RESOLVE™

INSOLVENCY AND BANKRUPTCY JOURNAL

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

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)

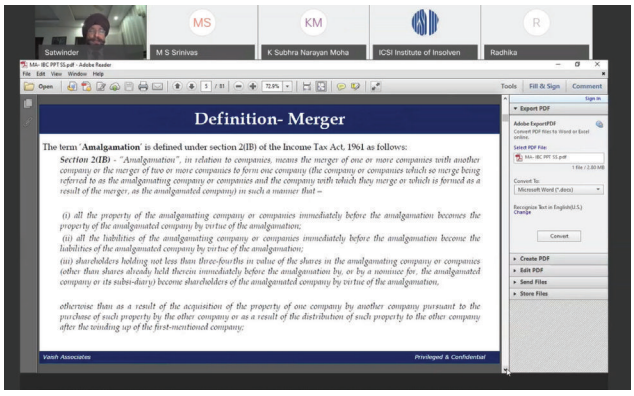
'ICSI House', 3rd Floor, 22, Institutional Area,
Lodhi Road, New Delhi - 110 003

NEWS FROM THE INSTITUTE

INITIATIVES BY ICSI IIP in January2021

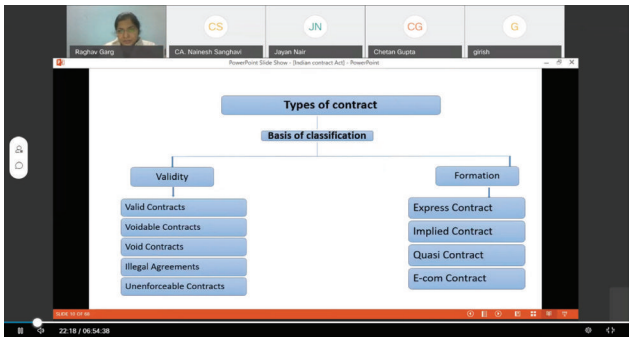
1. Workshop on the topic Practical Aspects of Mergers and Acquisitions in India for IPs

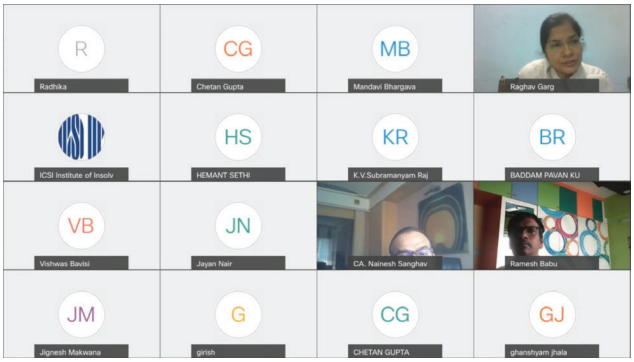
ICSI IIP organized a workshop on the topic `Practical Aspects of Mergers and Acquisitions in India for IPs' on January 16, 2021 from 10:00 AM to 05:00 PM. It was attended by 100 professional members. The workshop was addressed by the eminent speakers like CS Satwinder Singh, Insolvency Professional, CS NPS Chawla, Insolvency Professional and CA Snehal Kamdar, Insolvency Professional. The workshop covered important topics like Legal Covenants in M&A and M&A Finance Diligence.



2. LIT UP I Preparation Course for LIMITED INSOLVENCY EXAMINATION

ICSI IIP organized LIT UP Batch 7-preparation course for Limited Insolvency Examination from 22nd-24th January, 2021. It is full three days intensive preparation course. The course was attended by professional members and was addressed by experienced speakers like Ms. Sripriya, Insolvency Professional, Ms. Puja Bahry, Insolvency Professional, CS Preeti Garg, Advocate, CS Harshul shah, Advocate & Insolvency Professional, Dr. Prasad, Insolvency Professional, etc.

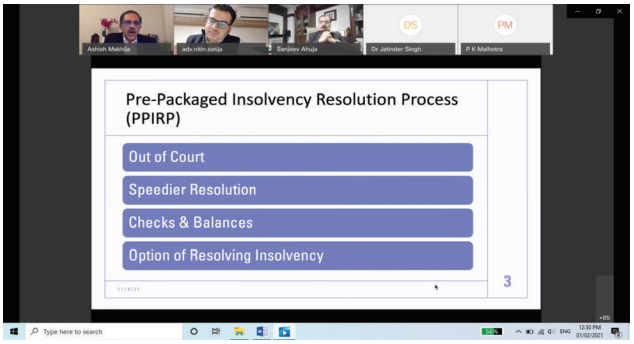


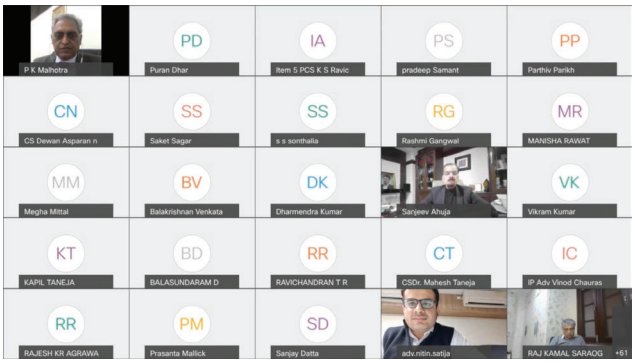


3. Roundtable on 'ILC (sub-committee) report on Pre-packaged Insolvency Resolution Process'

ICSI IIP organized a Roundtable on 'ILC (sub-committee) report on Pre-packaged Insolvency Resolution Process' on 18th January, 2021 at 5:00 pm. The round-table was moderated by Adv. Ashish Makhija.

The round-table discussion was attended by 176 participants.





Developed and Marketed by
TAXMANN®
Printed at
TAXMANN®
Edited & Published by
Dr. Binoy J. Kattadiyil
for
ICSI Institute of Insolvency Professionals
'ICSI House', 3rd Floor, 22,
Institutional Area, Lodhi Road,
New Delhi- 110 003.
Phones : 45341099, 45341048
E-Mail : info@icsiiip.com
Website : http://www.icsiiip.com

Printed at
Tan Prints (India) Pvt. Ltd.
44 km. Mile Stone, National Highway, Rohtak Road, Village Rohad, Distt. Jhajjar, Haryana (India)

For ICSI IIP Members

- **ICSI Institute of Insolvency Professionals**
  'ICSI House', 3rd Floor, 22, Institutional Area, Lodhi Road, New Delhi- 110 003.
  Phones : 45341099, 45341048
  E-Mail : Peer.mehboob@icsi.edu

  'ICSI House' Third Floor, C-36, Sector-62, Noida, Uttar Pradesh 201301
  Contact No. : 0120 408 2142

For Non-Members

- **Taxmann Publications Pvt. Ltd.**
  59/32, New Rohtak Road,
  New Delhi-110005
  Ph. : 91-11-45562222
  email : sales@taxmann.com

At a Glance

No. 1 | Pg. 1-100 | JANUARY 2021

Section 5(13), read with sections 5(6) and 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Insolvency Resolution Process - Appellant operational creditor filed CIRP petition against corporate debtor as corporate debtor had defaulted in payment for goods and services supplied - NCLT admitted petition on ground that claim of appellant was undisputed - On appeal by corporate debtor, NCLAT set aside order of NCLT holding that there were pre-existing disputes between parties based on various documents - Appellant operational creditor challenged impugned order only to extent of direction given in impugned order directing him to pay CIRP costs and fees before Adjudicating authority - Whether said direction was in nature of costs of proceedings which had been found to be unsustainable - Held, yes - Whether respondent corporate debtor having succeeded, could not be saddled with costs of CIRP at behest of appellant or with fees of interim resolution professional - Held, yes - Whether therefore, direction given to operational creditor to pay CIRP costs did not warrant interference and accordingly no grounds to interfere with order passed by NCLAT was made out - Held, yes (Paras 4, 5 and 6)

Section 7 of Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Section 7(1) is amended by section 3 of IBC (Amendment) Act, 2020 requiring minimum threshold for initiation of proceedings (class action) by certain categories of financial creditors against corporate debtors such as real estate developers - Whether provisos of section 7 require that in case of a real estate project, being conducted by a corporate debtor, an application can be filed by either one hundred allottees or allottees constituting one-tenth of allottees, whichever is less, if they are able to establish a default in regard to a financial creditor and it is not necessary that there must be default qua any of Applicants - Held, yes - Whether since, default can be qua any of applicants, and even a person, who is not an applicant, and action is, one which is understood to be in rem, in that, procedures, under Code, would bind entire set of stakeholders, including whole of allottees - Held, yes - Whether further, requirement of allottees being drawn from same project, stands to reason and also does not suffer from any constitutional blemish - Held, yes - Whether object of Statute, admittedly, is to ensure that there is a critical mass of persons (allottees), who agree that time is ripe to invoke Code and to submit to inexorable processes under Code, with all its attendant perils - Held, yes - Whether if Legislature felt that threshold requirement representing a critical mass of allottees, alone would satisfy requirement of a valid institution of an application under Section 7, it cannot be dubbed as either discriminatory or arbitrary - Held, yes - Whether a class within a sub-class, is indeed not antithetical to guarantee of equality under Article 14 and all allottees of a real estate project form a class - Held, yes - Whether if Legislature in its wisdom has found that greater good lies in conditioning an absolute right which existed in favour of an allottee by requirements which would ensure some certain element of consensus among allottees and that requirement is a mere one-tenth of allottees, it cannot be dubbed as an arbitrary or capricious figure - Held, yes - Whether though Legislature intended that in every application, filed under Section 7, by creditors covered by first proviso and by allottees governed by second proviso,

should also be embraced by newly imposed threshold requirement for which, it was intended, should be complied within 30 days from date of Ordinance, this restriction was not to apply to those applications which stood admitted as on date of Ordinance - Held, yes - Whether in regard to first and second provisos, they have only prospective operation and creditors covered by these provisos are not subjected to any time limit (except, no doubt, bar under Article 137 of Limitation Act), in matter of garnering requisite support; however, prescribing a time limit in regard to pending applications, cannot be, per se, described as arbitrary, as otherwise, it would be an endless and uncertain procedure - Held, yes - Whether impugned amendments made in section 7 is Constitutionally valid - Held, yes (Paras 135, 136, 140, 147, 151, 188, 196, 214, 220, 261, 366 and 372)

Section 11 of Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process – Persons not entitled to make application - Whether Explanation I was inserted to ensure that in circumstances contemplated in section 11, an application under Section 10 could not be made by any of categories of persons mentioned in definition of word `corporate applicant' - Held, yes - Whether, thus, Explanation came to be inserted by impugned amendment apparently, interpreting section 11- Held, yes - Whether this Explanation is clearly clarificatory in nature and it will certainly apply to all pending applications also - Held, yes - Whether incorporation of clarificatory Explanation II in Section 11 by section 4 of IBC (Amendment) Act, 2020 that came into force on 28-12-2019 is Constitutionally valid - Held, yes (Paras 242, 243 and 372)

Section 32A of Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Liability for prior offence - Whether erecting a bar against action against property of corporate debtor when viewed in larger context of objectives sought to be achieved at forefront of which is maximisation of value of assets which again is to be achieved at earliest point of time cannot become subject of judicial veto on ground of violation of Article 14 - Held, yes - Whether attaining public welfare very often needs delicate balancing of conflicting interests; there is no basis at all to impugn Section 32A on ground that it violates Articles 19, 21 or 300A - Held, yes - Whether insertion of section 32A in Code by section 10 of IBC (Amendment) Act, 2020 stipulating liability for prior offences of erstwhile management of corporate debtor apparently important to new management to make a clean break with past and start on a clean slate, is Constitutionally valid - Held, yes (Para 258, 259 and 372)

Words and phrases: Words "allottee" and "real estate project" as occurring in Explanation to Section 5(8)(f) of Insolvency and Bankruptcy Code, 2016; word `includes' in Explanation-I to Section 11 of Insolvency and Bankruptcy Code, 2016

- **Skillstech Services (P.) Ltd. v. Registrar, National Company Law Tribunal, New Delhi**

  (2021) 125 taxmann.com 201 (Delhi) • P-7

Section 60, read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Petitioner filed petition seeking listing of its petition, under section 9 before appropriate bench of NCLT - Petitioner submitted that registrar of NCLT had failed to even list petitioner's matter before appropriate bench of NCLT, on ground that threshold of pecuniary jurisdiction of NCLT had been amended by a notification dated 24-11-2020, from Rs. 1 lakh, to Rs. 1 crore - However, it was found that question as to whether NCLT had jurisdiction to entertain a particular case or not could not be determined by registrar in administrative capacity - Registrar would have to place matter before appropriate bench of NCLT, for said question to be judicially determined and appropriate bench of NCLT would have to take a considered view as to whether notice was liable to be issued in matter or not - Further, question as to whether above notification applied to a particular petition that had been filed prior to said notification or not was also a question to be determined by Bench of

NCLT and not by Registrar of Tribunal - Whether therefore, petition under section 9, moved by petitioner before NCLT, was to be placed by registrar, NCLT before an appropriate bench for proceeding further in accordance with law - Held, yes (Paras 6 to 8)

- **Kalinga Allied Industries India (P.) Ltd. *v.* Hindustan Coils Ltd.**
  (2021) 125 taxmann.com 202 (NCL-AT) • P-9

Section 31, read with section 30 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether statutory mandate on Adjudicating Authority under section 31(1) is to ascertain that resolution plan meets requirement of sub-sections (2) and (4) of section 30 - Held, yes - Whether Adjudicating Authority has a very limited power to judicial scrutiny and statutory provision does not permit Adjudicating Authority to interfere with commercial wisdom of Committee of Creditors (CoC) - Held, yes - Whether even for maximization of value of assets of corporate debtor, Adjudicating Authority is not entitled to overturn business decision of CoC - Held, yes - Whether therefore, when application for approval of Resolution Plan is pending before Adjudicating Authority, at that time, Adjudicating Authority cannot entertain an application of a person who has not participated in CIRP even when such person is ready to pay more amount in comparison to successful Resolution Applicant - Held, yes - Whether if a resolution plan is considered beyond time limit, then it will make a never-ending process - Held, yes (Paras 13 and 20)

- **POSCO India Pune Processing Center (P.) Ltd. v. Dhaval Jitendrakumar Mistry**
  (2021) 124 taxmann.com 401 (NCLT - Ahd.) • P-17

Section 9, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Application by operation credit - Adjudicating Authorities - Whether when law is altered during pendency of an action, rights of parties are decided according to law as it existed when action began, unless new statute and/or any notification shows a clear intention to very such right - Held, yes - Whether where corporate debtor was not an MSME on date of initiation of CIRP under section 9 of IBC, he could not be treated as MSME later on and could not take benefit of MSME in view of amendment in MSME classification norms vide notification dated 1-6-2020 with effect from 1-7-2020 by having its retrospective effect - Held, yes (Paras 13 and 14)

Section 25 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution Process - Resolution professional - Duties of - Whether on admission of company petition, management is suspended and Resolution Professional (RP) takes over powers and functions of corporate debtor and has to discharge his duties as per section 25 - Held, yes - Whether section 25 does not give any power to RP to change nature and character of corporate debtor that too during CIRP period - Held, yes - Whether therefore, where on date of admission of company petition corporate debtor was not under category of MSME, corporate debtor with permission of RP could not have registered itself as MSME - Held, yes (Paras 4 and 5)

- **Satish chand gupta v. Servel India (P.) Ltd.**
  (2021) 125 taxmann.com 205 (NCL-AT) • P-23

Section 5(8), read with sections 5(7) and 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Respondent/corporate debtor had accepted certain amounts from appellant against payment of interest and credited interest in a consistent manner against such amounts for a continuous period of five years - Whether therefore, bearing in mind that payment of interest on amounts borrowed by company was nothing but a consideration for time value of money and inasmuch as `interest' is compensation paid by borrower to lender for using lender's money over a period of time, it was to be concluded that appellant's status was that of a `financial creditor' as per section 5(7) read

with section 5(8) - Held, yes - Whether further, fact that there was a default in payment of accepted amounts by corporate debtor, it comes within purview of definition of `financial debt' - Held, yes - Whether thus, application filed by appellant/financial creditor under section 7 for initiation of CIRP would be clearly sustainable - Held, yes (Paras 33 and 34)

Code and Conduct 1-6

Knowledge Centre 1-4

Policy Update 1-2

Global Arena 1-5

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

From Chairman's Desk

Wishing you all a very happy new year, 2021!

Dear Professional Members,

While the impact of Covid-19 pandemic on the Indian economy is not over, different initiatives and steps taken by the government have made our nation move towards a V-shaped recovery of its economy. Some significant changes introduced in the year 2020, including those pertaining to the FDI norms for investments in defence, digital media and single brand retail, tax exemptions for sovereign funds and pension funds investing India, as also overhaul of select labour laws are expected to further impact transactional trends in 2021.

The month of January saw a significant verdict pronounced by Hon'ble Supreme Court of India wherein it has upheld the amendments made by Parliament to IBC concerning the requirement of a minimum threshold of either one hundred homebuyers or ten per cent of the allottees (whichever is less) of a housing project to initiate an insolvency action against a defaulting real estate firm. This minimum threshold requirement

was introduced *vide* the Insolvency and Bankruptcy Code (Amendment) Act of 2020. Under the erstwhile legal regime, even a single allottee could file for initiating a CIRP action against a defaulting property developer, and there was no need to garner support from other allottees. While addressing the challenge made on the ground of promissory estoppel, the court held that a supreme legislature cannot be cribbed, cabined or confined by the doctrine of promissory estoppel or estoppel.

Taking into account that a corporate insolvency resolution process may entail a complete overhaul or replacement of the developer's company management, the court agreed that having a single allottee approach would be risky. Allowing initiation of such an action by a lone allottee is also likely to de-rail the plans of other allottees, who may still have their faith in the existing developer or are interested in pursuing other legal remedies. As regards the challenge made to the 30-day time limit, the Court declined to regard it as arbitrary, and held that, otherwise, it would be an endless and uncertain procedure.

One of the other principles of law that the judgment underlined is that a law made by the legislature cannot be challenged in a court of law on the grounds of *malice.* The petitioners had argued that the changes brought into the IBC through the amendment Act were intended to pander to the real estate lobby. The Court however reminded the petitioner that such an argument is nothing but a thinly disguised attempt at questioning the law of the legislature based on malice. The Court reminded that while malice may furnish a ground of challenge in an appropriate case to veto an administrative action, it is trite that malice does not furnish a ground to attack a plenary law. The Court, in exercise of its extraordinary powers conferred under Article 142 of the Constitution of India granted reliefs such as exemption from paying court fees for filing application with the adjudicating authority under IBC to those who had filed petitions against the amendments before it. It clarified that if any of the petitioners move applications in respect of the same default, as alleged in their applications, within a period of two months from today, then, they will be exempted from the requirement of payment of court fees.

The other development in the IBC space concerns the ILC's sub-committee report on pre-packaged insolvency resolution process submitted to the Ministry of Corporate Affairs, Government of India. While the Government has already established a modern insolvency regime to rescue businesses in stress, it is continuing with its drive to improve in `resolving insolvency' as well as `ease

of doing business' by enriching the present insolvency regime with innovative options and features. The BLRC in its report noted that until the Indian market for insolvency practitioners becomes sufficiently developed and sophisticated, it may not be advisable to allow pre-pack sales without the involvement of the court or the NCLT. Now that we have a sufficiently established processes in place, pre-pack becomes a natural step in the direction of evolution of the insolvency regime. The report notes that pre-packs should be an additional option for resolution, which blends features of both formal and informal options. It should start with the simplest variant, which may acquire advanced features in course of time. The ultimate aim of the process is to yield a resolution plan, as envisaged under IBC. As regards the timelines, the report recommends that a pre-pack should allow 90 days for market participants to submit a resolution plan to the AA, and thereafter 30 days for the AA to either approve or reject it. A resolution plan once approved by the AA shall be binding on everyone, giving a clean slate for the resolution applicant to operate with same regulatory benefits, as are available in case of a CIRP.

With every amendment made to the IBC, and a final word being pronounced by the Apex Court on its constitutional validity, the road, which when we started in the year 2016 was very aptly described as *a journey into an unchartered territory - a leap into the unknown and* a *leap of faith,* is getting more and more visible and strengthened leading to evolution of jurisprudence on the subject.

One of the other areas of the law that the IBBI (being the chief regulator under IBC) is currently working on pertains to the institution of Committee of Creditors (CoC). The CoC has the responsibility to rescue viable firms and close unviable ones by exercising its commercial wisdom which is regarded as supreme under the IBC legal framework. An inappropriate decision can lead a viable firm to close down and an unviable firm survive which can prove to be very costly for stakeholders as well as the economy. Since the decisions of the CoC impact the life of the firm and consequently its stakeholders, it needs to be fair and transparent in its decisions. With this objective in mind, different workshops and sessions are being organised and conducted by the IBBI.

Best wishes for a happy, and above all a healthy, New Year.

Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

Managing Director's Message

Cheers to a new year and another chance for us to get it right

– Oprah Winfrey

Dear Professional Members,

Let me start by wishing you all a very happy and blissful new year, 2021!

With this New Year have come new hopes, new ideas and a strong desire to turn them into reality. The events that took place in the immediate past year are still fresh in our memories, but our great strength of resilience and sense of optimism persuades us to look ahead and keep working in the direction of building a better future. The lessons that the preceding year taught us certainly carry the essence of the true nature of many aspects of our lives which were perhaps forgotten in the past few decades. The period after any adversity that this world has gone through in the past, reminds us of the characteristics and virtues that the mythical bird Phoenix symbolize. It symbolizes not just the idea of eternity and the phenomenon of rebirth, but is

also regarded as a good omen of hope which is inherent in us. It makes us realize that while struggle is a part and parcel of life, we must accept it and grow stronger. What may seem to us like a plight is not truly a plight, but it is a tool that shall bestow us with a new lease of life, a new beginning, and a new meaning attached to it.

