanisms in Singapore is Chapter 50 of the Companies Act, 1967[1]. Parliament passed significant amendments to various insolvency and debt restructuring provisions in the Companies Act in 2017 and those have come into force with effect from 23 May 2017.

The following table outlines how the framework for insolvency in Singapore compares to that of India.

1. https://sso.agc.gov.sg/Act/CoA1967

Basis of Comparison	India	Singapore
Laws governing Insolvency	Insolvency and Bankruptcy Code, 2016 (IBC)	The Insolvency, Restructuring and Dissolution Act 2018 (IRDA), Singapore's omnibus insolvency law, was passed in Parliament on 1 October 2018, but has not yet become operational.[2] Chapter 50 of Companies Act currently governs Insolvency In Singapore. Parliament passed significant amendments to various insolvency and debt restructuring provisions in the Companies Act in 2017 and those have come into force with effect from 23 May 2017.
Cross Border Insolvency	Sections 234 and 235 of IBC contain details of cross border insolvency in India. It gives power to the Central Government who can make any agreements with the foreign country to start with the insolvency proceedings.	Singapore adopted the UNCITRAL model of Cross Border Insolvency Law through the amended Companies Act 2017 and is enshrined in the provisions Section 354A, 354B and 354C of the Companies Act.
Adjudicating Authority	National Company Law Tribunal (NCLT isthe Adjudicating Authority. The Appellate Authority is National Company Law Appellate Tribunal (NCLAT).	The Singapore courts have assigned certain judges with the requisite expertise as docketed insolvency judges to hear applications relating to insolvency and restructuring, including when the matter is urgent.
Types	There is Corporate Insolvency, Voluntary Liquidation and Liquidation which includes schemes of arrangement.	There is Judicial Management, Schemes of Arrangement, Compulsory Liquidation and Receivership. Their system of Judicial Management is similar to the Corporate Insolvency Process followed in India.
Who can trigger	Under IBC, the debtor themselves, the creditors (financial or operational can trigger insolvency	*Judicial Management*: The company, its directors or its creditors. *Schemes*: Company prepares a sample scheme and makes an application to court for a meeting of the creditors. *Compulsory Liquidation:* Creditors, the company and judicial manager can petition. *Receivership:* A secured creditor appoints a receiver in circumstances where a company is already insolvent or nearing insolvency.
Control	The control of the assets and management of the Corporate Debtor rests with the Insolvency Professional/Liquidator appointed by the Court, once proceedings start.	*Judicial Management*: Judicial Manager (officer of the court takes over running of company and management is displaced. Creditors may establish committee to monitor the process. *Schemes*: Management retains control of business while restructuring *Compulsory Liquidation:* Liquidator nominated by creditor, appointed by court has responsibility to wind up affairs of company *Receivership:* Receiver controls running of business.
Role of Insolvency Professional	Under IBC, the Insolvency Professional is known as an "officer of the court" and plays the role of taking over the Corporate Debtor, keeping it as a going concern, managing claims, holding creditors' meetings, preparing the Information Memorandum etc. On company undergoing liquidation, the IP has to hand over the company to the Liquidator.	*Judicial Management*: Preserve business of debtor as going concern. Present rescue plan to creditors, takes into custody all property and manage company's affairs according to plan. *Schemes*: No requirement of an IP *Compulsory Liquidation:* Collect assets and creditors' claims. Carry on business during the proceedings. Post assessment, adjudicate claims lodged against company, realize company's assets and distribute proceeds in order of statutory priority. *Receivership:* Take control of all or most of company's assets. Liquidator has to wait until receiver has completed his task.

2. https://sso.agc.gov.sg/Acts-Supp/40-2018/Published/20181107?DocDate=20181107

Moratorium	Moratorium is imposed on all the proceedings other than insolvency and all the other agreements of the company as soon as Insolvency Application is admitted by the court. It continues either till a resolution plan is implemented or till the company is liquidated.	*Judicial Management*: Automatic and immediate moratorium as soon as insolvency is triggered. *Schemes*: No automatic moratorium while Scheme is being proposed. *Compulsory Liquidation:* Post winding up order, automatic stay on proceedings against company unless court permits proceedings to continue. *Receivership:* No moratorium at all.
Priority of creditors	Section 53 of IBC lays down the priority of payment in cases of liquidation: (*a*) The insolvency resolution process costs and the liquidation costs paid in full; (*b*) the following debts which shall rank equally between and among the following :— (*i*) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and (*ii*) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52; (*c*) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date; (*d*) financial debts owed to unsecured creditors; (*e*) the following dues shall rank equally between and among the following:— (*i*) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date; (*ii*) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest; (*f*) any remaining debts and dues; (*g*) preference shareholders, if any; and (*h*) equity shareholders or partners, as the case may be	◆ Secured creditors have priority over all other claims. ◆ Claims of creditors secured by floating charge rank behind liquidator's fees and expenses and preferential claims. The general order of payment priority: 1. Receivers' expenses. 2. Claims secured by fixed charges. Costs and expenses of winding up. Employees' remuneration and other payments due to employees. 3. All taxes assessed before date of commencement of winding up or assessed at any time before expiration of time fixed for proving of debts. 4. Claims secured by a floating charge. 5. Unsecured creditors. 6. Any surplus to company/ shareholders.
Provisions for avoidance transactions	Yes	Yes
Approval for Reorganization Plan	Creditor Approval needed	Creditor Approval needed
Regulations for Group Insolvency of Companies	No specific provisions	No specific provisions
Dealing with COVID-19	Increasing the threshold for triggering insolvency as well as prohibiting legal proceedings for non-payment during this pandemic.	Increasing the threshold for triggering insolvency as well as prohibiting legal proceedings for non-payment during this pandemic.

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