As already mentioned, Phoenix is a mythical bird, but the idea that it symbolizes carries great relevance. In the ancient lore, it is said that when the phoenix got tired, it died but then from its ashes a new bird was born. Thus, the bird is regarded also as a sign of resurrection. It represents the cycle of birth, death and rebirth. It represents continuance of life in the flames of change. I may not be completely wrong if I use this analogy of the Phoenix bird to what the IBC's legal framework envisages to achieve vis-à-vis business entities. Businesses have their own life cycles. While birth of a business is embraced with joy and hope, there is always a need to have systems in place which can keep a check on its financial health, so that take timely measures can be taken to enable it to resuscitate itself. In cases where a business finds itself unsustainable due to the factors arising out of evolutionary process of change, then failure has to be accepted as a part of the life cycle since any resistance thereof is bound to have its own implications.

The underlying idea behind the legal mechanism laid down under IBC is to revive the businesses which are economically viable, and to proceed towards liquidation where businesses have lost their commercial relevance so that its assets can be released and put to better use. The English idiom of flogging a dead horse in the hope that someday the dead horse shall get up and start running is not applicable in the IBC context since a company can be sent for liquidation proceedings when the CoC decides (in exercise of its commercial wisdom) to make the CD tread the path of liquidation. To maximize cases of business revival (instead of liquidation), IBC enables certain steps to be taken for an early detection of financial stress.

While the year 2020 is considered as unprecedented in terms of the economic contraction that it witnessed, the next year is expected to see a sharp economic recovery. With the Covid induced restrictions being eased, supply side disruptions addressed and demand picking-up, the Indian economy is expected to bounce back. There are infact some definitive signs of a V-shaped

recovery on the back of return of consumer confidence, robust financial markets, and an untick in manufacturing and exports. A robust agricultural growth and revival in the industrial production (including production of consumer durables), augurs well for the Indian economy. The estimates suggest that the Indian economy could well be the fastest growing Asian economy in the calendar year 2021.

Let us welcome 2021 with a sense of gratitude for all the good things that it has come up with. At the same time, let us not forget the lessons that the previous year taught us.

Let us be thankful to life, and strive to be better.

I wish you a happy, healthy and prosperous 2021.

INTERVIEW

C.RAMASUBRAMANIAM
Insolvency Professional and PCS
Chennai

1. At the outset, let me start by asking your views about your overall experience as an Insolvency professional in terms of assignments handled, fees received, obstacles faced while handling processes, scope of Insolvency and Bankruptcy code.

I profusely thank ICSI IIP for providing me an opportunity to share my views and experience here. Our professional journey so far has been very successful and thanks to our rich in-depth experience across varied industry verticals. With our clients, we had the culture of "working from within" which contributed to enhancing our skills with respect to multiple senior roles in an organization. With such a background, it was almost a seamless transition for us to take over, preserve and enhance the value of ailing units albeit with humongous efforts and daily firefighting on running an ailing operation. IBC continue to give a rich, variety and mix of good and bad experiences not only to me, but to the entire professional fraternity around the country. With proper leveraging of our precious, efficient, and knowledgeable managers and associates, we have been rated to provide excellent services for a very reasonable cost, thus maximising the value of the enterprise we turnaround. Variety of judicial proceedings giving

us endless litigations on one side and the swiftly maturing statute on the other side, give us enough challenges and we deal them with passion and rigour. The scope of the code continues to grow at a pace faster enough to cater the needs of the stakeholders in IBC process. Repeating – our sincerity and dedication, professional attitude, keeping the value preservation and maximisation always at the back of the mind in whatever we do – has helped us move along the stakeholders in the successful journey so far.

2. Since before becoming an insolvency professional you were practicing as a Company Secretary, how practicing as an Insolvency professional has impacted your CS practice? How are you managing both the professions?

Riding two horses at once was never an easy job. Nevertheless, we continue to do all that we could do to thrive our momentum despite all odds. The core CS team having thousands of hours of effective and rigorous professional training helped me manage my CS profession efficiently. Having set up an established and professional CS practice consisting of qualified professionals assisted by several senior managers, it was relatively easy for me to set my focus and do justice to the more strenuous IBC profession. So, setting up different professional teams for CS and IBC, providing them with the best knowledge infrastructure, motivating these teams to consistently learn fast, use those key learnings and practice them professionally, looking for ways to increase our value addition, have led us to manage both the professions successfully.

3. How different Insolvency profession is from other professions?

Even though the deadlines are equally there in other professions, being an IP is a full-time job since he/she is stepping into the shoes of the senior management and often as CEO of the company; more so if the CIRP assignments which are run as `going concern'.

More time needs to be devoted as compared to other profession as it is not only on timelines and deadlines and compliances, also it relates to running the factory, the entire business, production planning, handling of trade unions, employees, prioritising payments as a going concern, handling of vendors, customers and all other business partners etc... And I have faced employees of the CD at my residence in the early morning hours while sipping a cup of coffee . Also equally spent hours of time along with the production team and sales team of CDs during the late evening hours and had a different kind of experience in each and every assignments and in that way IP is a full-time job indeed.

4. How did you manage your ongoing assignments of CIRPs during this COVID outbreak?

It was a tough time indeed during the covid pandemic. At the time of announcement of Lockdown, I was handling two critical CIRP

assignments, out of which one was a going concern with full factory operations. We had to stop the commercial production for one full month during the initial complete lockdown but when the situation improved, the Government has relaxed the lockdown and allowed to engage 50% of labourers after a month. Majority of the workers in the factory were from North India and by then they have migrated back to their hometown. We have arranged buses and brought them back after the lockdown was lifted partially. With respect to Compliance and filing, we adopted a suitable work from home policy for our employees and trainees ; also IBBI helped in relaxing the timelines and given more time to file reports of all the assignments to all IPs.

5. What is your point of view on Government's decision of temporary suspension of IBC till 25th March, 2021? Is there any impact of suspension on the Insolvency Professionals?

Considering the economic slowdown triggered by the pandemic, the Government has made a welcome move by doing a temporary suspension of IBC which was the need of the hour. Moreover, the defaults that occurred pre-pandemic were allowed and suspension covered only new defaults that happened post-covid outbreak. Such a move gave a relief to defaulting but viable companies which were struggling to survive because of COVID-19 outbreak. Insolvency professionals should support the decision of the Government since it is for the development of nation and such a temporary suspension provided a window to all stakeholders involved in IBC to concentrate on clearing the pending issues and use this time more productively.

6. What are your views on proposed framework of Prepackaged Insolvency Resolution Process, which if accepted will become part of IBC, 2016? How it will impact the overall functionality of Insolvency and Bankruptcy Code? Also, what will be the scope for Insolvency Professionals on overall Insolvency Resolution Process after Prepack get implemented?

The aim of the Prepack Insolvency Resolution Process is to aid the Corporate Debtor for an early redressal and to aid the existing insolvency framework and cut the cost and time of the resolution process. In eligible cases, eligible promoters who suffered setbacks due to various factors including macroeconomic causes shall have a right to submit suitable revival plans, before the start of the initiation of CIRP.

The scope will open further new avenues to Insolvency professionals. IPs should equip them in assisting the companies in drafting a revival plan using their overall business acumen and skills. Prepack Insolvency process, I personally consider as a hybrid of the formal and informal insolvency process and can be proactively applied even before a default occurred, to ensure smooth running of successful business. Value preservation and value maximization propositions get further boost with such a Prepack solution.

7. How far your expectations from the Judiciary and regulators in the insolvency sphere have met? Do you have any suggestions for the Government, judiciary and regulators to strengthen Insolvency and Bankruptcy regime?

The Government has implemented the Insolvency code in a very thoughtful and phased manner in a country with vast variations like India. Implementation of this Code is not an easy task and whenever there is a need for an amendment, Government has reacted in God's speed and settled the issues by way of amendments, new rules and regulations. New NCLT Benches are being formed in various places and the appointments of Honourable Members have happened without any delays. The requests for forming NCLAT in other regions are also being heard and in that way the Regulators are very keen in making this Code a successful one. Similarly IBBI has also assisted and trained and educated the IPs and Valuers and other professionals continuously by organising various programmes and mandatory training.

8. How do you foresee India's prospects of improving its ranking of World Bank's Resolving Insolvency in the coming years?

With the implementation of Individual insolvency and Information Utilities and the proposal for implementation of Prepack Insolvency process and with various new amendments, it is clearly evident that Government is keen in implementing the Code in a perfect manner. By implementing more NCLT benches, more cases are being heard and the recovery rate and the time taken for closure of the case has grown up considerably. Over the last four years this has happened only due to successful implementation of IBC. Also, earlier the time taken under BIFR regime was very high which took around 8 years whereas IBC has reduced the time considerably. Also the cost for resolution is reduced in the IBC regime as compared to earlier. Overall the IBC has helped in Ease of doing Business and thereby I am sure India will reach top 10 ranking very soon.

9. Any advice to the prospective aspirants or Fresh Insolvency Professionals who are seeing their career in Insolvency Law?

Insolvency Professional is a full-time job. I have seen few people handling IBC assignments focusing more on audit, compliance/or cost reduction perspective alone. The entire exercise is not about a fault-finding or to manage the compliance requirements. Even though the Resolution and Compliance are two eyes of IP profession, the entire IP profession should be handled by stepping into the shoes of the promoter. Challenges are there in every step and at the same time recognitions are also there if you take this profession with alignment to the code. Always follow the Code with true letter and spirits and code will save you at any point.

10. Lastly, how significantly do you think the ICSI Institute of Insolvency Professionals (ICSI IIP) serves the profession of Insolvency Professionals?

ICSI IIP is performing extremely well in serving the profession of IP. I witnessed several times ICSI IIP beating their own records. Whether it is publishing of materials or circulating IBC Learning Curve or providing regular updates like Readers Rendition to IPs or publishing of Monthly magazine or conducting periodical webinar on relevant topics or regulating the profession, I feel ICSI IIP is a front runner among all other IPAs. The website of ICSI IIP is also a user friendly one containing useful membership assistance, providing e-books and other relevant details to IPs including Knowledge capsules, e-journal, research articles etc.

My best wishes to the entire team of ICSI IIP which includes past and present employees.

***

***C.Ramasubramaniam is also a Central Council Member of ICSI and the views expressed here are his personal views and not of the Council.

Profile: C.RAMASUBRAMANIAM is a Fellow Member of the Institute of Company Secretaries of India and holds Masters Degree in Financial Management from Pondicherry University. He is the first Insolvency Professional registered from Chennai with the Insolvency and Bankruptcy Board of India. (IBBI) He has been in CS Practice from the year 2004.Currently, He is re-elected for the second time to the Central Council of ICSI for the term 2018-2022. Earlier He was an Elected Member of Southern India Regional Council of ICSI (SIRC of ICSI) for the term 2011-2014.

Insight!

BAD BANK-CAN IT SOLVE THE PROBLEM OF NPA?

CS Peer Mehboob,
Assistant Director,
ICSI IIP,

1. Background

On 01st February, 2020, Finance Minister Nirmala Sitharaman in her budget speech revived the idea of a 'Bad Bank' by stating that Centre proposes to set up an Asset Reconstruction Company to acquire bad loans from bank.

While the problem of bad bank has been perennial one in the Indian Banking Sector, the COVID-19 pandemic-triggered lockdown last year and the moratorium subsequently extended to borrowers by the RBI have worsened the crisis. With banks expected to report even more bad loans this year, the idea of a `bad bank' has gained particular significance.

Given the large overhang of non-performing assets in our financial services ecosystem, there is a strong case for a one-time clean-up via a "bad bank" Asset Reconstruction Company (ARC), as announced in this year's Union Budget.

2. What is a 'Bad Bank'?

A bad bank (also referred to as Asset Management Company or AMC) is a corporate structure which isolates illiquid and high risk assets (typically non-performing loans) held by a bank or a financial organisation, or perhaps a group of banks or financial organisations.

In simple words, a Bad Bank is a financial entity set up to buy non-performing assets (NPAs), or bad loans, from banks. The aim of setting up a bad bank is to help ease the burden on the banks by taking bad loans off their balance sheets and get them to lend again to customers without constraints. After the purchase of a bad loan from a bank, the bad bank may later try to restructure and sell the NPA to investors who might be interested in purchasing it.

3. Extent of crisis faced by banks

According to the latest figures released by the RBI, the total size of bad loans in the balance sheets of Indian Banks at gross level was just around Rs.9 lakh crore as of March 31, 2020. Down significantly from over Rs.10 lakh crore two years ago. While the size of total bad loans held by banks has decreased over the last few years. Analysts points out that it is mostly the result of larger write offs rather than due to improved recovery of bad loans or a slowdown in the accumulation of fresh bad loans.

The size of bad loans write offs by banks has steadily increased from around Rs.70,000 crore in 2015-16 to nearly Rs. 2.4 lakh crore in 2019-20. Further, RBI in its Financial Stability Report warned that due to lockdown imposed last year, the proportion of banks gross non-performing assets is expected to rise sharply from 7.5% of gross advances in September 2020 to atleast 13.5% of gross advances in September 2021.

4. Will a bad bank solve the problem of NPAs?

Despite a series of measures by the RBI for better recognition and provisioning against NPAs, as well as massive doses of capitalisation of public sector banks by the government, the problem of NPAs continues in the banking sector, especially among the weaker banks. As the Covid-related stress pans out in the coming months, proponents of the concept feel that a professionally-run bad bank, funded by the private lenders and supported by the government, can be an effective mechanism to deal with NPAs. The bad bank concept is in some ways similar to an ARC but is funded by the government initially, with banks and other investors co-investing in due course. The presence of the government is seen as a

means to speed up the clean-up process. Many other countries had set up institutional mechanisms such as the Troubled Asset Relief Programme (TARP) in the US to deal with a problem of stress in the financial system.

5. Conclusion:

An advantage of setting up Bad Bank is that it can help consolidate all bad loans of banks under a single exclusive entity. The idea of Bad Bank has been tried out in countries such as the United States, Germany, Japan and others in the past. The Economic Survey of 2016-17 said the RBI had hoped ARCs would buy bad loans of commercial banks but that didn't happen. In FY15 and FY16, Asset Reconstruction Companies bought up just 5% of the total NPAs and found it "difficult to recover much from the debtors". To the extent that a new bad bank set up by the government can improve banks' capital buffers by freeing up capital, it could help banks feel more confident to start lending again.

Hence, it will be interesting to see if the Centre finally opts for setting up a bad bank in the system.

Insolvency Resolution Process for Personal Guarantors to Corporate Debtors - An Insight

Akhil Chadha
FCS, LLB, IP

1. Introduction

Chapter III, Part III of the Insolvency and Bankruptcy Code 2016 ("IBC 2016") deals with Insolvency Resolution Process for Individuals and Partnership Firms. Chapter III of IBC 2016 has been made effective from December 1, 2019 vide MCA notification dated November 15, 2019 to the extent of their applicability to personal guarantors to corporate debtors. The MCA has also notified The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 which were made effective from December 1, 2019. In this article we will discuss the insolvency resolution process of corporate guarantors initiated by the creditors. We will also discuss the challenges that have been faced by the stakeholders on notification of these provisions.

2. Provisions Referred

1) Insolvency and Bankruptcy Code 2016.
2) The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.
3) Indian Contract Act 1872.

3. Analysis

According to Section 5(22) of IBC 2016 "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor.

According to Rule 3(e) of The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 "guarantor" means a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has

been invoked by the creditor and remains unpaid in full or part.

Chapter VIII of the Indian Contract Act 1872 deals with the provisions relating to Indemnity and Guarantee. Section 126 of the Indian Contract Act 1872 provides definition of a Contract of Guarantee. Sec 126 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. 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. Section 128 of the Indian Contract Act 1872 also provides that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. According to the law of guarantee a creditor does not necessarily sue the debtor first for recovering his money. The creditor at his option may sue either of the debtor or the guarantor or he can sue both of them.

4. Interpretation

A contract of guarantee is governed by the Indian Contract Act 1872 and breach of any provision of a contract of guarantee would essentially mean breach of a contract. The Indian Contract Act 1872 also provides for consequences of a breach of contract. The remedies available include recovery proceedings according to the provisions of Code of Civil Procedure 1908.

IBC 2016 vide Chapter III, the provisions of which are notified on December 1, 2019, gives rights to creditors to initiate Insolvency Resolution Process against personal guarantors to the corporate debtors through Sections 94 to 120. The remedies available to the creditors under the said provisions are in addition to the rights of the creditors under the relevant provisions of the IBC 2016 against the corporate debtor. It is pertinent to mention herein that the creditor can sue the personal guarantor for the remaining amount due after acceptance of a hair cut by the creditor in a resolution plan. This has been established by judgments of various courts including the Apex Court.

This legal position is, in some of the opinions, in contradiction to the provisions of Section 31 of the IBC 2016 which provides for approval of the resolution plan by the adjudicating authority. Section 31 provides that if the Adjudicating Authority is satisfied that the resolution plan as approved by the Committee of Creditors ("CoC") under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

A Resolution Plan is submitted to the CoC which confirm the conditions referred to in Section 30(2). According to Section 30(4) a resolution plan approved by a vote of not less than sixty-six per cent. of voting share of the financial creditors is submitted to the Adjudicating Authority ("AA") for its approval. The CoC , after considering feasibility and viability of the plan , the manner of distribution proposed,

which may take into account the order of priority amongst creditors as laid down in sub-section *(1)* of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Insolvency and Bankruptcy Board of India ("Board") approves a resolution plan.

Thus if in the commercial wisdom of the CoC , a resolution plan is approved which provides for payment to all the creditors ,although with a haircut, and which is binding on all the stakeholders, there should be an end to those claims of the creditors and any actions of the creditors against the personal guarantors should be forbidden.

Several writ petitions were filed in various High Courts challenging the Notification dated 15.11.2019 and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019. The Petitioners also sought to declare Sections 95, 96, 99, 100, 101 of the Insolvency and Bankruptcy Code, 2016 as unconstitutional to the extent they apply to personal guarantors of corporate debtors.

The Board has filed transfer petitions under Article 139 (A) read with Article 142 of the Constitution of India seeking transfer of all these Writ Petitions filed before High Courts to the Hon'ble Supreme Court.

The Hon'ble Supreme Court has allowed the transfer petitions and observed "We are of the considered opinion that the Writ Petitions that are pending in the High Courts pertaining to the challenge to the Notification dated 15.11.2019 and related issues have to be transferred to this Court. Transfer of the Writ Petitions to this Court would avoid conflicting decisions by the High Courts which are in seisin of the Writ Petitions. The Insolvency and Bankruptcy Code is at a nascent stage and it is better that the interpretation of the provisions of the Code is taken up by this Court to avoid any confusion, and to authoritatively settle the law. Considering the importance of the issues raised in the Writ Petitions which need finality of judicial determination at the earliest, it is just and proper that the Writ Petitions are transferred from the High Courts to this Court."

5. Conclusion

Though the provisions for initiating Corporate Insolvency Resolution Process (CIRP) have been suspended in this difficult period of pandemic but the creditors can initiate insolvency proceedings against the individual guarantor. However personal guarantors have challenged these provisions on the ground that the creditors do not have the right to recovery after agreeing to a Resolution Plan and agreeing to a hair cut in the CIRP. The Petitioners also sought to declare Sections 95, 96, 99, 100, 101 of the Insolvency and Bankruptcy Code, 2016 as unconstitutional to the extent they apply they apply to personal guarantors of corporate debtors. The law will be settled once the Hon'ble Supreme Court of India pronounces a final judgment on the subject. It will be interesting to watch that SC makes any recommendations to alter the present provisions.

THE PROPOSED PRE-PACK INSOLVENCY REGIME - A CRITICAL ANALYSIS

Anant Merathia,
Managing Partner
BA (Eco), Masters (Foreign Trade),
LLM (Singapore),
FCIArb (London)

Poornima Devi,
Associate
BA.BL(Hons)

Dhanisha Giri,
Associate
BA.LLB(Hons)

The Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") has been a fast evolving legislation and has introduced various facets of the law in the past four years. The latest being the introduction of the concept of Pre-pack Insolvency. On October 2020, a report was submitted by the Sub-committee of the Insolvency and Law Committee on Pre-packaged Insolvency Resolution Process through the Ministry of Corporate Affairs. Although there is no set definition to the term Pre-pack, it is proposed to be introduced as an additional option to the current insolvency regime and will be a precursor of sorts to the current Corporate Insolvency Resolution Process ("CIRP") and subsequent Liquidation proceedings, if any.

The Pre-pack process in itself is a time-bound process, wherein the debtor is in possession of the Corporate Debtor ("CD") unlike the CIRP process as has been followed usually, where it is a creditor in possession. The role of the Resolution Professional ("RP") and the Hon'ble National Company Law Tribunal ("NCLT") has been limited considerably to supervisory and approving bodies respectively. Most provisions of the Code applicable to the CIRP process are also applicable to the proposed Pre-Pack Insolvency Resolution Process, however various aspects require clarifications or considerations, some such concern areas have been discussed in this article.

1. MSME Debtors and Bar of Promoters under Section 29A of the Code

On analyzing the persons who may initiate and propose a pre-pack reorganization plan, it can be seen that the applicability of Section 29A of the Code has been proposed to be applicable even for Pre-Pack Insolvencies. Promoters are generally barred under the Section 29A of the Code to present a Resolution Plan, however the MSME promoters enjoy some exceptions

by virtue of Section 240A of the Code. This is likely to mean that the non-MSME promoters would have no recourse to propose a pre-pack reorganization plan for their own company and this might cause a disruption considering that it would be a debtor-in-possession and creditor-in-control model after the pre-pack insolvency has been initiated. There is a high possibility that the pre-pack insolvency option would not be opted for by non-MSME promoters when a recourse such as a One-Time Settlement ("OTS") is also available.

However, on the other hand, it is also possible that previously defaulting debtors may take advantage of this proposed new regime and cause some sort of misuse, especially to try and gain a period of moratorium and if the barred promoters are allowed to propose a reorganization plan, there would be a possibility of falling into a vicious circle of non-payment all over again. This could lead to the promoter taking the creditors with less control over the process (typically operational creditors, unorganized and unsecured financial creditors, government authorities) for a ride.

As a recourse, a Non-MSME promoters who are generally barred under Section 29A of the Code could also be included to be able to initiate and present a resolution plan (with the same benefits as available for MSME under S.240A of IBC) in the best interests of the company and the creditors, only in case of 'pre-default' stress induced pre-pack insolvency process, in a regulated manner so as to ensure that the creditors are not taken for a ride. There could also be a limited voting percentage allocated to the operational creditors to ensure that at least as a class of creditors, they are part of the process and cannot be shortchanged that easily. Further serious criminal actions for misuse of the pre-pack reorganization by such promoters can be explored and some parameters to bar them from availing any benefits of the business or the restructuring process on misuse will have to be considered. The challenge however will be that the promoter will always consider a possibility of approaching via a constitutional challenge of not being allowed to do business due to the bar caused as result of a misuse of the Pre-pack process before the Hon'ble Supreme Court, which may hinder the process.

2. Tight Schedules of Timelines as proposed

In case of the timelines as recommended in the Report, it can be said that the same are extremely tight schedules involving a 90 days timeline to file the resolution plan and 30 days for the Adjudicating Authority ("AA") to approve the same. It may be inferred that the CIRP process also has some pre-determined timelines which have not been adhered to in a strict manner due to the procedural and other lapses. Although the strict timelines can be taken as a positive step to speed up the process and

provide a faster recourse to the creditors, the practical implementation of the same may have to be tried and tested.

From a practical angle, the 90 days period may fall short in relation to the duties of the RP; considering that the RP must cross check the books of account and the Information Memorandum ("IM") as provided by the CD, reach out to creditors for confirmation and collate claims, file any avoidance application as maybe necessary and so on. In normal circumstances it can be seen that this process takes about 3-6 months to collate and verify the claims itself and multiple litigations with respect to claims especially of Operational Creditor and unorganized and unsecured Financial Creditors.

Moreover, the 90 days period as proposed is likely to be too rushed and as there will certainly be issues with respect to disputes and claims; in all likelihood there would be the COC members who would not be for the prepack resolution and would either challenge the same or create a stalemate in the COC in one way or the other. Considering the lack of infrastructure and number of members in the current Benches, it would be difficult to accommodate the cases of pre-pack insolvency in the normal schedule and further decide/ approve the matter in a week or 30 days. This could be solved with the proposal of a dedicated Bench for the Pre-pack Insolvency matters.

It can be anticipated that the timelines recommended may take longer, and similar to the CIRP timelines, the same could be made mandatory to avoid such delays. However considering that on the end of 90 days the pre-pack insolvency process is deemed to have attained closure, this will build pressure on the CDs. It can also be noted that if a third party, i.e., an entity other than the promoters, were to propose and present a plan, it will take a considerable amount of time to create and process a plan which cannot possibly be done in short span of time as the one proposed here. They need time for necessary due diligence before being able to participate in the Swiss challenge. Also with respect to the pending disputes in regard to claim collation etc, the AA must have a final say in any such extension that may be granted on reasonable grounds thereby ensuring no prejudice is caused to the stakeholders at large.

There is also an ambiguity with respect to the applicability of the Limitation Act, 1963 and how the same can be taken forward with respect to the entries in the books of account of the CD. The same would have to be clarified in the proposed regulations. While as much as the various judicial precedents clarifying that the Limitation Act,1963 does apply to IBC; since the reliance here is heavily on the books of the corporate debtor the onus is on such corporate debtor to reflect true and correct payable is in its books without tinkering with them under the garb of Limitation.

3. Sidelining the Operational Creditors ("OC")

The sub-committee has recommended that only an electronic publication of public announcement will be made and the same shall be disseminated by the IU. This might prejudice the Operational Creditors and Financial Creditors from the unorganized sector, though there is publication of the same on the website

of CD and on the website designated by IBBI, the lack of paper publication might hinder the aforementioned creditors.

Similar to the process in CIRP, even those OC's who meet the criteria specified in S.24(3) of IBC, 2016 cannot become a part of the Committee of Creditors with any voting rights, despite being entitled to be notified about the meetings, in case of pre-pack process. The sub-committee also recommends that the pre-pack should offer two optional approaches for value maximization, namely, ***"(i) without swiss challenge but no impairment to OCs, and (ii) with swiss challenge with rights of OCs and dissenting FCs subject to minimum provided under section 30(2)(b)."*** However, what exactly would constitute 'impairment to OC's' is not clearly explained and the same would have to be clarified, in a bid to ensure the protection of the interests of the OC's. The hidden challenge here would be that in case there is a Swiss challenge also; the obligation for the bidders/contenders for the company would only be to pay the minimum provided in Section 30(2)(b) of IBC, which effectively is a liquidation value and for all practical purposes in most cases this is a big "ZERO" for operational creditors. Hence it would be convenient for the resolution applicants to meet this criteria at the cost of the operational creditors.

While the Hon'ble Supreme Court has expressed its view on the position/role of OC's in the CIRP process, there could be adequate provisions to consider getting OC's represented in the CoC either directly or through an authorized representative (similar to homebuyers).

4. Fate of Undecided Claims

The undecided claims of creditors would have to be adequately addressed and those creditors whose claims are being adjudicated upon cannot be left 'high and dry', both before and after approval of the pre-pack by the AA, considering that there is a short timeline proposed. If a claim is decided in favour of a creditor after approval of the pre-pack or even after the resolution plan is filed; the clock cannot be reversed and this creditor would have already suffered irreparable damages/ loss. Hence the timeline to decide such issues will have to be regulated.

This again would narrow down to exclusive and dedicated Benches set up across the country with the specific aim of hearing and adjudicating the disputes which arise out of pre-pack processes, in a bid to both address the concerns of the affected creditors and also to expedite the pre-pack.

5. Role of the RP

The role of the RP is limited in many ways. The RP is not in the preliminary control of

the business and given the short time-frame most of the duties of the RP are to be relied on the information given by the CD. For instance the IM has to be verified by only relying on the books of account of the CD and this may not suffice as reliable information at times. Along with the books of account, additional methods need to be added to ensure that the CD does not take the creditors for a ride and there must also be a regulated approach to the same. The CD in all likelihood could provide lesser amounts/claims due to its creditors especially Operational Creditors and this shall prejudice them. The proposed deterrent criminal actions and Avoidance applications against the promoters, while a good step, it is to be determined how practical it would be and it would have to be really seen in light of the past experiences.

There should also be a regulated approach wherein the independence of the RP is maintained and there is a reasonable benchmark set for the fees of RP and his/her duties. More so it must be ensured through regulation that the Avoidance applications are duly filed and the procedure is taken forward in a straightforward manner as the CD will have more control and this may dilute the powers of the RP. On the contrary, given that the RP cannot be replaced, except in certain specified circumstances, the creditors must be given some recourse to that effect, wherein some checks and balances can be availed.

6. 'Clean Slate' after Pre-Pack process

Usually, once the Resolution Plan is approved and admitted, the Resolution Applicant is given a clean slate and can start a fresh with regards to the debts and liabilities of the CD Company. It is to be noted that the 'clean slate' principle cannot possibly be allowed to all under the pre-pack process. In cases where the promoters of the CD itself presents a resolution plan, the 'clean slate' principle should not be applicable as it might unduly benefit the said promoters and the CD, especially if there have been acts of malfeasance done by them vide the CD. This may also be used by the Promoters to possibly collude with certain Financial Creditors to wipe out the other creditors, much lower in the waterfall mechanism. Again, here while there are deterrents, these need to be a lot stronger. When a promoter considers using the prepack insolvency resolution regime; he/she must think multiple times as is it is not a mere OTS with its key bankers or JLF but is factoring in the stakes of various other stakeholders such as Operational Creditors, statutory authorities, employees, unsecured Financial Creditors and NBFCs, others.

7. Ambiguity in 'Closure' of the process

The scenarios envisaged in the Report for 'closure' of pre-pack process have only been broadly addressed, i.e., on approval of the resolution process, when no resolution is received/approved, on expiry of timeline, at any time within the timeline on termination by the creditors, on liquidation (as specified in the Report). The regulations/framework would have to clearly set out the criteria and ingredients for "closure" to ensure that there are no loopholes to abuse this process.

It is to be noted that the proposal is to mandatorily close the pre-pack process on the expiry of 90th day, except where the application for approval of resolution plan has been submitted to the AA for approval. It is presumed that the timelines are mandatory to ensure such closure else, there is a lot of probability that the pre-pack process would also be prolonged and delayed for multiple reasons.

8. Conclusion

While the subcommittee has done a phenomenal job in taking the best from various prepack mechanisms globally and modifying to suit the Indian business environment and also keeping in mind the ongoing IBC regime; there are quite a few areas which could be used as pitfalls by promoters and businesses going forward. This involves a larger involvement of all stakeholders (as the resolution plan is binding on them – at least the one post Swiss Challenge) and establishing strength in the infrastructure and judiciary to adjudicate upon these issues in a summary/expedited manner.

Pre-pack is a new concept and it will be subject to a few trial and error mechanisms before all the concerns can be addressed by the legislatures. However this is a new feather in the cap, in the development of the Insolvency and Bankruptcy Laws in India and a pathway to newer concepts in the future.

INSIGHTS

(2021) 123 taxmann.com 154 (Article)

NCLAT declines reference for reconsideration of decision that entries in B/S don't amount to acknowledgement of debt

Delep Goswami,
FCS, Advocate, Supreme Court of India, NEW DELHI

Anirrud Goswami,
Advocate, Goswami & Goswami, New Delhi

1. THE ISSUE OF LIMITATION PERIOD FOR INVOKING CIRP UNDER THE IBC ASSUMES SERIOUS IMPORTANCE

For admitting application filed by the Financial Creditor (**FC**) or by the Operational Creditor (**OC**) under section 7 or 9 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) to initiate Corporate Insolvency Resolution Process (**CIRP**) of the Debtor Company (**DC**), the three year period of "limitation" under section 18 of the Limitation Act, 1963 (**LA 1963**) assumes tremendous significance. However, despite numerous judgments of the Courts and of the NCLAT on this issue, quite often this issue is raised by the OC before the Adjudicating Authority (AA) and/or before the National Company Law Appellate Tribunal (NCLAT), which gets opposed by the DC. Therefore, it becomes necessary for the AA or the NCLAT to reiterate the correct legal position. The issue assumes criticality when a different view is canvassed by the Creditors to buttress their point of view that entries in the Balance Sheet of the Debtor Company amounts to acknowledgement of debt u/s 18 of the LA and their application u/s7 or 9 of the IBC is within the "limitation period" and deserves to be admitted by the AA for CIRP of the Debtor Company.

Incidentally, in its judgment dated 14-11-2018 in ***Binani Industries Ltd. v. Bank of Baroda*** **(2018) 99 taxmann.com 164/150 SCL 703 (NCL-AT)** the NCLAT has clearly held that CIRP under IBC is not a recovery proceeding and that it is not a "litigation", nor it is an auction.

2. V.PADMAKUMAR JUDGMENT - NCLAT HOLDS THAT BALANCE SHEET ENTRIES ARE NOT AN ACKNOWLEDGEMENT OF DEBT

In this context, it is interesting to note that by a 4:1 majority decision, a 5-Member Bench of the NCLAT in ***V. Padmakumar* v. *Stressed Assets Stabilisation Fund* (Company Appeal (AT)(Insolvency) No. 57 of 2020, dated 12-3-2020)** held that **as the filing of Balance Sheet/Annual Return being mandatory under section 92(4) of the Companies Act, 2013(CA 2013), failing of which attracts penal action under section 92(5)&(6) thereof, the Balance Sheet/ Annual Return of the "Corporate Debtor" in Company Appeal (AT) (Insolvency) No. 57 of 2020 cannot be treated to be an acknowledgement under section 18 of the Limitation Act, 1963.**

In *V. Padmakumar* (*supra*), the NCLAT by its majority decision ruled that if the argument is accepted that the Balance Sheet/Annual Return of the "Corporate Debtor" amounts to acknowledgement under section 18 of the Limitation Act, 1963, then in such case, it is to be held that no limitation would be applicable, because every year, it is mandatory for the Corporate Debtor to file Balance Sheet/Annual Return, which is not the law.

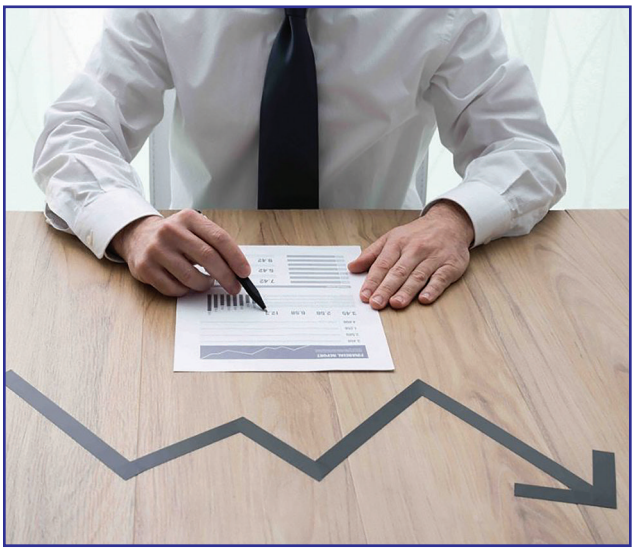
In *V. Padmakumar* (*supra*), the NCLAT also referred to the **decision of the SC in *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta and Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC)** wherein the SC held that for the purpose of section 7 of IBC, LA 1963 is applied from the date of inception of the IBC.It was also noted that section 238A inserted by IBC (Second Amendment Act), 2018 which relates to the "proceedings" or "appeals" before the AA, NCLAT, the Debt Recovery Tribunal (DRT) or Debt Recovery Appellate Tribunal (DRAT) and it does not deal with application under sections 7, 9 or 10 of the IBC. NCLAT therefore held that the decision of the SC in *B.K. Educational Services* (*supra*) being law of the land under Article 141 of the Constitution of India, Article 137 of the Limitation Act, 1963 will be applicable to application filed under sections 7, 9 or 10 of IBC from the date of commencement of the IBC *i.e.* 1st December, 2016.

In another judgment of the SC in ***Vashdeo R. Bhojwani* v. *Abhyudaya Co-operative Bank Ltd.* (2019) 109 taxmann.com 198/156 SCL 539 (SC)**, the SC referred to its earlier judgment in *B.K. Educational Services* (*supra*) and held that:-

> "It is thus clear that since the Limitation Act is applicable to applications filed under section 7 or 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. **The "right to sue" therefore accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act,** save and except in those cases where, in the facts of the case, section 5 of the Limitation Act may be applied to condone the delay in filing such application".

3. SUPREME COURT: TIME-BARRED DEBTS CANNOT BE LEGALLY RECOVERABLE

Where hearing the V. Padmakumar's case, the NCLAT referred to another judgment of the SC in ***Jignesh Shah v. Union of India* (2019) 109 taxmann.com 486/156 SCL 542 (SC)** where the SC had noticed that the Patna High Court in ***Ferro Alloys Corpn Ltd. v. Rajhans Steel Ltd.* (1999) 22 SCL 138** has held that simply because a suit was instituted for realisation of the debt payable by the debtor company to the creditor, such institution of the suit and the pendency thereof in that court cannot inure to the benefit of the winding up proceeding. And it was held therein that if the debt having become time-barred when the petition for winding up was presented to the HC, the same could not be legally recoverable.



On the question of **"date of default"**, the SC observed that the "date of default" is the date for the purpose of computing the period of limitation in respect of application filed u/s 7 of the IBC and that mere filing of a suit for recovery or a decree passed by a Court cannot be held to be deferment of default. The period of limitation can only be extended in the manner provided in section 18 of the Limitation Act, 1963. For example, an acknowledgement of liability under section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up, would, in no manner, impact the limitation within which the winding up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding up proceeding.

Similar issue fell for consideration before the SC in ***Gaurav Hargovindbhai Dave v. Asset Reconstructions Co. (India) Ltd.* (2019) 109 taxmann.com 395/156 SCL 397 (SC)** wherein, in the facts of the case, the SC noticed that Respondent-Debtor Company was declared Non-Performing Asset (NPA) on 21-7-2011 and that the creditor Bank had filed two OAs before the DRT in 2012 to recover the total debt. **Taking into consideration the relevant facts thereat, the SC held that the default having taken place on 21-7-2011 when the account of the debtor company was declared as NPA, it was held that the application filed by Financial Creditor u/s 7 of IBC on 3-10-2017 was barred by limitation.**

Generally, the FCs in their arguments before the AA and in the NCLAT stress that in respect of applications u/s 7 of IBC, Article 62 of the LA 1963 is applicable, where the limitation period is 12 years from date on which the money suit has become due, and that since the section 7 application was filed by the FC within the limitation period, there was nothing

wrong in the AA admitting the same u/s 7 of the IBC. They also argue that the entries in the Balance Sheet of the CD amounts to acknowledgement for the purpose of section 18 of the Limitation Act, 1963 and based thereon, application for initiation of CIRP filed u/s 7 or 9 of the IBC deserves to be admitted.

4. SUPREME COURT DECISIONS CONFIRM THAT LIMITATION PERIOD CANNOT BE IGNORED FOR INITIATING CIRP

Interestingly, in ***Sagar Sharma* v. *Phoenix ARC Pvt. Ltd.* (2019 110 taxmann.com 50/156 SCL 707 (SC)**, the SC *vide* its judgment dated 30-9-2019 referring to its earlier decision in *B.K. Educational Services* (*supra*) reminded the NCLAT that for application u/s 7 of the IBC, Article 137 of the LA 1963 will apply. **Article 62, which relates to deed of mortgage executed between the parties, cannot be taken into consideration for counting the period of limitation. The SC specifically observed that Article 141 of the Constitution of India mandates that its judgments are followed in letter and spirit.** The date of coming into force of IBC does not and cannot form a trigger point of limitation for application filed under IBC. Equally, since "applications" are petitions, which are filed under the IBC, it is Article 137 of the Limitation Act, 1963 which will apply to such applications.

Further, the SC in its judgment in ***Vashdeo R. Bhojwani* v. *Abhyudaya Co-operative Bank Ltd.* (2019 109 taxmann.com 198/156 SCL 539 (SC)**, also referred to its earlier judgment in *B.K. Educational Services* (*supra*) where it was held that for purposes of consideration of applications u/s 7 or 9 of the IBC, the LA 1963 is applicable from the inception of the IBC on 1-12-2016 and Article 137 of the LA 1963 gets attracted and that **"the right to sue" therefore accrues "when a default occurs".** If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the LA 1963, save and except those cases where Section 5 of the LA 1963 may be applied to condone the delay in filing of such application. Mere filing of a suit for recovery or a decree passed by a Court, cannot shift forward the date of default.

5. WHAT THE NCLAT HELD IN *V.PADMAKUMAR* CASE

In *V. Padmakumar's* case (*supra*), the NCLAT also referred to its judgment dated 7-2-2020 in ***G. Eswara Rao* v. *Stressed Assets Stabilization Fund* (2020) 116 taxmann.com 794 (NCL-AT)** (Company Appeal AT Insolvency No. 1097 of 2019),wherein the NCLAT held that "In the present case, the Corporate Debtor defaulted to pay prior to 2004, due to which OA No. 193 of 2004 was filed by Respondent (Financial Creditor). A Decree passed by the DRT or any suit cannot shift forward the date of default. On the other hand, the judgment and Decree passed by the DRT on 17th August, 2018, only suggests that debt become due and payable. It does not shifting forward the date of default, as Decree has to be executed within a specified period. It is not that after passing of judgment or Decree, the default takes place immediately, as recovery is permissible, all the debts in terms of judgment and Decree dated 17th August, 2018 with pendent lite and future

at the rate of 12% per annum could have been executed only through an execution case." The NCLAT in that case held the AA has failed to consider the aforesaid fact and wrongly held that the date of default took place when the judgment and Decree was passed by the DRT on 17th August, 2018. In paragraph 24 of the aforesaid G. Eswara Rao's judgment, the NCLAT held that the period of limitation for moving application u/s 7 of the IBC was for three years, and if counted from 2004, to be completed in the year 2007. As the date of passing of the Decree by DRT is not the date of default, the NCLAT held that the application u/s 7 of the IBC was barred by limitation and hence in G. Eswara Rao's case, *set aside* the impugned order dated 1-10-2019 and dismissed the application u/s 7 filed by the Financial Creditor.

After hearing arguments of both side and taking into considerations the decisions of the SC and that of the NCLAT itself, in the V. Padmakumar's case, the NCLAT Bench ruled that as the filing of Balance Sheet/Annual Return being mandatory under section 92(4) of the Companies Act, 2013, failing of which attracts penal action under section 92(5) and (6), the Balance Sheet/Annual Return of the Corporate Debtor cannot be treated to be acknowledgement under section 18 of the Limitation Act, 1963. Further, it this argument is accepted, then in such case, it is to be held that no limitation would be applicable, because every year, it is mandatory for the Corporate Debtor to file Balance Sheet/Annual Return, which is not the law on limitation.

The NCLAT in its judgment dated 12-3-2020 in *V. Padmakumar* (*supra*) found that the account of the Corporate Debtor was declared NPA on 31st October, 2002 and decree was passed on 19th June, 2009/31st August, 2009. NCLAT therefore **held that since the Financial Creditor (M/s Stressed Assets Stabilization Fund) filed its application in under section 7 of the IBC against the Corporate Debtor "M/s Uthara Fashion Knitwear Limited" in 2019, it was barred by limitation and was not maintainable. T**he NCLAT , thus, *set aside* the impugned order passed by the NCLT, Chennai Bench on 21st November, 2019 while admitting the application filed by the Financial Creditor.

6. FIVE-MEMBER NCLAT BENCH DECLINES REFERENCE FOR RECONSIDERATION OF V.PADMAKUMAR'S JUDGMENT

Despite the abovementioned clear cut judgment dated 12th March, 2020 by the NCLAT 5-Member Bench (with 4:1 majority) in *V. Padmakumar's* case, another 3-Member Bench of the NCLAT consisting of Justice Jarat Kumar Jain (Judicial Member) and Balvinder Singh and V.P. Singh (Members Technical) passed a Referral Order in Company Appeal (Insolvency) No. 385 of 2020 (***Bishal Jaiswal* v. *Asset Reconstruction Co. India Ltd.***) and doubted the correctness of the decision of 5-Member Bench in *V. Padmakumar* (*supra*) requiring reconsideration of the said judgment. The issue framed by the Referral Bench in its order of reference was as follows:—

> "Hon'ble Supreme Court and various Hon'ble High Courts have consistently held that an entry made in the Company's Balance Sheet amounts to an acknowledgement of debt under section 18 of the Limitation Act, 1963, in view of the settled law, V. Padmakumar's case requires reconsideration."

The said reference was considered by a 5-Member NCLAT Bench which observed in its judgment of 22-12-2020 that the Referral Bench failed to note of the fact that the earlier 5-Member Bench Judgment rendered in *V. Padmakumar* with a majority of 4:1 was delivered to remove uncertainty arising out of the conflicting verdicts of Benches of co-equal strength in *V.Hotel's* case and in *M/s Ugro Capital Limited's* case. In view of this factual position, it was inappropriate on the part of the Referral Bench to doubt the correctness of the 5-Member Bench Judgment, which admittedly has not been appealed against and occupies the field till date. Besides, the fact that the earlier 5-Member Bench of NCLAT in *V. Padmakumar* case has taken note of the authoritative pronouncements of the Hon'ble Supreme Court relevant to the determinable issue, therefore, relying upon judgments of various High Courts on the subject is of no consequence. It also ruled that the Appellate Tribunal (NCLAT) is not a Constitutional Court. It is the creation of a Statute *viz.* Companies Act, 2013. Therefore, this Appellate Tribunal has to apply the law as embodied in the Statutes and as laid down by the Hon'ble Supreme Court, as the Appellate Tribunal only interprets and applies the law as it is. Further, once a Larger Bench of NCLAT came to be constituted in the wake of two conflicting judgments rendered by Benches of co-equal strength on the issue, **the judgment by such Larger Bench of 5 NCLAT Members becomes binding on subsequent Benches of lesser strength.** It was a matter of judicial discipline for the Referral Bench to follow the judgment of the five member Bench in "V. Padmakumar's case" as a binding precedent and not to question the correctness of the Judgment by adopting the "cut and paste" methodology in branding the five Member Bench Judgment in "V. Padmakumar's case" as "so very incorrect", divorced of the context in which the SC used this expression.

While expressing its shock on this aspect, the 5-Member Bench of NCLAT in *Bishal Jaiswal* (*supra*) dealt with the issue raised on the basis of gross misconception and misunderstanding of law, and also dealt with the aspect of judicial discipline. It termed the reference made by the 3-Member Bench of NCLAT to reconsider the earlier NCLAT 5-Member judgment V. Padmakumar's case (*supra*) as a **"misadventure" as it would lead to weaken the authority of law and the dignity of the Institution, which will shake people's faith in the rule of law and hoped that the Referral Bench would exhibit more serious attitude towards adherence of the binding judicial precedents and not venture to cross the red line.**

Even though, the 5 Member Bench of NCLAT in *Bishal Jaiswal's* case confined its consideration only to competence of reference and deferred the hearing of the concerned Company Appeal (AT) (Insolvency) No. 385 of 2020, nonetheless it noted that in that case, the lenders assigned the debt in favour of "Asset Reconstruction Company (India) Ltd", who

filed application u/s 7 of IBC for initiation of CIRP against the Corporate Debtor. The NCLT Kolkata Bench, as Adjudicating Authority, being satisfied that debt and default was established and that the application had been filed within the period of limitation, admitted the application. Being aggrieved, Mr. Bishal Jaiswal, ex-director of the CD filed appeal (No.385/3030) primarily on the ground that the account of the CD had been declared as NPA on 28th February, 2014 and since the application u/s 7 of IBC came to be filed in December, 2018, the same was barred by limitation. Besides, the Appellant thereat also contended that ordinarily a judgment of the Larger Bench is binding on any subsequent Bench of lesser or co-equal strength and therefore the judgment of NCLAT in *V. Padmakumar* (*supra*) ought to have been followed in the instant case. It was also contended that the "Referral Order" created uncertainty as it failed to notice that the law laid down in *V. Padmakumar's* (*supra*) has been followed and applied by the NCLAT in subsequent judgments and that the decision in *V. Padmakumar* (*supra*) itself was a result of reference to a Larger Bench to resolve conflicting decisions of Co-ordinate Benches.

On the other hand, the Financial Creditor contended that the right to sue for the first time accrued to it upon classification of the account as NPA on 31st July, 2013, but thereafter the CD had admitted, time and again, and unequivocally acknowledged its debt in the Balance Sheets for the years ending 31st March, 2015; 31st March, 2016 and 31st March, 2017. Hence, according to the Financial Creditor, the right to sue stood extended in terms of section 18 of the Limitation Act, 1963.

After noticing the submissions of the learned counsels for the parties, the Referral Bench declined to accept the argument advanced on behalf of the CD that section 18 of the Limitation Act is not applicable to Insolvency Cases and proceeded to record its reasons (in paragraph 30 its Referral Order) for reconsideration of V. Padmakumar's judgment, mainly on the ground, *inter alia*, that "there is consistent view of the Hon'ble Supreme Court and High Courts of Allahabad, Calcutta, Delhi, Karnataka, Kerala and Telangana that entries in the Balance Sheet of the Company be treated as an acknowledgement of debt for the purpose of section 18 of the Limitation Act, 1963. The majority view in *V. Padmakumar's* case is just contrary to settled law."

However, the five Member NCLAT Bench observed that normally the judgment of a Larger Bench is binding on the Smaller Bench. But if the smaller Bench of 2 judges disagree with a previous judgment of a Larger Bench and concludes that an earlier judgment of three learned Judges is **"so very incorrect that in no circumstances can it be followed"**, in that case, it has to follow the proper course/tests by inviting the attention of the Chief Justice and request for the matter being placed before a Bench larger than the Bench whose decision has come up for consideration.

7. 5-MEMBER NCLAT BENCH HOLDS THAT 3-MEMBER NCLAT BENCH FAILED TO DISTINGUISH BETWEEN IBC AND RECOVERY PROCEEDINGS

The 5-Member Bench of NCLAT in *Bishal Jaiswal* (*supra*) observed that the Referral

Bench has failed to draw a distinction between the "recovery proceedings" and the "insolvency resolution process". The IBC provides timelines for resolution of insolvency issues and proceedings thereunder cannot be equated with "recovery proceedings". The insolvency resolution mechanism is based on "debt" and "default". Adjudication of civil disputes and complex issues is impermissible within the ambit and scope of IBC. Stretching forward the concept of default beyond NPA, in the context of law declared by the Hon'ble Supreme Court, as it now stands, would be forbidden province and the liability in regard to defaulted amount on the basis of classification of account of Corporate Debtor as NPA cannot be given a new lease of life, when it is time-barred. The judgment of the Hon'ble Supreme Court in *B.K. Educational Services* (*supra*) is eloquent on the subject. Even in *Jignesh Shah* (*supra*), the Hon'ble SC has recognized the nature of remedy under Companies Act being distinct from recovery mechanism and observed that limitation cannot be impacted by an acknowledgement of liability under section 18 of the Limitation Act to keep debt alive for the purpose of winding up proceedings. This equally holds good in so far as insolvency jurisdiction is concerned, unless a contrary view is taken by the Hon'ble Supreme Court in matters involving the issue. Therefore, the order of reference which, in letter and spirit, is more akin to the NCLAT appreciating the findings and a judgment in "V. Padmakumar's case" is incompetent and deserves to be rejected. It is not open to the Referral Bench to appreciate the judgment rendered by an earlier Larger Bench, as if sitting in appeal, and to hold that the view taken by the Larger Bench was erroneous. The Referral Bench had overlooked all legal considerations. Such misadventures weaken the authority of law, dignity of institution, as also shake people's faith in rule of law and hoped and trusted that the Hon'ble Members of the Referral Bench would exhibit more serious attitude towards adherence of the binding judicial precedents and not venture to cross the red line.

8. CONCLUSION

The discussions and analysis of the case laws in this article will at least put to rest the contentious issue as to whether the entries in the Balance Sheet of the Debtor Company would be treated as an "acknowledgement of Debt" under section 18 of the Limitation Act, 1963 for the purposes of applications u/s 7 or 9 of the IBC. Till an authoritative pronouncement is made by the Hon'ble Supreme Court of India on this issue, the litigants before NCLAT/NCLT will have to abide by the decision in *V. Padmakumar* (*supra*).

□□

(2021) 123 taxmann.com 286 (Article)

Surety's Right of Subrogation and Insolvency & Bankruptcy Code, 2016

Hareesh Kumar Kolichala,
Chief Manager (Law), Union Bank of India

In the case of ***State Bank of India*** **v. *V. Ramakrishnan* (2018) 91 taxmann.com 68/146 SCL 597 (NCL - AT)** the Hon'ble Supreme Court of India held that there was no bar for a creditor to proceed against a surety for recovery of dues even during the moratorium period declared under section 14 of the Insolvency & Bankruptcy Code, 2016 (Code).

The factual backdrop of the case is that V. Ramakrishan was the Managing Director of the corporate debtor, namely, the Veeson Energy Systems Ltd. and also the personal guarantor in respect of credit facilities that had been availed from the Appellant State Bank of India. As the said Company defaulted in repayment of the debts, the account of Company was classified as a non-performing asset. Consequent thereto, the Appellant issued a notice dated under section 13(2) of the SARFAESI Act demanding an outstanding amount from the said borrowers within the statutory period of 60 days. As no payment was forthcoming, a possession notice Under Section 13(4) of the SARFAESI Act was issued on 18-11-2016. In the meanwhile, an application was filed by the said corporate debtor, under section 10 of the Code to initiate the Corporate Insolvency Resolution Process (CIRP) against itself and the same was admitted, followed by the moratorium that was imposed statutorily by Section 14 of the Code. While the said proceedings were pending, an interim application was filed by Ramakrishnan as personal guarantor to the corporate debtor, in which he took up the plea that Section 14 of the Code would apply to the personal guarantor as well, as a result of which proceedings against the personal guarantor and his property would have to be stayed. The National Company Law Tribunal, by its order dated 18-9-2017, held that, as per Section 31 of

the Code, a Resolution Plan approved would bind the personal guarantor as well, and since after the creditor is proceeded against, the guarantor stands in the shoes of the creditor and therefore Section 14 would apply in favour of the personal guarantor as well. The interim application filed by him was thus allowed, and the State Bank of India was restrained from moving against him.

The SBI had carried the matter in appeal before the National Company Law Appellate Tribunal (NCLAT) which resulted in the appeal being dismissed. The Appellate Tribunal relied upon Section 60(2) and (3) of the Code as well as Section 31 of the Code to find that the moratorium imposed under section 14 would apply also to the personal guarantor. The reasoning was that since the personal guarantor also forms part of a Resolution Plan which is binding on him, he is very much part of the insolvency process against the corporate debtor, and that, therefore, the moratorium imposed under section 14 should apply to the personal guarantor as well.The Allahabad High Court expressed a similar view as NCLT & NCLAT in *Sanjeev Shriya* v. *State Bank of India* (2017(9)ADJ 723). The rationale being that if a CIRP is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, and thus the liability of the surety would also be unclear. The Court took the view that until debt of the corporate debtor is crystallised, the guarantor's liability may not be triggered and hence the guarantor cannot be proceeded against during the moratorium period.

The Supreme Court of India had, in the further appeal filed by SBI, overturned the decisions of the NCLT and NCLAT and settled the position of law.

When the Code was enacted originally, there was no provision, as introduced now by Section 14(3) of the Code, explicitly providing that Moratorium as envisaged under section 14(1) was not applicable to sureties to the Corporate Debtors.Earlier, as discussed above, the NCLT, NCLAT and Allahabad High Court had decided that the moratorium was applicable to guarantors as well. The repealed Sick Industrial Companies Act, 1985 prohibited recovery action against a Corporate Debtor as well as personal guarantors after filing of reference before the BIFR (Board) constituted under the said Act.

In the meanwhile, the Insolvency Law Committee, appointed by the Ministry of Corporate Affairs, by its Report dated 26-3-2018, made important recommendations, one of which was as under:

> "To clear the confusion regarding treatment of assets of guarantors of the corporate debtor *vis-à-vis*

the moratorium on the assets of the corporate debtor, it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed under the Code;"

The Committee observed as under:

5.5 Section 14 provides for a moratorium or a stay on institution or continuation of proceedings, suits, etc. against the corporate debtor and its assets. There have been contradicting views on the scope of moratorium regarding its application to third parties affected by the debt of the corporate debtor, like guarantors or sureties. While some courts have taken the view that section 14 may be interpreted literally to mean that it only restricts actions against the assets of the corporate debtor, a few others have taken an interpretation that the stay applies on enforcement of guarantee as well, if a CIRP is going on against the corporate debtor.

The Committee deliberated and noted that this would mean that surety's liabilities are put on hold if a CIRP is going on against the corporate debtor, and such an interpretation may lead to the contracts of guarantee being infructuous, and not serving the purpose for which they have been entered into.

5.8 In *State Bank of India* v. *V. Ramakrishnan* (2018) 91 taxmann.com 68/146 SCL 597 (NCL - AT) and *Veeson Energy Systems*, the NCLAT took a broad interpretation of section 14 and held that it would bar proceedings or actions against sureties. While doing so, it did not refer to any of the above judgments but instead held that proceedings against guarantors would affect the CIRP and may thus be barred by moratorium. The Committee felt that such a broad interpretation of the moratorium may curtail significant rights of the creditor which are intrinsic to a contract of guarantee.

5.9 A contract of guarantee is between the creditor, the principal debtor and the surety, where under the creditor has a remedy in relation to his debt against both the principal debtor and the surety 55. The surety here may be a corporate or a natural person and the liability of such person goes as far the liability of the principal debtor. As per section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor may go against either the principal debtor, or the surety, or both, in no particular sequence 56. Though this may be limited by the terms of the contract of guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is joint and several. The Committee noted that this characteristic of such contracts *i.e.* of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost important for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended.

5.10 The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be

necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of section 14.

5.11 Further, since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision. The Committee concluded that section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only".

Thereafter, the Parliament had amended Section 14 and introduced sub-section (3) to it which reads as under:

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

(a) such transactions as may be notified by the Central Government in consultation with any financial sector regulator;

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

Supreme Court held that the moratorium would not apply to a surety especially in view of the fact that the amendment made to the Code was retrospective in nature and the same only a clarification.

Section 128 of the Indian Contracts Act, 1872 provides that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. If the Resolution Plan approved by the COC discharges the Corporate Debtor, then, whether the liability of the surety is also extinguished as per the law contained in Section 128? In the case of *Jagannath Ganeshram Agarwala* v. *Shivnarayan Bhagirath* (AIR 1940 BOM 247), the High Court of Bombay held that as a result of bankruptcy, the debt due by the principal debtor may become unenforceable against the debtor (by operation of law), but the liability of the surety is not thereby discharged. Relying on the above judgment, in the case of *Maharashtra State Electricity Board* v. *Official Liquidator* (AIR 1982 SC 1497), the Hon'ble Supreme Court held that a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability.

However, in the case of *Shri Kundanmal Dabriwala v. Haryana Financial Corpn.* (2012) 22 taxmann.com 274/114 SCL 609 (Punj. & Har.), a Scheme of arrangement under section 391 of the Companies Act, 1956 was sanctioned by the Company Court. Since the Corporation was not paid the entire loan amount recoverable from the company, the respondent Corporation issued notice dated 7-10-2008 under section 32(G) of the State Financial Corporation Act, 1951 against the promoters/guarantors/ directors of the Company. The question that arose before the Court was "Whether the revival scheme submitted by the Petitioner under sections 391 and 394 of the Companies Act, 1956 and accepted by court amounts to compounding with the principal debtor leading to the discharge of the surety within the meaning of Sections 134 and 135 of the Contract Act, 1872?". The Punjab & Haryana High Court held that the as under:

> "Present is a case, which leads to extinction of principal debtor's liability in terms of scheme of arrangement sanctioned by this Court. Such scheme is binding on all the creditors including non consenting creditors such as the Corporation. Under Section 135 of the Act, a contract between the creditor and the principal debtor by which the creditor compounds with the principal debtor, discharges the surety. It shall include a binding arrangement sanctioned by the Court under section 391 of the Companies Act,1956. It is a case of a deemed and binding contract though by operation of law, but such contract extinguishes the liability of the principal debtor. **With such extinction of the liability of the principal debtor, the surety cannot recover the amount of debt paid, from the debtor.** Therefore, it cannot be said that the surety will continue to be liable for payment of debt due to the creditor prior to settlement."

The arrangement sanctioned by Companies Court under section 391 of the erstwhile Companies Act, 1956 is similar to the Resolution Plan approved by the COC and Adjudicating Authority under IBC, 2016 and as such it appears that it amounts to extinction of the remaining claim of the Creditor. By ratio of the above judgement, since, on such extinction of the claim of the creditor, the surety stands discharged for the reason that he cannot step into the shoes of the creditor and sue the debtor for the recovery of the amount paid by the surety in terms of Section 140 of the Indian Contract Act.

Similarly, in the case of *Union Bank of India* v. *Chairperson* (2008 (8) ADJ 506) *Debts* Recovery Appellate Tribunal, the Allahabad High Court had held that liability of the surety gets automatically terminated when liability of principal debtor is extinguished while observing as under:

> "This submission of Sri Kushal Kant, learned Counsel for the Bank cannot be accepted. The Company had been wound up and the Official Liquidator had been appointed. The Official Liquidator had filed report No. 301 of 2002 before the

Company Judge with a prayer that he may be allowed to disburse Rs. 78,16,428.42 to the Bank towards full and final settlement of the claim of the Bank submitted before the Official Liquidator. The Bank had filed an application supported by an affidavit of the Branch Manager that the report of the Official Liquidator may be accepted and the Official Liquidator may be directed to disburse Rs. 78,16,428.42 to the Bank towards full and final settlement of the claim of the Bank before the Official Liquidator. The Company Judge accepted the report and passed an order that since the Bank had agreed to accept the said amount towards full and final settlement of the claim, the Official Liquidator shall make the amount. This amount was subsequently paid by the Official Liquidator to the Bank. It cannot, therefore, be urged by the Bank that in view of Section 134 of the Contract Act, the surety is not discharged. The Official Liquidator had stepped into the shoes of the Company when it was wound up. The decision in the case of *United Bank of India* (*supra*) relied upon by learned Counsel for the Bank is not applicable to the facts of the present case.

16. The second submission of learned Counsel for the Bank that discharge of the principal borrower by operation of the Bankruptcy Law will not discharge the guarantors is also without any force and needs to be rejected. The Bank had accepted the amount towards full and final settlement of its claim submitted before the Company Judge and the principal borrower did not stand discharged because of operation of law. The decision of the Supreme Court in *Maharashtra State Electricity Board* (*supra*), therefore, does not help the Petitioner-Bank. On the other hand, the submission of Sri R.P. Agarwal, learned Counsel for the Respondents that the liability of the surety gets automatically terminated when liability of principal debtor is extinguished, deserves to be accepted"

These decisions had been rendered even after referring to the decision of the Supreme Court in the case of *Maharashtra State Electricity Board* (cited *supra*) and may not have been decided correctly.

In a recent case of *G.K. Investments Ltd.* v. *Vistra ITCL (India) Ltd.* (Govt. Appeal No. 2182 of 2018, dated 28-11-2018) in the context of IBC, 2016, it was held by High Court of Calcutta as under:

> "That the creditors may give up some of their claims with or without conditions in an expectation that such concessions and rearrangement would be beneficial for the continued existence of the corporate debtor. The creditors in doing so may not in all situations give up their right to enforce other securities so as to recover the deficit which has been done in the instant case and reflected in the reinstated plan but in no case can realize more than it had agreed.

> Once the debt is crystallized to the extent the unsustainable portion of the debt has remained unrealized the secured creditors may realize such sums after giving adjustment of all sums received under the plan. Keeping in view the object of the Code and the terms of the restated plan, it *prima facie* appears that the creditors have not given up the right to recover the differential amount that has resulted due to the reduction in the value of shares. The object and purpose of the plan needs to be read, understood and considered in that context. On such considerations, I am unable to accept that the restated plan has extinguished the liability of the pledgors".

In view of the above, if the debt of the Corporate Debtor is extinguished by operation of law like CIRP proceedings, surety's liability continues and such recovery proceedings may be initiated against a surety even during the moratorium declared by the Adjudicating Authority.

However, the amendment and the decisions of the Courts throw up important questions of law which are discussed in this article as under:

1. SUBROGATION

As per Section 140 of the Indian Contract Act, 1872, where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. It means that the surety steps into the shoes of the Creditor upon payment of the amount to the Creditor which is called as Subrogation. Therefore, the other important question that arises, whether the Surety, on payment of entire amount to a Financial Creditor during the course of CIRP, can exercise his right of subrogation, step into the shoes of the Financial Creditor and replace the Financial Creditor in the COC? Whether, on payment of the part of the amount to the Creditor, a surety can exercise his right of subrogation to the extent of the amount paid to the Creditor and file a claim for the same with the Interim Resolution Professional or Resolution Professional as the case may be? In the event of part-payment of the amount by the surety during the CIRP, whether both Financial Creditor and Surety can form part of the COC? The Code is silent on this issue.

In view of what is provided under section 14(3), a Financial Creditor or an Operational Creditor may proceed against a surety for recovery even during moratorium and after conclusion of CIRP However, it is not clear, if the Creditor recovers full amount from the Guarantor before conclusion of CIRP, whether the Financial Creditor has to be excluded from the Committee of Creditors and the percentage of shares of other members of the COC has to be worked out again?

Regulation 28(1) & (2) of Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), 2016 provides as under:

> "In the event a creditor assigns or transfers the debt due to such

creditor to any other person during the insolvency resolution process period, both parties shall provide the interim resolution professional or the resolution professional, as the case may be, the terms of such assignment or transfer and the identity of the assignee or transferee. (2) The resolution professional shall notify each participant and the Adjudicating Authority of any resultant change in the committee within two days of such change".

There is no other provision in the Code for replacing the Financial Creditor with the Guarantor. to enable him to exercise his right of subrogation and be entitled to be paid as per the Resolution Plan, if the Surety pays the amount to the said Financial Creditor during the course of CIRP. The Code is also not clear on the question as to whether, on payment of the part of the amount to the Creditor, a surety can exercise his right of subrogation to the extent of the amount paid to the Creditor and file a claim for the same with the Interim Resolution Professional or Resolution Professional as the case may be? In the event of part-payment of the amount by the surety during the CIRP, whether both Financial Creditor and Surety can form part of the COC? The Code is silent on this issue.

If a Creditor recovers only a part of his dues after conclusion of CIRP and as per the Resolution Plan approved by the Adjudicating Authority, as per the above precedents, he can recover the balance amount from the Guarantor. On payment of the balance amount, whether a surety has the right to be subrogated and proceed against the Corporate Debtor for exercising his right of subrogation? If a surety is allowed to exercise his right of subrogation against the Principal Debtor/corporate Debtor, then the purpose of the Code is lost. If the Surety is not allowed to exercise his right of subrogation, it is repugnant to the principles of law of guarantee.In the above said case of State *Bank of India* v. *V. Ramakrishnan*, the National Company Law Tribunal, Chennai, by its order dated 18-9-2017, held that if the Financial Creditor, during the Corporate Insolvency Resolution Process and declaration of the moratorium is permitted to proceed against the personal guarantor of the Corporate Debtor for recovery of the outstanding debt to the extent of the personal guarantee given, then, the security interest, if any, of the Financial Creditor shall get transferred to the guarantor which will be in violation of Section 14(1)(*b*) of the I & B Code, 2016, indicating that the guarantor will step into the shoes of the Creditor.

In the case of *Maharashtra State Electricity Board* (cited above), the Supreme Court had clearly stated that on payment of the guaranteed amount, the guarantor Bank shall have recourse to the securities obtained by it from the company which is in liquidation. But, the case of a company in liquidation is different and the case of a corporate debtor just taken over by the Resolution Applicant is different. In case of a company under liquidation, the guarantor may be able to lodge his claim with the Liquidator by exercising his right of subrogation. The issue is whether a corporate debtor that is taken over by the Resolution Applicant, on payment of

the agreed amount to the creditors as approved under the Resolution Plan, is liable to the guarantor of the creditor to pay him the amount that is paid to the Creditor of the Corporate debtor? This issue has not been decided by the Supreme Court while dealing with the issue as to moratorium was applicable to a guarantor or not.

Section 238 of the Code provides that the Code shall have an overriding effect over all other laws which are inconsistent with the Code which reads as under:

Section 238: ***"The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."***

Similarly, Section 31(1) provides that if the Adjudicating Authority is satisfied that the resolution plan as approved by the Committee of Creditors under Sub-section (4) of Section 30 meets the requirements as referred to in Sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

What is the scope of Section 31(1) which states that the Resolution Plan approved by the CoC is binding on, *inter alia*, guarantors? In the case of *State Bank of India* (*supra*), it was explained by the Supreme Court as under:

> "Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment".

Therefore, Section 31 is only to overcome the rigour of Section 133 of the Contract Act and to bind the guarantor for the changed debt and nothing more. But, whether these provisions fetter the right of a Guarantor/surety from exercising his right of subrogation on payment of the balance amount to the Creditor?Though the Code by Section 238 provides that the provisions of the Code shall have overriding effect to anything inconsistent contained in any other law,yet, nowhere in the Code it is provided that right of subrogation of a guarantors of the Corporate Debtor would cease on approval of the Resolution Plan. Therefore, it appears that a guarantor may exercise his right of subrogation on payment of the balance amount to the creditors. But, such a situation would lead weird consequences and make the Resolution Applicant liable to pay to the guarantors all over once again which is not the intention of the Parliament and hence there is a need to amend the law and to provide the circhouumstances under which a Surety could replace a Financial Creditor in the COC. Secondly, an explicit provision should be made specifying that the right of subrogation would not be available to a guarantor on approval of the Resolution Plan. The law is still evolving and hoped that these issues will be settled in due course.

(2021) 123 taxmann.com 287 (Article)

Balance Sheet and Acknowledgement of Liability in IBC: Deciphering the Brain-Teaser

Richa Pathak,

LL.M., London School of Economics & IIM-Ahmedabad

Mansi Mishra,

Fourth Year Student at NLIU, Bhopal

1. Introduction

The Insolvency and Bankruptcy Code, 2016 (**"Code"**) is a relatively newer legislation and continues to undergo the phase of interpretation of its various provisions. Amidst this, the debate around the extent of application of the Limitation Act, 1963 (**"Limitation Act"**) has taken an interesting turn. The National Company Law Appellate Tribunal (**"Appellate Tribunal"**) *vide* its order dated 12 March 2020 in the case of *V. Padmakumar* v. *Stressed Asset Stabilization Fund*[1] (**"V. Padmakumar"**), by 4:1 majority, held that entries in balance sheets cannot be used to extend the limitation period under section 18 of the Limitation Act for the purpose of triggering proceedings under the Code. Thereafter, while deciding another similar case, the Appellate Tribunal in *Bishal Jaiswal* v. *Asset Reconstruction Co. (India) Ltd.*[2] (**"Bishal Jaiswal"**), decided on 25 September 2020, referred the decision in *V. Padmakumar* for reconsideration by a larger bench. The larger bench of the Appellate Tribunal constituted to reconsider *V. Padmakumar,* refused to reverse the aforementioned order. This article shall seek to elaborate upon and discuss the decisions in *V. Padmakumar*, *Bishal Jaiswal* and the order of the larger bench, and analyze the law surrounding the issue.

2. Section 18(1) of the Limitation Act

The said section stipulates that "where, before the expiration of the prescribed period of limitation for a suit or application in respect of any property or right, an acknowledgement of

liability in respect of such property or right has been made in writing, then a fresh period of limitation shall be computed from the time of such acknowledgement was so signed".

Now in light of the discourse under the Code, the question often written about is if the borrower happens to acknowledge it's debt by making necessary entries in its balance sheets before the expiration of the prescribed period of limitation. In that case would it amount to an acknowledgement of liability under section 18 of the Limitation Act and on that account, recommence the period of limitation from the date of such acknowledgement for the purposes of filing an application praying for the limitation of corporate insolvency resolution process (**"CIRP"**) under section 7 of the Code. Consequently, it appeared that this topic was eventually laid to rest by the Appellate Tribunal in *V. Padmakumar*.

3. Decision in V. Padmakumar

In *V. Padmakumar*, M/s. Stressed Asset Stabilization Fund (**"Financial Creditor"**) had filed an application under section 7 ("**Section 7 Application**") of the Code, against M/s. Uthara Fashions Private Limited (**"Corporate Debtor"**), in the year 2019. Section 7 relates to initiation of corporate insolvency resolution process (**"CIRP"**) by filing an application with the National Company Law Tribunal (**"NCLT"**).

The Corporate Debtor contended that the Section 7 Application was barred by limitation, which is of three years from the date of default, as it was filed after seventeen years of the account of the Corporate Debtor being declared as Non-Performing Asset (**"NPA"**). While responding to this contention, the Financial Creditor argued before the NCLAT that a fresh limitation commenced each time, the Corporate Debtor acknowledged the debt in its balance sheets, as per Section 18 of the Limitation Act. Section 18 of the Limitation Act stipulates that a fresh limitation of three years commences each time a debtor acknowledges its liability in writing. The Appellate Tribunal, in its majority judgment, rejected the counter-argument of the Financial Creditor and held that the Section 7 Application was time barred, since the Corporate Debtor's account was declared as an NPA long back in 2002. The Appellate Tribunal relied upon a two-fold reasoning behind the said decision - Firstly, as filing of balance sheet is mandatory under section 92(4) of the Companies Act, 2013 (**"Companies Act"**), non-compliance of which attracts penal action, the balance sheet of the Corporate Debtor cannot be treated as an acknowledgement of debt under section 18 of the Limitation Act. Secondly, if balance sheet is recognized as an acknowledgment of debt under section 18 of the Limitation Act, then there would practically be no

limitation for filing an application under section 7 of the Code because balance sheet, pursuant to the Companies Act, is mandatorily prepared every year.

However, it is the minority opinion delivered by Justice Cheema that caught attention. Justice Cheema *inter alia* relied upon the judgment of the Supreme Court in Mahabir Cold Storagev. *CIT*[3], wherein the entries in the books of account were held to be amounting to an acknowledgement of liability thereby extending the period of limitation under section 18 of the Limitation Act. The minority judgment also noted the judgment in *L.C. Mills* v. *Aluminium Corpn. of India Ltd.*[4], where it was observed that the acknowledgement of debt under section 18 does not create a new right of action, but only extends the period of limitation. Hence, Justice Cheema concluded that annual returns/ audited balance sheets can be referred to and relied on to see if contents therein amount to acknowledgement or not. He also observed that the reasoning behind majority judgment, that filing of balance sheet is mandatory and that is why it cannot amount to acknowledgement, does not hold water. He further observed that it would depend on facts of each case as to whether or not an entry in balance sheet amounts to an acknowledgment of debt for the purpose of extending limitation under section 18 of the Limitation Act.

4. Subsequent Decision in Bishal Jaiswal

In *Bishal Jaiswal*, the Appellate Tribunal was to decide upon a similar question related to limitation for filing an application under section 7 of the Code. It was the contention of the corporate debtor in the case that the application for initiation of CIRP was time barred as it was filed after more than five years of the corporate debtor being declared as an NPA. In response, the financial creditor in the case contended that Section 18 of the Limitation Act would come to rescue, as the corporate debtor had consistently recognized the amount owed to the financial creditor as a liability in its balance sheets prepared in the preceding three years. As a result, a fresh limitation began each time such an acknowledgement was made. In order to negate the said contention, the corporate debtor placed reliance upon *V Padmakumar*.

The bench in *Bishal Jaiswal* referred to a catena of judgments, for instance *A.V. Murthy* v. *B.S. Nagabasavanna*[5], wherein it was held that the entries in the books of account would amount to an acknowledgement of the liability within the meaning of Section 18 of the Limitation Act and extend the period of limitation for the discharge of the liability as debt. It was also observed by the bench, by placing reliance on *Bengal Silk Mills Co.* v. *Ismail Golam Hossain Ariff*[6], that merely because balance sheet is prepared under a statutory compulsion, it does not lead to the conclusion that the entries in balance sheet cannot amount to an acknowledgment of debt under section 18. The Appellate Tribunal further noted that financial statements are statutorily recognized to hold evidentiary value under the Companies Act. After analysing the relevant precedents, the Appellate Tribunal in *Bishal Jaiswal* came to the conclusion that the position of law laid down in *V. Padmakumar* is contrary to the settled

law, and hence requires reconsideration. Therefore, it referred *V. Padmakumar* for reconsideration by a five-judge bench of the Appellate Tribunal ("**Reference Bench**").

The Reference Bench[7] termed the judgment in *Bishal Jaiswal* as a 'misadventure' and refused to reconsider the decision in *V. Padmakumar*. The Reference Bench noted that as per the decision in *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminum Industries Ltd.*[8], Section 18 of the Limitation Act has no application to proceedings under the Code. Hence, the question regarding acknowledgement of debt in balance sheet should not have arisen in the first place. It was further observed that the majority decision in *V. Padmakumar* was arrived at after duly noting the authoritative precedents of the Supreme Court in *Sampuran Singh* v. *Niranjan Kaur*[9], and of the Appellate Tribunal in *V Hotels Ltd.* v. *Asset Reconstruction Co. (India) Ltd.*[10]. In both the aforementioned cases, it was held that for determining limitation under section 7 of the Code, the date of default is NPA, which is a crucial date. Moreover, the acknowledgment, if any, has to be prior to expiration of the prescribed period for filing of a suit. It was further put forth by the Reference Bench that the precedents relied upon by Justice Cheema in his minority view pertained to recovery proceedings before civil courts, which are distinct from CIRP. Therefore, in light of the aforementioned observations, the Reference Bench did not reconsider *V. Padmakumar*.

5. Observations

The decision of the Reference Bench and the minority decision in *V. Padmakumar* have opened up a potential point of litigation in order to resolve the issue regarding application of Section 18 of the Limitation Act.

6. Application of Limitation Act vis-à-vis the Code

With respect to applicable limitation period for filing applications under section 7 of the Code, the position of law laid down in *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta and Associates*[11] ("B.K. Educational") is unambiguous wherein it was held that for the purpose of determining limitation under section 7, 9 or 10 of the Code, Article 137 of the Limitation Act would be applicable. Article 137 provides for a limitation period of three years from the date when the right to apply accrues. The Apex Court in *B.K. Educational Services (P.) Ltd.* further clarified the manner in which this limitation under Article 137 can be extended, *i.e.*, only through application of Section 5 of the Limitation Act which provides for condonation of delay based on facts of the case. This position has been thereafter upheld in *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.*[12], the Apex Court had observed that where the application under the Code was filed after more than three years of the corporate debtor being declared an NPA, the application was time-barred as per Article 137 of the Limitation Act. Similarly, this aforesaid position has also been consistently followed in *Vashdeo R. Bhojwani* v. *Abhyudaya Cooperative Bank Ltd.*[13], decided by the Supreme Court itself. In light of the aforementioned precedents, the legal position in *B.K. Educational* Services *(P.) Ltd.* was a good law at the time

when *V Padmakumar* was decided. The Apex Court has also clarified in *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminum Industries Ltd.*[14], that Section 18 of the Limitation Act would have no application to proceedings under the Code, as rightly noted by the Reference Bench. Hence, the authors believe that the Appellate Tribunal in *Bishal Jaiswal* and in minority opinion in *V. Padmakumar* failed to appreciate the position laid down by the Apex Court.

7. Different Nature of Proceedings under the Code

The object with which the Code was enacted is diametrically opposed to recovery. In fact, the Code aims at resolution of distressed assets in a time-bound manner, and infusing new life into corporate debtors. However, it was never the intention of the Code to give a new lease of life to otherwise time-barred debts. Furthermore, as already stated above, the limitation for the purposes of the Code is computed from the date of default. The authors resonate with the observation of the Reference Bench that the cases relied upon by the Appellate Tribunal in *Bishal Jaiswal* pertaining to application of Section 18 of the Limitation Act were based on recovery proceedings in civil jurisdiction. It is now well settled that proceedings under the Code are distinct and independent of the recovery proceedings. This difference in the nature of proceedings has also been recognized in *Jignesh Shah* v. *Union of India* .[15], where the Supreme Court observed that Section 18 of Limitation Act cannot come to rescue where suit of recovery was filed as winding up, as it is a distinct remedy from recovery, and the limitation for winding up is not affected by keeping the debt alive in one manner or the other.

While it is true that written acknowledgment can be considered by courts as acknowledgement of debt for extending limitation under section 18 of the Limitation Act, it could not have been the intention of the legislature for balance sheets being recognized for this purpose under the Code. It would practically mean that there would be no limitation period for filing an application under section 7 of the Code provided the corporate debtor concerned maintains a balance sheet as required under section 92 of the Companies Act. Initiation of CIRP is based on two key pillars - debt and default. The date of default is the account of a corporate debtor being declared as NPA. This date of default cannot be moved forward by relying upon entries in balance sheet for otherwise time-barred debt. The same would be against the letter and spirit of the Code.

8. Conclusion

The question of application of Section 18 of the Limitation Act to filing of applications under sections 7,9 and 10 of the Code requires urgent address by the Supreme Court. It was the Supreme Court under catena of judgments, which had to come to the rescue by clarifying that *the date of enforcement of IBC has no bearing on limitation, nor does it revive a time-barred claim*[16].The NCLAT in *Bishal Jaiswal* took notice of the digression of the legal position set in *V. Padmakumar* and observed that the dissenting opinion of Justice Cheema in *V. Padmakumar* is falling in line with the settled jurisprudence on this subject. In this setting, the issue revolving around

the subject, if decided contrary to what the authors argued for, would mean newer implications on the current well-established jurisprudence surrounding "debt" and "default" under the Code. It would also entail infusing new life to otherwise time-barred debts and potential flooding of applications with the tribunals, which would pose newer infrastructural challenges.

■■

1. 2020 SCC OnLine NCLAT 417.
2. Company Appeal (AT) (Insolvency) No. 385 of 2020.
3. 1991 Supp (1) SCC 402.
4. AIR 1971 SC 1482.
5. (2002) 38 SCL 639 (SC).
6. 1961 SCC Online Cal 128.
7. Reference made by Three Member Bench in Company Appeal (AT) (Insolvency) No. 385 of 2020.
8. (2020) 118 taxmann.com 323 (SC).
9. (1999) 2 SCC 679.
10. (2020) 114 taxmann.com 287 (NCL - AT).
11. (2018) 98 taxmann.com 213/150 SCL 293 (SC).
12. (2019) 109 taxmann.com 395/156 SCL 397 (SC).
13. (2019) 109 taxmann.com 198/156 SCL 539 (SC).
14. (2020) 118 taxmann.com 323 (SC).
15. (supra).
16. Sagar Sharma v. Phoenix Arc (P.) Ltd. (2019) 110 taxmann.com 50/156 SCL 707 (SC).

(2021) 125 taxmann.com 203 (SC)

SUPREME COURT OF INDIA

Rajkumar Brothers and Production (P.) Ltd. *v.* Harish Amilineni Shareholder and Erstwhile Director of Amilionn Technologies (P.) Ltd.

INDIRA BANERJEE AND SANJIV KHANNA, JJ.
CIVIL APPEAL NO. 4044 OF 2020
JANUARY 22, 2021

Section 5(13), read with sections 5(6) and 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Insolvency Resolution Process - Appellant operational creditor filed CIRP petition against corporate debtor as corporate debtor had defaulted in payment for goods and services supplied - NCLT admitted petition on ground that claim of appellant was undisputed - On appeal by corporate debtor, NCLAT set aside order of NCLT holding that there were pre-existing disputes between parties based on various documents - Appellant operational creditor challenged impugned order only to extent of direction given in impugned order directing him to pay CIRP costs and fees before Adjudicating authority - Whether said direction was in nature of costs of proceedings which had been found to be unsustainable - Held, yes - Whether respondent corporate debtor having succeeded, could not be saddled with costs of CIRP at behest of appellant or with fees of interim resolution professional - Held, yes - Whether therefore, direction given to operational creditor to pay CIRP costs did not warrant interference and accordingly no grounds to interfere with order passed by NCLAT was made out - Held, yes (Paras 4, 5 and 6)

CASE REVIEW

Harish Amilineni v. Raj Kumar Bros & Production (P.) Ltd. (2020) 121 taxmann.com 145/162 SCL 836 (NCL-AT) (para 6) affirmed.

CASES REFERRED TO

Harish Amilineni v. *Raj Kumar Bros. & Production (P.) Ltd.* (2020) 121 taxmann.com 145/162 SCL 836 (NCL-AT) (para 1).

Abhishek Kumar, Adv., **Ms. Garima Prashad**, AOR, **Ms. Ankita Pandey** and **Imtiyaz**, Advs. *for the Appellant.* **Raavi Yogesh Venkata**, AOR *for the Respondent.*

ORDER

1. This appeal under section 62 of the Insolvency and Bankruptcy Code, 2016 is against an order dated 10th August, 2020 passed by the National Company Law Appellate Tribunal (NCL-AT), New Delhi *Harish Amilineni* v. *Raj Kumar Bros. & Production (P.) Ltd.* (2020) 121 taxmann.com 145/162 SCL 836 allowing Company Appeal (AT) (Insolvency) No. 212 of 2020 filed by the Respondent.

2. The Appellant had filed a petition under section 9 of the IBC before the National Company Law Tribunal (NCLT) Hyderabad, being CP(IB) No. 737/9/HDB/2019. Notice on the said petition was issued by the NCLT on 21st November, 2019.

3. By an Order dated 9th January, 2020, the NCLT admitted the petition observing that the claim of the Appellant was undisputed. Aggrieved by the order dated 9th January, 2020, the Respondent filed above mentioned appeal before the NCLAT. By the order impugned in this appeal, the NCLAT has set aside the order of the NCLT, holding that there were pre-existing disputes between the Respondent and the Appellant. The aforesaid finding is based on various documents.

4. The NCLAT set aside the impugned order of the NCLT and dismissed the application of the appellant under section 9 of the IBC. The Appellant has challenged the impugned order only to the extent of the direction in paragraph 8(C) thereof, which reads as follows:

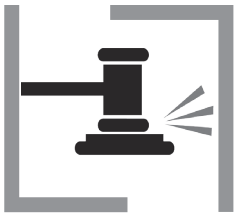
> "The IRP/RP will place particulars regarding CIRP costs and fees before the Adjudicating Authority and the Adjudicating Authority after examining the correctness of the same will direct the Operational Creditor to pay the same in time to be specified by the Adjudicating Authority."

5. The direction is in the nature of costs of the proceedings under section 7 of the IBC, which have been found to be unsustainable in law. The Respondent having succeeded, cannot be saddled with the costs of the Corporate Insolvency Resolution Process (CIRP) initiated at the behest of the Appellant or with the fees of the Interim Resolution Professional (IRP). The direction does not warrant interference in appeal.

6. We find no grounds to interfere with the order dated 10th August, 2020 passed by the National Company Law Appellate Tribunal in *Harish Amilineni's* case (*supra*).

7. The Civil Appeal is accordingly dismissed.

●●●



(2021) 123 taxmann.com 343 (SC)

SUPREME COURT OF INDIA

ManishKumar *v.* Union of India

ROHINTON FALI NARIMAN, NAVIN SINHA AND K.M. JOSEPH, JJ.
WRIT PETITION (C) NOS. 19, 26 27, 28 OF 2020.
JANUARY 19, 2021

Section 7 of Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Section 7(1) is amended by section 3 of IBC (Amendment) Act, 2020 requiring minimum threshold for initiation of proceedings (class action) by certain categories of financial creditors against corporate debtors such as real estate developers - Whether provisos of section 7 require that in case of a real estate project, being conducted by a corporate debtor, an application can be filed by either one hundred allottees or allottees constituting one-tenth of allottees, whichever is less, if they are able to establish a default in regard to a financial creditor and it is not necessary that there must be default qua any of Applicants - Held, yes - Whether since, default can be qua any of applicants, and even a person, who is not an applicant, and action is, one which is understood to be in rem, in that, procedures, under Code, would bind entire set of stakeholders, including whole of allottees - Held, yes - Whether further, requirement of allottees being drawn from same project, stands to reason and also does not suffer from any constitutional blemish - Held, yes - Whether object of Statute, admittedly, is to ensure that there is a critical mass of persons (allottees), who agree that time is ripe to invoke Code and to submit to inexorable processes under Code, with all its attendant perils - Held, yes - Whether if Legislature felt that threshold requirement representing a critical mass of allottees, alone would satisfy requirement of a valid institution of an application under Section 7, it cannot be dubbed as either discriminatory or arbitrary - Held, yes - Whether a class within a sub-class, is indeed not antithetical to guarantee of equality under Article 14 and all allottees of a real estate project form a class - Held, yes - Whether if Legislature in its wisdom has found that greater good lies in conditioning an absolute right which existed in favour of an allottee by requirements which would ensure some certain element of consensus among allottees and that requirement is a mere one-tenth of allottees, it cannot be dubbed as an arbitrary or capricious figure - Held, yes - Whether though Legislature intended that in every application, filed under Section 7, by creditors covered by first proviso and by allottees governed by second proviso, should also be embraced by newly imposed threshold requirement for which, it was intended, should be complied within 30 days from date of Ordinance, this restriction was not to apply to those applications which stood admitted as on date of Ordinance - Held, yes - Whether in regard to first and second provisos, they have only prospective operation and creditors covered by these provisos are

not subjected to any time limit (except, no doubt, bar under Article 137 of Limitation Act), in matter of garnering requisite support; however, prescribing a time limit in regard to pending applications, cannot be, per se, described as arbitrary, as otherwise, it would be an endless and uncertain procedure - Held, yes - Whether impugned amendments made in section 7 is Constitutionally valid - Held, yes (Paras 135, 136, 140, 147, 151, 188, 196, 214, 220, 261, 366 and 372)

Section 11 of Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process – Persons not entitled to make application - Whether Explanation I was inserted to ensure that in circumstances contemplated in section 11, an application under Section 10 could not be made by any of categories of persons mentioned in definition of word 'corporate applicant' - Held, yes - Whether, thus, Explanation came to be inserted by impugned amendment apparently, interpreting section 11- Held, yes - Whether this Explanation is clearly clarificatory in nature and it will certainly apply to all pending applications also - Held, yes - Whether incorporation of clarificatory Explanation II in Section 11 by section 4 of IBC (Amendment) Act, 2020 that came into force on 28-12-2019 is Constitutionally valid - Held, yes (Paras 242, 243 and 372)

Section 32A of Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Liability for prior offence - Whether erecting a bar against action against property of corporate debtor when viewed in larger context of objectives sought to be achieved at forefront of which is maximisation of value of assets which again is to be achieved at earliest point of time cannot become subject of judicial veto on ground of violation of Article 14 - Held, yes - Whether attaining public welfare very often needs delicate balancing of conflicting interests; there is no basis at all to impugn Section 32A on ground that it violates Articles 19, 21 or 300A - Held, yes - Whether insertion of section 32A in Code by section 10 of IBC (Amendment) Act, 2020 stipulating liability for prior offences of erstwhile management of corporate debtor apparently important to new management to make a clean break with past and start on a clean slate, is Constitutionally valid - Held, yes (Para 258, 259 and 372)

Words and phrases: "allottee" and "real estate project" as occurring in Explanation to Section 5(8)*(f)* of Insolvency and Bankruptcy Code, 2016; word 'includes' in *Explanation-I* to Section 11 of Insolvency and Bankruptcy Code, 2016

CASES REFERRED TO:

Pioneer Urban Land & Infrastructure Ltd. v. Union of India (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 14), Chitra Sharma v. Union of India (2018) 96 taxmann.com 216/148 SCL 833 (SC) (para 20), Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. 1979 taxmann.com 210 (SC) (para 20), Nagpur Investment Trust v. Vithal Rao (1979) 1 SCC 500 (para 20), B.K. Educational Services (P.) Ltd. v. Parag Gupta & Associates (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 23), Swiss Ribbon (P.) Ltd. v. Union of India (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 23), Garikapati Veeraya v. N. Subbiah Choudhry AIR 1957 SC 540 (para

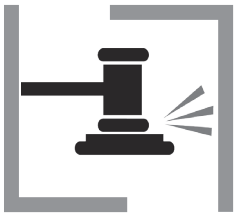
25), Thirumalai Chemicals Ltd. v. Union of India (2011) 11 taxmann.com 204/108 SCL 78 (SC) (para 25), Delhi Metro Rail Corporation Ltd. v. Tarun Pal Singh (2018) 14 SCC 161 (para 25), State of Karnataka v. Karnataka Pawn Brokers Association (2018) 91 taxmann.com 228/255 Taxmann 12 (para 26), Vasant Ganpat Padave v. Anant Mahadev Sawant (Civil Appeal No. 11774 of 2018, dated 18-9-2019) (para 29), Ameerunnissa Begum v. Mahboob Begum (1953) SCR 404 (para 31), State of Jammu & Kashmir v. Triloki Nath Khosa (1974) 1 SCC 19 (para 31), Murthy Match Works v. Asstt. Collector of C.Ex. (1974) 4 SCC 428 (para 31), Ajoy Kumar Banerjee v. Union of India (1984) 3 SCC 127 (para 31), Ashutosh Gupta v. State of Rajasthan (2002) 4 SCC 34 (para 31), Indira Sawhney v. Union of India (1992) Suppl. 3 SCC 217 (para 36), Lord Krishna Sugar Mills Ltd. v. Union of India (1960) 1 SCR 39 (para 36), State of Kerala v. N.M. Thomas (1976) 2 SCC 310 (para 36), State of West Bengal v. Rash Behari Sarkar (1993) 1 SCC 479 (para 36), State of Kerala v. Aravind Ramakant Modawdakar (1999) 7 SCC 400 (para 36), Sansar Chand Atri v. State of Punjab (2002) 4 SCC 154 (para 37), Union of India v. Godfrey Philips India Ltd. 1986 taxmann.com 508 (SC) (para 38), K. Nagaraj v. State of A.P. (1985) 1 SCC 523 (para 38), State of Himachal Pradesh v. Narain Singh (2009) 13 SCC 165 (para 38), Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad (1999) 4 SCC 468 (para 39), Howrah Municipal Corporation v. Ganges Rope Co. Ltd. (2004) 1 SCC 663 (para 39), Arcelonmittal India (P.) Ltd. v. Satish Kumar Gupta (2018) 98 taxmann.com 99/150 SCL 354 (SC) (para 39), Karnail Kaur v. State of Punjab (Civil Appeal No. 7474 of 2013, dated 22-1-2015) (para 39), Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta (2019) 111 taxmann.com 234 (SC) (para 39), Director of Public Works v. Ho Po Sang (1961) 3 WLR 39 (para 40), M.S. Shivananda v. Karnataka State Road Transport Corpn. (1980) 1 SCC 149 (para 40), Lalji Raja & Sons v. Firm Hansraj Nathuram (1971) 1 SCC 721 (para 40), Kanaya Ram v. Rajender Kumar (1985) 1 SCC 436 (para 40), J.P. Srivastava & Sons (P.) Ltd. v. Gwalior Sugar Co. Ltd. (2004) 56 SCL 1 (para 42), Anjum Hussain v. Intellicity Business Park (P.) Ltd. (Civil Appeal No. 1676 of 2019, dated 10-5-2019) (para 42), State of Gujarat v. Shri Ambica Mills Ltd. (1974) 4 SCC 656 (para 47), State of West Bengal v. Anwar Ali Sarkar AIR 1952 SC 75 (para 48), E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3 (para 49), Shayara Bano v. Union of India (Writ petition (c) No.118 of 2016, dated 22-8-2017) (para 49), Navtej Singh Johar v. Union of India writ Petition (C) No.572 of 2016, dated 6-9-2018 (para 50), Joseph Shine v. Union of India (Writ petition (C) No.194 of 2017, dated 27-9-2018 (para 50), Justice K.S. Puttaswamg v. Union of India (2017) (WP (C) (E) No.494 of 2012, dated 24-8-2017) No. (para 50), Hindustan Construction Co. Ltd. v. Union of India (2019) 111 taxmann.com 468 (SC) (para 50), Shreya Singhal v. Union of India (2015) 55 taxmann.com 387 (SC) (para 51), Innoventive Industries Ltd. v. ICICI Bank Ltd. (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 131), Rajahmundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao AIR 1956 SC 213 (para 142), Chairman, Tamil Nadu Housing Board v. T.N. Ganapathy (1990) 1 SCC 608 (para 155), Union of India v.

Tarsein Singh (Civil Appeal No. 7064 of 2019, dated 19-9-2019) (para 170), In re, Special Courts Bill, 1978 (1979) 1 SCC 380 (para 176), Dr. Subramanian Swami v. Director, CBI (2014) 45 taxmann.com 105/127 SCL 93 (SC) (para 178), Kesavananda Bharti Sripadagalvaru v. State of Kerala (1973) 4 SCC 225 (para 199), S. Sundaram Pillai v. R. Pattabiraman (1985) 1 SCC 591 (para 227), Ku. Sonia Bhatia v. State of U.P. (1981) 2 SCC 585 (para 227), Virtual Soft Systems Ltd. v. CIT (2007) 159 Taxman 155/289 ITR 83 (SC) (para 228), Hiralal Rattanlal v. State of U.P. (1973) 1 SCC 216 (para 233), Hitendra Vishnu Thakur v. State of Maharashtra (1994) 4 SCC 602 (para 262), Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Co. (2001) 8 SCC 397 (para 262), Pulborough Parish School Board Election, Bourke v. Nutt (1894) 1 QB. 725 (para 262), Abbott v. Minister of Lands (1895) AC 425 (para 274), Hamilton Gell v. White (1922) 2 K.B. 422 (para 276), Odgen Industries Pty. Ltd. v. Haider Doreen Lucas (1969) 3 WLR 75 (para 279), Isha Valimohamed v. Haji Gulam Mohamad & Haji Dada Trust (1974) 2 SCC 484 (para 281), Bansidhar v. State of Rajasthan (1989) 2 SCC 557 (Para 286), Bombay Stock Exchange v. V.S. Kandalgaonkar (2014) 51 taxmann.com 246/(2015) 230 Taxman 365 (SC) (para 287), New India Assurance Co. Ltd. v. Shanti Misra (1975) 2 SCC 840 (para 288), Vinod Gurudas Raikar v. National Insurance Co. Ltd. (1991) 4 SCC 333 (para 291), Union of India v. Harnam Singh (1993) 2 SCC 162 (para 291), V. Dhanapal Chettiar v. Yesodai Ammal (1979) 4 SCC 214 (para 292), D.C. Bhatia v. Union of India (1995) 1 SCC 104 (para 293), Mst. Bibi Sayeeda v. State of Bihar (1996) 9 SCC 516 (para 294), Gopeshur Pal v. Jiban Chandra Chandra AIR 1914 Cal. 806 (para 295), Rameshwar v. Jot Ram (1976) 1 SCC 194 (para 297), Mohinder Kumar v. State of Haryana (1985) 4 SCC 221 (para 302), D.C Bhatia *v.* Union of india (1995) SCC 104 (Para 302), West v. Gwynne (1910) WLR 976 (para 306), M.P. Steel Corporation v. CCE (2015) 57 taxmann.com 399/51 GST 435 (SC) (para 308), Mardia Chemicals Ltd. v. Union of India (2004) 51 SCL 513 (SC) (para 312), P.D. Aggrawal v. State of U.P. (1987) 3 SCC 622 (para 317), Darshan Singh v. Ram Pal Singh (1992) 1 Suppl. SCC 191 (para 319), K.S. Paripoornan v. State of Kerala (1994) 5 SCC 593 (para 322), State Bank's Staff Union (Madras Circle) v. Union of India AIR 2005 SC 3446 (para 323), Delhi Transport Corpn. v. DTC Mazdoor Congress (1991) Suppl. (1) SCC 600 (para 326), Vijay v. State of Maharashtra (2006) 6 SCC 289 (para 328) and L'office Cherifien Des Phosphates v. Yamashita Shinnihon Steamship Co. Ltd. (1994) 1 All ER 20 (HL) (para 342).

Vaibhav Manu Srivastava, AOR, Akash Vajpayee, Adv., Akshay Ravi, Adv., Krishnamohan K. Menon, AOR, Chaitanyashil Priyadarshi, Adv., Ms. Dania Nayyar, Adv., Ms. Parul Sachdeva, Adv., Namit Saxena, AOR, Piyush Singh, Adv., Aditya Parolia, Adv., Akshay Srivastava, Adv., Nithin Chandran, Adv., Rajesh Kumar, Adv., Gaurav Goel, AOR, Ashwarya Sinha, AOR, Deepak Anand, AOR, Mareesh Pravir Sahay, AOR, Ms. Eccha Shukla, Adv., Ms. Awantika, Adv., Sudhir Kumar Gupta, AOR, Shikhil Suri, Adv., Shiv Kumar Suri, AOR, Ms. Madhu Suri, Adv., Ms. Shilpa Saini, Adv., Ms. Nikita Thapar, Adv., Ms. Vinishma Kaul, Adv., Ms. Priyanjali Singh, AOR, Ms. Rashi Bansal, AOR, Dinesh Chandra Pandey, AOR, Dhruv Gupta, Adv., Arjun Singh Bhati, AOR,

Annam D. N. Rao, AOR, Rahul Mishra, Adv., Saurabh Trivedi, AOR, Ms. Purti Marwaha Gupta, Adv., Ms. Anindita Pujari, AOR, Arvind Kumar Gupta, Adv., Ms. Henna George, Adv., Ms. Deval Singh, Adv., Om Narayan, Adv., E. C. Agrawala, AOR, Ms. Bharti Tyagi, AOR, Rajesh Goyal, AOR, Sumit Gehlawat, Adv., Tervernder Singh, Adv., Abhishek Bharadwaj, Adv., Pai Amit, AOR, Ms. Pankhuri Bharadwaj, Adv., Rakesh Taneja, Adv., Pai Amit, AOR, Parshuram A.L., Adv., Rohit R. Saboo, Adv., Kumar Vaibhav, Adv., Ankit Agrawal, Adv., Rahat Bansal, Adv., Annam Venkatesh, AOR, S.K. Gandhi, Adv., Ms. Manjula Gandhi, Adv., Shiv Kumar Pandey, Adv., Shivanshu Kumar, Adv., Chandrashekhar A. Chakalabbi, Adv., Himanshu, Adv., Awanish Kumar, Adv., Anshul Rai, Adv., Mayank Pandey, AOR, Ms. Misha Rohatgi, AOR, and Pallav Mongia, AOR, *for the Petitioner.*

Arvind Kumar Sharma, AOR, Ms. Charu Ambwani, AOR, Sajan Poovayya, Sr. Adv., Amar Gupta, Adv., Divyam Agarwal, AOR, Daksh Ahluwalia, Adv., Ms. Pallavi Kumar, Adv., Adhiraj Gupta, Adv., Pratibhanu Singh, Adv., Shikhar Maniar, Adv., Ms. Raksha Aggarwal, Adv., Hirendranath, Adv., Santanam Swaminadhan, Adv, Ms. Prakruti Golechha, Adv, Ms. Abhilasha Shrawat, Adv, Mrs. Aarthi Rajan, AOR, Keshav Mohan, Adv., Prashant Kumar, Adv., R.K Awasthi, Adv., Piyush Vatsa, Adv., Ms. Ritu Arora, Adv., Santosh Kumar - I, AOR, Rajesh P., AOR, Manoranjan Sharma, Adv., Prabhakar Tiwari, Adv., Krishna Dev Jagarlamudi, AOR, Vikram Hegde, AOR, Rahul Kumar, Adv., *for the Respondent.*



(2021) 125 taxmann.com 201 (Delhi)

HIGH COURT OF DELHI

Skillstech Services (P.) Ltd. *v.* Registrar, National Company Law Tribunal, New Delhi

PRATHIBA M. SINGH, J.
W.P.(C) NO. 474 OF 2021
CM APPL. NO. 1227 OF 2021
JANUARY 13, 2021

Section 60, read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Petitioner filed petition seeking listing of its petition, under section 9 before appropriate bench of NCLT - Petitioner submitted that Registrar of NCLT had failed to even list petitioner's matter before appropriate bench of NCLT, on ground that threshold of pecuniary jurisdiction of NCLT had been amended by a notification dated 24-11-2020, from Rs. 1 lakh to Rs. 1 crore - However, it was found that question as to whether NCLT had jurisdiction to entertain a particular case or not could not be determined by registrar in administrative capacity - Registrar would have to place matter

before appropriate bench of NCLT, for said question to be judicially determined and appropriate bench of NCLT would have to take a considered view as to whether notice was liable to be issued in matter or not - Further, question as to whether above notification applied to a particular petition that had been filed prior to said notification or not was also a question to be determined by Bench of NCLT and not by Registrar of Tribunal - Whether therefore, petition under section 9, moved by petitioner before NCLT, was to be placed by registrar, NCLT before an appropriate bench for proceeding further in accordance with law - Held, yes (Paras 6 to 8)

CASES REFERRED TO

Tharakan Web Innovations (P.) Ltd. v. *Cyriac Njavally* (IA No. 175/KOB/2020) (para 4).

Swaroop George, Adv *for the Petitioner*. **Harish Vaidyanathan Shankar**, **Akash Meena**, **Ms. Kinjal Shrivastava** and **Varun Kishore**, Advs. *for the Respondent.*

ORDER

1. This hearing has been done by video conferencing.

2. The present petition has been filed by the Petitioner seeking listing of its petition, under section 9 of the Insolvency and Bankruptcy Code, 2016, before the appropriate bench of the National Company Law Tribunal (hereinafter, "NCLT").

3. The case of the Petitioner is that the Registrar of the NCLT has failed to even list the Petitioner's matter before the appropriate bench of NCLT, on the ground that the threshold of the pecuniary jurisdiction of the NCLT has now been amended by a notification dated 24th November, 2020, from Rs. 1 lakh to Rs. 1 crore.

4. Mr. George, ld. counsel for the Petitioner, submits that the question as to whether the NCLT has the pecuniary jurisdiction or not, cannot be decided by the Registrar of the NCLT, but in fact the same ought to be looked into and determined by an appropriate bench of the NCLT, after appreciating the fact situation involved. Reliance is placed upon the view of the NCLT, Kochi in *Tharakan Web Innovations (P.) Ltd.* v. *Cyriac Njavally* IA Nos. 175/KOB/2020 in IBA/34/KOB/2020 wherein the Tribunal has held that if disputes had arisen prior to the outbreak of the pandemic, the said notification may not apply, as the notification cannot be made applicable retrospectively.

5. Mr. Harish Vaidyanathan, ld. Counsel appearing for the Respondent submits that the said judgment of the NCLT, Kochi Bench has been stayed by the Kerala High Court.

6. This court is of the opinion that the question as to whether the NCLT has jurisdiction to entertain a particular case or not cannot be determined by the Registrar in the administrative capacity. The Registrar would have to place the matter before the appropriate bench of the NCLT, for

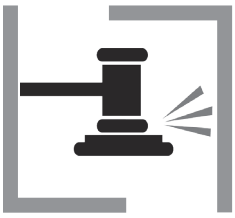
the said question to be judicially determined. The appropriate bench of the NCLT would have to then, take a considered view as to whether notice is liable to be issued in the matter or not.

7. The question as to whether the notification dated 24th March, 2020 applies to a particular petition that has been filed prior to the said notification or not is also a question to be determined by the Bench of the NCLT and not by the Registrar of the Tribunal.

8. Accordingly, it is directed that the petition under section 9 of the IBC, moved by the Petitioner before the NCLT, shall be placed by the Registrar, NCLT before an appropriate bench for proceeding further in accordance with law. The listing of the petition is directed to be done within a period of ten days from today.

9. Advance intimation of listing of the said matter shall be given to the Petitioner's counsel by the Registrar.

10. The present petition and all pending applications are disposed of, in the above terms.



(2021) 125 taxmann.com 202 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI BENCH

Kalinga Allied Industries India (P.) Ltd. *v.* Hindustan Coils Ltd.

JUSTICE BANSI LAL BHAT, ACTG. CHAIRPERSON
JARAT KUMAR JAIN, JUDICIAL MEMBER
AND SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 518 OF 2020†
JANUARY 11, 2021

Section 31, read with section 30 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether statutory mandate on Adjudicating Authority under section 31(1) is to ascertain that resolution plan meets requirement of sub-sections (2) and (4) of section 30 - Held, yes - Whether Adjudicating Authority has a very limited power to judicial scrutiny and statutory provision does not permit Adjudicating Authority to interfere with commercial wisdom of Committee of Creditors (CoC) - Held, yes - Whether even for maximization of value of assets of corporate debtor, Adjudicating Authority is not entitled to overturn business decision of CoC - Held, yes - Whether therefore, when application for approval of Resolution Plan is pending before Adjudicating Authority,

at that time, Adjudicating Authority cannot entertain an application of a person who has not participated in CIRP even when such person is ready to pay more amount in comparison to successful Resolution Applicant - Held, yes - Whether if a resolution plan is considered beyond time limit, then it will make a never-ending process - Held, yes (Paras 13 and 20)

CASES REFERRED TO

Chhattisgarh Distilleries Ltd. v. *Dushyant Dave* (2020) 117 taxmann.com 385 (NCL-AT) (paras 4,16), *Kotak Investment Advisors Ltd.* v. *Krishna Dharamshi* (C.A. (AT) (Ins.) Nos. 344-345 of 2020) (para 4), *Sharwan Kr. Agrawal Consortium* v. *Rituraj Steel (P.) Ltd.* (2020) 117 taxmann.com 302/160 SCL 210 (NCL-AT) (para 6), *Binani Industries Ltd.* v. *Bank of Baroda* (C.A. (AT) (Ins.) No. 82 of 2018) (para 10), *Swiss Ribbon (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 10), *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567 (SC) (para 12), and *Committee of Creditors Essar Steel India Ltd.* v. *Satish Gupta* (2019) 111 taxmann.com 234 (SC) (para 16).

Abhijeet Sinha, **Rakesh Wadhwa** and **Sanwal Tiberwal,** Advs. *for the Appellant.* **Virender Ganda**, Sr. Adv., **Vipul Ganda**, **Vishal Ganda**, **Ayandeb Mitra** and **Ms. Shelly Khanna**, Advs. *for the Respondent.*

JUDGMENT

Jarat Kumar Jain, Judicial Member. - The Appellant, Kalinga Allied Industries India Pvt. Ltd. filed this Appeal against the impugned order dated 27-2-2020 passed by Ld. Adjudicating Authority (National Company Law Tribunal) Special Bench, New Delhi. Whereby allowed the Interlocutory Application No. 1513 (PB) of 2020 filed by M/s. Hindustan Coils Ltd. (respondent No. 1) and directed that the application along with the proposed plan of respondent No. 1 be placed before committee of creditors (in short, CoC) for consideration.

2. Brief facts of this case are that pursuant to the expression of interest issued by RP on 24-8-2018, the Appellant submitted a Resolution Plan in time. After several rounds of deliberations by the CoC revised Resolution Plan was submitted by the Appellant on 19-12-2018. The same was approved by the CoC by requisite majority in the 13th meeting on 28-12-2018. Thereafter, the RP filed an Application under section 30(6) of the Insolvency & Bankruptcy Code (In short I&B Code) for approval of Resolution Plan in the month of January, 2019. Thereafter, various objections were filed before the Adjudicating Authority which were heard and disposed of. Some time in the month of February 2020, the Respondent No. 1 filed an application I.A. No. 1513 (PB) of 2020 seeking direction for consideration of its Resolution Plan which is 12% more than the offer of the successful Resolution Applicant (Appellant herein).

3. Learned Adjudicating Authority after hearing the parties held that the Respondent No. 1 offers to pay Rs. 50.01 Crore which is Rs. 4.9 Crore more than offered by the successful resolution applicant (Appellant). It is

also held that the object of the I&B Code encourages maximization of the value of assets of the corporate debtor, which is also advantageous to all the stakeholders. Therefore, it is directed that the proposed plan of the Respondent No. 1 be placed before the CoC for consideration. Being aggrieved with this order, the Appellant has filed this Appeal.

4. Learned Counsel for the Appellant submitted that Ld. Adjudicating Authority has no Jurisdiction to entertain any Application from a person who has not participated in Corporate Insolvency Resolution Process (In short CIRP) for consideration of a purported better plan or a plan with a better value ignoring the statutory time lines under section 12 of the I&B Code and even assuming jurisdiction, there was no occasion for the Ld. Adjudicating authority to pass a direction to the CoC to consider the plan of Respondent No. 1. The Adjudicating authority cannot *suo motu* direct the CoC to consider new resolution plan and reconsider already approved resolution plan. For this purpose, placed reliance on the Judgment of this Appellate Tribunal in the case of *Chhattisgarh Distilleries Ltd.* v. *Dushyant Dave* (2020) 117 taxmann.com 385 (NCL-AT). The Respondent No. 1 never underwent to rigors of compliance before the CoC by submitting the expression of interest with other prospective Resolution Applicants. It is further submitted that from the order dated 27-2-2020, it is clear that the Respondent No. 1 was well aware of the Resolution Plan amount offered by the Appellant and accordingly the Respondent No. 1 has enhanced its offer before the Ld. Adjudicating Authority in the guise of maximization of realization. Once the Resolution Plan has been opened and the Fundamentals and Financials of the plan and offer made therein were disclosed to all the participants, including RP. After this, no further fresh bid or offer could have been accepted or considered. For this purpose, placed reliance on the judgment of this Appellate Tribunal in the Case of *Kotak Investment Advisors Ltd.* v. *Krishna Dharamshi* (C.A. (AT) (Ins) Nos. 344-345 of 2020). (See para 23)

5. It is also submitted that the Appellant's plan was approved by the CoC and the Application for approval of plan under section 31 of the I&B Code, was pending before the Adjudicating Authority. Meanwhile, the Respondent No. 1 has filed the Application which is beyond the period of 330 days. Therefore, the Application was not maintainable.

6. Learned Counsel for the Appellant further submitted that once the plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under section 31(1) of the I&B Code is to ascertain

that a Resolution Plan meets the requirements of sub-section (2) of section 30 thereof. The Adjudicating Authority has a very limited power to judicial scrutiny and statutory provision does not permit the Adjudicating Authority to interfere with the commercial wisdom of the CoC. Even for maximization of value of the assets of the Corporate Debtor, the Adjudicating Authority is not entitled to overturn the business decisions of the CoC. For this proposition, placed reliance on the decision of this Appellate Tribunal in the case of *Sharwan Kr. Agrawal Consortium* v. *Rituraj Steel (P.) Ltd.* (2020) 117 taxmann.com 302/160 SCL 210.

7. Learned Counsel for the Appellant submitted that in the impugned order it is inadvertently mentioned that Learned Counsel for the Resolution Professional raised no specific objection in regard to the Application filed by the Respondent No. 1. For correction of this fact, RP has already filed an Application before the Adjudicating Authority, otherwise also there can be no estopple against the law and the Appellant can very well maintain this Appeal. The Impugned Order is erroneous and prejudicial to the interest of the Appellant. Therefore, it may be set aside.

8. *Per Contra* Learned Counsel for the Respondent No. 1 submitted that the Appellant has made mis-representation in the Appeal and tried to misguide this Appellate Tribunal. On 22-10-2019 a new Application C.A. No. 1545(PB)/2019 was listed and heard wherein 3rd party stranger Applicant namely Kalinga Enterprises Pvt. Ltd. seeking direction from the Adjudicating Authority to direct the CoC to consider the Resolution Plan. Kalinga Enterprises Pvt. Ltd. is a related party of the Appellant as defined under section 5(24)(*d*) of the I&B Code and section 2(76) of the Companies Act, 2013 and this fact has been admitted by the Appellant in his rejoinder. The Appellant and the Kalinga Enterprises Pvt. Ltd. being a common director and part of the consortium.

9. Learned Counsel for the Respondent No. 1 further submitted that the impugned order grants an opportunity for CoC to evaluate better Resolution Plan. The Appellant has itself delayed the CIRP of the Corporate Debtor. The Appellant dragged the CIRP by two years by abusing its position as the only Resolution Applicant.

10. It is further submitted that the impugned order was dictated in the open Court in the presence of all the parties, however, none of the parties objected it. The object of the I&B Code is maximization of the value of the assets of the Corporate Debtor. Keeping in view that the offer of the Respondent No. 1 is around 12% more than the offer of the successful Resolution Applicant. Therefore, the order does not call for any interference

by this Appellate Tribunal. The Tribunal while passing the order followed the settled principle enumerated in the judgment of Hon'ble Supreme Court in the cases of *Binani Industries Ltd.* v. *Bank of Baroda* (C.A. (AT) (Ins.) No. 82 of 2018) and *Swiss Ribbon (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365. The Appeal is premature as the CoC has not yet deliberated and rejected the Appellant's plan. There will be no prejudice to the Appellant since the Resolution Plan of the Appellant has not yet attained finality. Thus, the Appeal is liable to be dismissed.

11. After hearing Learned Counsels for the parties we have perused the record following issues are crop up for our consideration.

i. What are the powers of the Adjudicating Authority under section 31 of the I&B Code?

ii. Whether the Adjudicating Authority can direct the CoC to consider the Resolution Plan of a person who was not part of CIRP?

iii. Whether the conduct of the Appellant during the pendency of the CIRP can be considered in this Appeal?

Issue No. 1

12. The Hon'ble Supreme Court in the matter of *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567 held that once the Resolution Plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under section 31(1) of the I&B Code is just to test the Resolution Plan with reference to provisions of section 30(2). This Appellate Tribunal in the Case of *Sharvan Kumar Agarwal Consortium* (*supra*) held that once the Plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under section 31(1) of the I&B Code is to ascertain that the Resolution Plan meets the requirement of sub-sections (2) & (4) of section 30 thereof. The Adjudicating Authority has a very limited power to judicial scrutiny and statutory provision does not permit the Adjudicating Authority to interfere with the commercial wisdom of the CoC. Even for maximization of value of assets of the Corporate Debtor. The Adjudicating Authority is not entitled to overturn business decision of the CoC.

13. With the aforesaid, we are of the considered view that the Adjudicating Authority has a very limited power of judicial scrutiny under section 31 of the I&B Code and the statutory provision does not permit the Adjudicating Authority to interfere with the commercial wisdom of the CoC. Even for maximization of value of assets of the Corporate Debtor. In the impugned order Ld. Adjudicating

Authority erroneously assumed that it is the duty of the Adjudicating Authority to satisfy itself that the price offer is reasonable and adequate. For this purpose, considered the liquidation value and fair value of the Corporate Debtor and price offered by successful Resolution Applicant and reached a conclusion that the Respondent No. 1's offer is around 12% more than the offer of successful Resolution Applicant.

14. We are of the considered view that Ld. Adjudicating Authority has exceeded his jurisdiction and indulge in quantitative analysis which is not permissible under section 31 of the I&B Code.

Issue No. 2

15. In pursuant to the expression of interest issued by RP on 24-8-2018 the Appellant submitted a Resolution Plan. After several rounds of deliberation by the CoC revised Resolution Plan was submitted by the Appellant on 19-12-2018. The same was approved on 28-12-2018 by the CoC in the 13th meeting by requisite majority. Thereafter, the RP filed an Application under section 30(6) of the I&B Code for approval of Resolution Plan in the month of January, 2019 and sometime in the month of February, 2020 the Respondent No. 1 filed an Application seeking direction for consideration of its Resolution Plan. Admittedly the Respondent No. 1 has not submitted any Resolution Plan pursuant to the expression of interest issued by the RP. Thus, the Respondent No. 1 is not part of CIRP. The Respondent No. 1 has filed Application directly before the Adjudicating Authority. The Adjudicating Authority in the guise of maximization of the value of assets of the Corporate Debtor directed that the Respondent No. 1's Application and Resolution Plan be put up before the CoC for consideration. There is no provision in the code or regulation which provides that while exercising the power under section 31 of the I&B Code the Adjudicating Authority can direct the CoC to consider the Resolution Plan of such person who has not been part of CIRP. Otherwise also if such procedure is adopted then the CIRP will be frustrated. Once the Resolution Plan has been opened and fundamentals and financials of the Plan and offer made therein were disclosed to all the participants including RP. Then anyone can enhance its offer before the Adjudicating Authority in the guise of maximization of realisation. Therefore, no further fresh bid or offer could have been accepted or considered as held by this Appellate Tribunal in the case of *Kotak Investment Advisors Ltd.* (*supra*) (See Para 23).

16. This Appellate Tribunal in the case of *Chhattisgarh Distilleries Ltd. v. Dushyant Dave* (2020) 117 taxmann.com 385 (NCL-AT) in the light of the pronouncement of

Hon'ble Supreme Court in the case of *Committee of Creditors Essar Steel India Ltd. v. Satish Gupta* (2019) 111 taxmann.com 234 held that:

> "In the light of the above pronouncement of Hon'ble Supreme Court, we have examined the issues raised in these Appeals. Admittedly, the A-1 filed its resolution plan before the Adjudicating Authority on 13-2-2019 whereas, the last date for submission of Resolution Plan before RP was 15-10-2018. Resolution plan of successful Resolution Applicant *i.e.* Dera Finvest Pvt. Ltd. (R2) was approved by 98.72% of the Committee of Creditor in e-voting conducted on 1-11-2018 and 2-11-2018. When the Resolution Plan is filed before the Adjudicating Authority then the Authority has to satisfy that the Resolution Plan approved by the Committee of Creditor fulfils the requirements as specified in sub-section (2) of section 30. However, the Adjudicating Authority cannot direct the CoC to consider the second Resolution Plan submitted before the Authority although the second Resolution Applicant is ready to invest more amount in comparison to first Resolution Applicant. Learned Adjudicating Authority has rightly held that Adjudicating Authority cannot *suo motu* direct the CoC to consider new resolution plan and reconsider already approved Resolution Plan. The Hon'ble Supreme Court in the above referred judgment held that under section 30(2) of I&B Code, decision of committee of Creditor is purely Commercial and cannot be adjudicated by the Adjudicating Authority. Thus, we are of the view that Adjudicating Authority is well within its jurisdiction while rejecting the application of A-1."

17. With the aforesaid, we are of the considered view that Ld. Adjudicating Authority has erroneously entertained the Application and Resolution Plan of the Respondent No. 1 and directed the RP to put up the same before the CoC for consideration.

Issue No. 3

18. Learned Senior Counsel for the Respondent No. 1 has raised the objection that the Appellant mis-represented in the Appeal and mis guided this Appellate Tribunal. Admittedly, a new Application C.A. No. 1545/PB/2019 was filed by Kalinga Enterprises Ltd. (In short 'KEL') as a third party and seeking direction from the Adjudicating Authority to direct the CoC to consider its Resolution Plan. KEL is a related party to the Appellant. The Adjudicating Authority *vide* order dated 22-10-2019

directed the RP to place Resolution Plan of the Applicant KEL before the CoC. KEL and the Appellant have a common Director and part of same consortium. The Learned Counsel for the Appellant submitted that the objection raised by the Respondent No. 1 has no force on following grounds:

i. The I&B Code defines under section 5(24)(*d*) related party with reference to a Corporate Debtor and not with reference to Resolution Applicant.

ii. KEL and the Appellant were a part of consortium, this fact was disclosed in the Application filed by KEL.

19. We have considered the aforesaid objection raised by Learned Counsel for the Respondent No. 1 we are of the view that the order passed by the Adjudicating Authority on 22-10-2019 has no relevance with this Appeal. Therefore, we find no force in the objection raised by Learned Counsel for the Respondent No. 1.

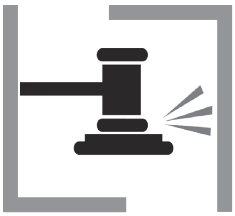
20. With the aforesaid, we are of the view that when the Application for approval of Resolution Plan is pending before the Adjudicating Authority at that time the Adjudicating Authority cannot entertain an Application of a person who has not participated in CIRP even when such person is ready to pay more amount in comparison to the successful Resolution Applicant. If a Resolution Plan is considered beyond the time limit then it will make a never-ending process. Thus, impugned order is not sustainable in law as well as in fact. The impugned order is hereby set aside.

21. The Adjudicating Authority is directed to proceed with the Application filed by the RP for approval of Resolution Plan as per law.

The Appeal is allowed. However, no order as to costs.

▪

†Arising out of order dated 27-2-2020 passed by NCLT, Special Bench, New Delhi.



(2021) 124 taxmann.com 401 (NCLT - Ahd.)

NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD BENCH

POSCO India Pune Processing Center (P.) Ltd. *v.* Dhaval Jitendrakumar Mistry

MS. MANORAMA KUMARI, JUDICIAL MEMBER
AND CHOCKALINGAM THIRUNAVUKKARASU, TECHNICAL MEMBER

I.A. NO. 514 OF 2020
CP (IB) NO. 268 OF 2018
JANUARY 6, 2021

Section 9, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Application by operation credit - Adjudicating Authorities - Whether when law is altered during pendency of an action, rights of parties are decided according to law as it existed when action began, unless new statute and/or any notification shows a clear intention to very such right - Held, yes - Whether where corporate debtor was not an MSME on date of initiation of CIRP under section 9 of IBC, he could not be treated as MSME later on and could not take benefit of MSME in view of amendment in MSME classification norms vide notification dated 1-6-2020 with effect from 1-7-2020 by having its retrospective effect - Held, yes (Paras 13 and 14)

Section 25 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution professional - Duties of - Whether on admission of company petition, management is suspended and Resolution Professional (RP) takes over powers and functions of corporate debtor and has to discharge his duties as per section 25 - Held, yes - Whether section 25 does not give any power to RP to change nature and character of corporate debtor that too during CIRP period - Held, yes - Whether therefore, where on date of admission of company petition corporate debtor was not under category of MSME, corporate debtor with permission of RP could not have registered itself as MSME - Held, yes (Paras 4 and 5)

CASES REFERRED TO

Keshoram v. *State of Bombay* AIR 1951 SC 128 (SC) (para 9).

Abhay Itagi, Adv. *for the Applicant.* **Atul Sharma**, Adv. *for the Respondent.*

ORDER

1. The instant application is filed under section 60(5) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as 'IB Code') with the following prayers:

   i. That the Resolution Professional may be directed to forthwith

furnish the material information in respect of the Corporate Debtor;

ii. That the Resolution Professional be directed to extend the date for submission of Resolution Plan by 30 days from the date of receipt of material information;

iii. That the Resolution Professional be replaced with any other person who is competent, fair and unbiased;

iv. That the erstwhile promoters be held to be disqualified to submit the Resolution Plan in respect of the Corporate Debtor;

v. That the Resolution Professional be directed not to accept the Resolution Plan that may be submitted by the erstwhile promoters either individually, jointly or in any other capacity.

2. The brief facts of the case are as under:

2.1 CP(IB) No. 268 of 2018 was filed by Operational Creditor, namely, POSCO India Pune Processing Center Private Limited against the Corporate Debtor *viz.*, M/s. Poggenamp Nagatsheth Powertronics Private Limited under section 9 of the IB Code, seeking initiation of Corporate Insolvency Resolution Process (hereinafter referred as "CIRP"), which was admitted by this Adjudicating Authority *vide* its Order dated 22-1-2020 and Mr. Dhaval Jitendrakumar Mistry was appointed as Resolution Professional (hereinafter referred as "RP") of the Corporate Debtor, after replacing the Interim Resolution Professional *vide* order dated 3-6-2020.

2.2 It is stated in the application that the Applicant and the erstwhile promoters of the Corporate Debtor were found to be the two prospective Resolution Applicants. Thereafter, the RP intimated both the prospective Resolution Applicants to file their objections to the list of prospective Resolution Applicants on or before 18-7-2020. The provisional list indicated the erstwhile promoters and the Applicant as the two prospective Resolution Applicants, to which the Applicant did not objected after seeing erstwhile promoters as one of the prospective resolution applicant as list was provisional and RP would assess the applicability of the erstwhile promoters under section 29A of the IB Code.

2.3 It is further stated by the Applicant that the name of

the erstwhile promoters were also included in the final list, which was objected by the Applicant *vide* letter dated 30-7-2020 wherein the Applicant informed the RP that the erstwhile promoters are disqualified under section 29A of the IB Code and RP shall reconsider their eligibility. During the course of the correspondence exchanged between the parties, RP never disclosed the status of the Corporate Debtor and always asserted that erstwhile promoters are not disqualified under section 29A of the IB code.

2.4 It is stated by the Applicant that only on 12-8-2020, for the first time, RP disclosed the status of the Corporate Debtor being an Micro, Small and Medium Enterprise (hereinafter referred as 'MSME'), which was never disclosed through Information Memorandum or through the correspondences seeking reconsideration of eligibility of the erstwhile promoters. Hence, the erstwhile promoters being eligible to submit the Resolution Plan in light of section 240A of the IB Code since the Corporate Debtor is registered under Micro, Small and Medium Enterprises Development Act, 2006 (as amended w.e.f. 1-7-2020).

2.5 Thus, it is pertinent to note that the RP has failed to disclose certain information pertaining to the Corporate Debtor in the Information Memorandum which has made the Applicant handicapped to draw a viable financial proposal and prepare a Resolution Plan in the absence of the information/ documents sought for.

3. Heard both sides and gone through the records, from the prayer it appears that the Applicant's main grievance is that 30 days time shall be extended for submission of Resolution Plan. However, it is a matter of record that at the behest of the Applicant, the Company Petition was admitted on 22-1-2020 and thereafter, in the month of July, 180 days was expired and further 90 days expired in the month of October. On exemption of the lockdown period, CIRP expired somewhere in end of December, 2020. In view of that, when sufficient time in CIRP was there, it is expected from the Applicant to file the Resolution Plan in time as time is the essence of the IB Code and if any time is permitted beyond the prescribed period, the very object of the IB Code will be frustrated. In that view, sufficient time has been availed by the Applicant and no direction can be given to the RP beyond the stipulated time given under the IB Code.

4. With regard to the issue that the promoters have filed its Resolution Plan, claiming Corporate Debtor to be the MSME. On going through the record, it is found that the Corporate Debtor on the date of

admission of the Company Petition was not under the category of MSME. However, subsequently the Government of India *vide* its notification dated 1-6-2020 has carried out certain changes in the criteria for classification of Micro, Small and Medium Enterprises and in view of that the Corporate Debtor is claiming itself to be a MSME as the criteria for classification of MSME has been amended with effect from 1-7-2020. In view of such amendment, Corporate Debtor claiming itself to fall under the criteria of MSME and is keen to revive the Corporate Debtor and make it a going concern, so that the value of the assets can be maximised, while the stakeholders can be benefited. It is also a matter of record that during CIRP, Corporate Debtor with permission of RP registered the Corporate Debtor as MSME. However, it is expected from the RP that while discharging duty, RP must adhere to the provisions of the IB Code *i.e.* section 25 of the IB Code, which does not give any power to the RP to change the nature and character of the Corporate Debtor, that too during the CIRP period.

5. Admittedly, in the reply filed by the RP, he has stated that Corporate Debtor (suspended management) has requested him to register the Corporate Debtor as MSME. It shall be noted that on admission of the Company Petition, the management is suspended and RP takes over the powers and functions of the Corporate Debtor and he has to discharge his duty as per section 25 of the IB Code. He has no authority to give direction/ permission to the suspended management for changing the nature of the Corporate Debtor. Under such circumstances as also on perusal of the records, it appears that RP has never objected in getting change the nature of the Corporate Debtor, on the contrary he remained silent.

6. While going through the amendment notification dated 1-6-2020, it *prima facie* appears prospective one, as the date of its effect is given as 1-7-2020. For the sake of convenience, the notification is reproduced hereinbelow:

MINISTRY OF MICRO, SMALL AND MEDIUM ENTERPRISES NOTIFICATION

New Delhi, the 1st June, 2020

S.O. 1702(E).—In exercise of the powers conferred by sub-section (If read with sub-section (9) of section 7 of the (Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006) and in supersession of the notification of the Government of India, Ministry of Small Scale Industries, dated the 29th September, 2006, published in the Gazette of India, Extraordinary, Part II, Section3, sub-section (ii), *vide* S.O. 1642(E), dated the 30th September, 2006 except as respects things done or omitted to be done before such supersession, the Central Government, hereby

notifies the following criteria for classification of micro, small and medium enterprises, namely:—

(*i*) a micro enterprise, where the investment in Plant and Machinery or Equipment does not exceed one crore rupees and turnover does not exceed five crore rupees;

(*ii*) a small enterprise, where the investment in Plant and Machinery or Equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees;

(*iii*) a medium enterprise, where the investment in Plant and Machinery or Equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees.

This notification shall come into effect from 1-7-2020.....

On plain reading of the notification, it shows that though it is notified on 1-6-2020, however, its effect has expressly been given on and from 1-7-2020 *i.e.* prospectively. That itself has drawn line of its effective date.

7. It is to be mentioned herein that, on the date of filing of application under section 9 of the IB Code and on the initiation of CIRP *i.e.* 22-1-2020, the Corporate Debtor does not fall under the criteria of classification of MSME, however, in view of amendment made *vide* notification dated 1-6-2020, as said hereinabove, the Corporate Debtor automatically assumed itself to be a MSME and trying to take the benefit of amendment in MSME criteria by giving a retrospective effect.

8. It is well established principle of interpretation that no statute can be given retrospective effect unless statute so directs either expressly or by necessary implication. Nor can a power be exercised retrospectively, unless the statute expressly so provided.

9. It is fundamental rule of construction that no statute shall be so construed to have retrospective operation unless such a construction appears very clear in the terms of the Act or arises by necessary and distinct implication. Thus, cardinal principle of construction that every statute is "*prima facie*" prospective, unless it is expressly or by necessary implication made to have retrospective operation as observed by Hon'ble Supreme Court in *Keshoram* v. *State of Bombay* AIR 1951 SC 128. There is presumption of prospectively articulated in the legal maxim, "*nova constitutio futuris formam imponere debet, right non praeteritis*", *i.e.* a new law ought to regulate what is to follow, not the past, and this presumption operates unless shown to the contrary by express provision in the statute or is otherwise discernible by necessary implication.

10. The general rule that all statutes other than those which are merely

declaratory or which related only to matters of procedure or of evidence, are *prima facie* prospective and retrospective effect is not to be given to them unless, by express words or necessary implication.

11. It is admitted position that instant amendment came during pending action (*lis pedence*). It is also established principle that in the case of pending actions, the law is that the right of the parties is decided according to the law as it existed when the action was commenced unless a clear intention to the contrary is found in the new statute, as the cause of action is the demarcation line for initiating any proceeding and/or any application. In the present case, when application was filed and CIRP initiated, the Corporate Debtor was not falling in the criteria/classification of MSME, hence, the amendment benefit cannot be availed by the Corporate Debtor, when it is under CIRP by giving retrospective effect.

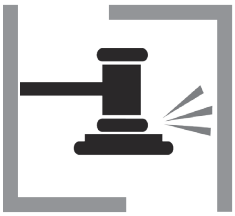
12. It is established principle that parties are governed by law in force at the date when a suit or proceeding is initiated, unless expressly laid down or by necessary implication inferred.

13. It is settled law that, if the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. In general, when law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute and/or any notification shows a clear intention to very such right.

While going through the notification dated 1-6-2020 of Government of India, it is clearly spelled that, it has to come into effect from 1-7-2020. Further, if there is nothing about retrospective effect in the notification, then its effect will be from the date of its issuance, however, in this notification effective date is clearly mentioned as 1-7-2020, however, sometime it is given retrospective effect, but to cure the defect or would be clarificatory in nature and hence retrospective.

14. Under the facts and circumstances, as discussed hereinabove, the Corporate Debtor at this stage cannot be treated as MSME and cannot take the benefit of MSME, in view of amendment *vide* notification issued on 1-6-2020, w.e.f. 1-7-2020, by having its retrospective effect when admittedly on the date of filing application under section 9 of the IB Code Corporate Debtor does not fall under the criteria of MSME. Hence, the question of not accepting the Resolution Plan filed by erstwhile promoters' does not arise as the erstwhile promoters' will be ineligible under section 29A of the IB Code to file the Resolution Plan.

15. Therefore, the Application is bad in the eye of law, hence, is not maintainable and stands rejected.



(2021) 125 taxmann.com 205 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Satish chand gupta v. Servel India (p) ltd.

VENUGOPAL M., JUDICIAL MEMBER
AND V.P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 502 OF 2020†

JANUARY 29, 2021

Section 5(8), read with sections 5(7) and 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Respondent/corporate debtor had accepted certain amounts from appellant against payment of interest and credited interest in a consistent manner against such amounts for a continuous period of five years - Whether therefore, bearing in mind that payment of interest on amounts borrowed by company was nothing but a consideration for time value of money and inasmuch as 'interest' is compensation paid by borrower to lender for using lender's money over a period of time, it was to be concluded that appellant's status was that of a 'financial creditor' as per section 5(7) read with section 5(8) - Held, yes - Whether further, fact that there was a default in payment of accepted amounts by corporate debtor, it comes within purview of definition of 'financial debt' - Held, yes - Whether thus, application filed by appellant/financial creditor under section 7 for initiation of CIRP would be clearly sustainable - Held, yes (Paras 33 and 34)

CASE REVIEW

Satish Chand Gupta v. *Servel India (P.) Ltd.* (2021) 125 taxmann.com 204 (NCLT - New Delhi) *set aside*.

CASES REFERRED TO

Nikhil Mehta & Sons v. *AMR Infrastructure Ltd.* (2017) 84 taxmann.com 163/143 SCL 278 (NCL - AT) (para 8), *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 8), *Shailesh Sangani* v. *Joel Gardoso* (2019) 103 taxmann.com 181/152 SCL 657 (NCL - AT) (para 12), *Dilworth* v. *Commissioner of Stamps* 1899 AC 99 (para 13), *Mahalakshmi Oil Mills* v. *State of Andhra Pradesh* 1990 taxmann.com 1344 (SC) (para 14), *Sushil Ansal* v. *Ashok Tripathi* (2020) 118 taxmann.com 569 (NCL - AT) (para 15) and *Sanjay Kewalramani* v. *Sunil Paramanand Kewalramani* (Co. Appl. (AT)(Ins.) No. 57 of 2018, dated 12-7-2018) (para 20).

Siddhant Buxy, Adv. *for the Appellant.* **Ms. Anju Bhushan** *for the Respondent.*

†Arising out of order passed by NCLT, New Delhi Bench-V in *Satish Chand Gupta* v. *Several India (P.) Ltd.*(2021) 125 taxmann.com 204.

Code and Conduct of Insolvency Professionals

Independence and impartiality

1. Prologue

As per the provisions of IBC, the role of Insolvency Professional *inter alia* includes managing the affairs of the corporate debtor as a going concern, appoint and convene meetings of the committee of creditors to decide upon resolution plans, collect, collate and admit claims of all creditors, comply with the procedure prescribed in law etc. Given the vital role of Insolvency Professional in Corporate Insolvency Resolution Process, its independence from the stakeholders and impartiality is of utmost significance.

The subject was also discussed in the Bankruptcy Law Reforms Committee wherein it was observed that, in administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution

proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner. The role of the IPs is thus vital to the efficient operation of the insolvency and bankruptcy resolution process.

Therefore, an Insolvency Professional must act independently, objectively, and with impartiality.

2. Legal Framework

As per Regulation 7(2) of the IBBI (CIRP) Regulations, 2016, an Insolvency Professional shall all times abide by the Code, rules, regulations, guidelines and the bye-laws of the insolvency professional agency with which he is enrolled and abide by the Code of Conduct.

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.**

"Independence and impartiality" clause of the Code of Conduct for Insolvency Professionals is briefly summarised as under:

Independence and impartiality

- An insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.
- In cases where the insolvency professional is dealing with assets of a debtor during liquidation or bankruptcy process, he must ensure that he or his relatives do not knowingly acquire any such assets, whether directly or indirectly unless it is shown that there was no impairment of objectivity, independence or impartiality in the liquidation or bankruptcy process and the approval of the Board has been obtained in the matter.
- An insolvency professional shall not take up an assignment under the Code if he, any of his relatives, any of the partners or directors of the insolvency professional entity of which he is a partner or director, or the insolvency professional entity of which he is a partner or director is not independent, in terms of the Regulations related to the processes under the Code, in relation to the corporate person/debtor and its related parties.
- An insolvency professional shall disclose the existence of any

pecuniary or personal relationship with any of the stakeholders entitled to distribution under section 53 or 178 of the Code, and the concerned corporate person/ debtor as soon as he becomes aware of it, by making a declaration of the same to the applicant, committee of creditors, and the person proposing appointment, as applicable.

- An insolvency professional shall disclose as to whether he was an employee of or has been in the panel of any financial creditor of the corporate debtor, to the committee of creditors and to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

- An insolvency professional shall not influence the decision or the work of the committee of creditors or debtor, or other stakeholders under the Code, so as to make any undue or unlawful gains for himself or his related parties, or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means to achieve any *mala fide* objectives.

Regulation 3 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 prescribes eligibility criteria for resolution professionals. It provides that An insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor. As per *Explanation* to regulation 3 of IBBI (CIRP) Regulations, 2016, a person shall be considered independent of the corporate debtor, if he is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company; is not a related party of the corporate debtor; is not an employee or proprietor or a partner of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor in the last three financial years; or is not an employee or proprietor or a partner of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm in the last three financial years.

In addition to the above, an Insolvency Professional is required to make disclosures at the time of their appointment and thereafter. In terms of sections 7(5), 9(5), 10(4) and 16(2) of the Insolvency and Bankruptcy Code, 2016, an Insolvency Professional may be appointed as Resolution Professional, if no disciplinary proceedings are pending against him.

3. Judicial/Regulatory Rulings

- Whether an ex-employee of the Financial Creditor having rendered services in the past, should be permitted to act as `Interim Resolution Professional' at the instance of such Financial Creditor?

Case Title: State Bank of India vs. Ram Dev International Ltd., Company Appeal (AT) (Insolvency) No. 302 of 2018.

An appeal was preferred by State Bank of India, financial creditor against the order of hon'ble NCLT wherein it was observed that there is an apprehension of bias against the appointment of proposed Interim Resolution Professional, as he was ex-employee of financial creditor and has been drawing pension from the financial creditor. Therefore, hon'ble NCLT directed financial creditor to substitute name of Interim Resolution Professional.

Hon'ble NCLAT held that:

".....the Adjudicating Authority was perfectly justified in seeking substitution of Mr. Shailesh Verma to ensure that the 'Corporate Insolvency Resolution Process' was conducted in a fair and unbiased manner. This is notwithstanding the fact that Mr. Shailesh Verma was not disqualified or ineligible to act as an 'Interim Resolution Professional'. Viewed thus, we find no legal flaw in the impugned order which is free from any legal infirmity and has to be upheld. It goes without saying that the Appellant- 'Financial Creditor' should not have been aggrieved of the impugned order as the same did not cause any prejudice to it."

- Whether proposal of the Committee of Creditors for appointment of Resolution Professional be rejected on the ground that the proposed Resolution Professional is empanelled as an Advocate or Company Secretary or Chartered Accountant with one or more members of the Committee of Creditors?

Case Title: State Bank of India Vs. Ram Dev International Ltd., Company Appeal (AT) (Insolvency) No. 302 of 2018

An appeal was preferred by the State Bank of India, financial creditor against the order of hon'ble NCLT, whereby Mr. K. G. Somani, who was proposed to act as Resolution Professional by the majority voting share of the Committee of Creditors has been held to be ineligible on the ground that he was in the panel of erstwhile 'State Bank of Hyderabad', which is now merged with the 'State Bank of India', which is one of the members of the Committee of Creditors.

Hon'ble NCLAT held that except for pendency of a disciplinary proceeding or ineligibility in terms of provisions of the I&B Code, there is no bar for appointment of a person as Resolution Professional. A Resolution Professional if empaneled as an Advocate or Company Secretary or Chartered Accountant with one or other 'Financial Creditor' that cannot be a ground to reject the proposal, if otherwise there is no disciplinary proceeding is pending or it is shown that the person is an interested person being employee or in the payroll of the Financial Creditor.

Hon'ble NCLAT observed that there is no allegation against Mr. K. G. Somani and no disciplinary proceeding is pending against him and he is not in the payroll of one or other member of the Committee of Creditors and therefore his name should be approved by the Adjudicating Authority.

Hon'ble NCLAT set aside impugned order dated 15th May, 2018 passed by Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi.

- Disciplinary action taken by IBBI against Insolvency Professional for compromising independence.

The Disciplinary Committee of IBBI vide an order dated 14th November, 2019 found that an Insolvency Professional:

- failed to make disclosures with respect to appointment of an LLP (in which he was a partner) as an IPE contravening the directions under the Circular issued by IBBI;
- allowed charging fee of Rs. 12,09,90,185/- payable to lender's legal counsel as an IRPC and abdicated his authority in favour of CoC. He paid expenses of third party from CD and included in IRPC. He deliberately in connivance with some stakeholders squandered the assets (money) for unlawful purpose;
- shared the fee, which can be paid only to an individual acting as an IP, with an LLP (in which he was a partner) against the provisions of the Code and the Regulations.

The Disciplinary Committee of IBBI observed that there was understanding between CoC and RP to contravene a law and willingness to remedy the situation only if they are caught. Thus, the RP has deliberately compromised his independence. The Disciplinary Committee observed contravention of sections 5(13) and 208(2)(a) of the Code, Regulations 33 and 34 of IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016; and Regulation 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 read with clauses 3, 5, 12, 13 and 14 of the Code of Conduct under the said Regulations. The Disciplinary Committee Imposed penalty of ten per cent of the RP's fee and Directed the RP to make good the loss by securing reimbursement and deposit the amount of Rs. 12,09,90,185/- in the account of Corporate Debtor.

FAQs on monitoring compliances

1. **When can an Insolvency Professional registered with IBBI take up assignment as an IRP/RP/Liquidator/ Voluntary Liquidator/authorized representative etc.?**

   An Insolvency Professional registered with IBBI can only take up assignment if he/she holds valid Authorisation of Assignment (AFA) certificate issued by the Insolvency Professional Agency he is registered with.

   As per clause 4*(aa)* of IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 'authorisation for assignment' means an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws.

2. **How can IP give consent for accepting any assignment?**

   An IP shall give consent in Form IP-1 to accept assignment as IRP or RP.

   Form IP-1 has to be submitted within 3 days of signing of Form-2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 or Form-AA of the Regulations, as the case may be.

3. **What are the disclosures to be made by an IP after he/she has been appointed as an IRP/RP?**

   As per IBBI Circular dated 16th January, 2018- IP is required to submit a disclosure with IPA and disclose his relationship, if any

with *(i)* the Corporate Debtor, *(ii)* other professionals engaged by him *(iii)* Financial Creditor *(iv)* Interim Finance Providers and *(v)* Prospective Resolution Applicant.

An Insolvency Professional shall disclose his relationship with the Corporate Debtor within 3 days of his appointment.

4. What are the CIRP Forms that have to be filed on the website of IBBI?

As per IBBI circular dated 14th August, 2019, an Insolvency Professional has to submit following CIRP Forms within specified timelines.

The due dates of filing CIRP Forms is mentioned in regulation 40B of CIRP Regulations read with circular mentioned above.

Following Forms have to be submitted:

Forms	Period Covered	Timeline
CIRP 1	From commencement of CIRP till Issue of Public Announcement	Within 7 days of making Public Announcement
CIRP 2	From Public Announcement till replacement of IRP	Within 7 days of replacement of IRP.
CIRP 3	From Appointment of RP till issue of Information Memorandum (IM) to Members of CoC	Within seven days of issue of IM to members of CoC.
CIRP 4	From issue of IM till issue of Request for Resolution Plans (RFRP)	Within seven days of the issue of RFRP.
CIRP 5	From issue of RFRP till completion of CIRP	Within seven days of the approval or rejection of the resolution plan or issue of order for liquidation, as the case may be, by the AA.
CIRP 6	Event Specific Form	Within seven days of the occurrence of event.

5. What are the events covered for filing of Form CIRP-6?

Following events shall be considered for filing of Form CIRP-6:

- Filing of application in respect of preferential transaction, undervalued transaction, fraudulent transaction, and extortionate transaction;
- Raising interim finance;
- Insolvency resolution process of guarantors;
- Extension of period of CIRP and exclusion of time;
- Premature closure of CIRP (appeal, settlement, withdrawal, etc.);
- Request for liquidation before completion of CIRP; and
- Non-implementation of resolution plan as approved by the AA.

6. Whether Form CIRP-6 is required to be filed even when the Corporate Insolvency Resolution Process is closed even before public announcement is made?

Form CIRP-6 is required to be filed even before CIRP is closed, before making public announcement as it would refer to premature closure of CIRP.

7. What disclosure is required to be filed on demotion of office of an Insolvency Professional as an IRP/ RP?

As per circular dated 12th June, 2018, an Insolvency Professional on demotion of his office as an IRP/ RP shall submit the details of the cost incurred by him/her during the CIRP period **within 7 days of demotion of office** in the specified format to their respective IPA's.

If an IRP is continuing as an RP in the same assignment, he/she shall still file the cost disclosure separately both as IRP and RP on the demotion of his office respectively.

8. When is half yearly return required to be filed?

Half yearly return shall be submitted within 15 days from end of 31st March and 30th September every year by the IPs to their respective IPAs.

9. Whether half yearly return has to be filed even when there are nil assignments?

Half yearly return has to be filed even when the IP is handling *nil* assignments.

Important developments having taken place in IBC

During the month of January, 2021

◆ **Circular - Retention of records relating to Corporate Insolvency Resolution Process**

On 4th January, 2021, IBBI *vide* a circular in respect of record retention by the IPs, laid down the roles and responsibilities of Insolvency Professionals for retention and safekeeping of records relating to the Corporate Insolvency Resolution Process.

Further, the circular also mentioned that the Board shall conduct inspection, to ensure that the records are being maintained by an IP in the manner required under the relevant regulations.

IBBI circular may be viewed at:

https://ibbi.gov.in/uploads/legalframework/5bb3be107809847f06cf2059f54ff3c8.pdf

◆ **MCA invites comments on recommendations of sub-committee of Insolvency Law Committee on pre-packaged insolvency resolution process**

On 8th January, 2021, the Ministry of Corporate Affairs invited public comments on the recommendations of sub-committee of the Insolvency Law Committee. The sub-committee, which was set up in June 2020 designed a pre-pack framework within the basic structure of the Insolvency and Bankruptcy Code,

2016, for the Indian market as detailed in their report of October, 2020.

On 16th January, 2021, ICSI IIP and PHD Chamber of Commerce and Industry jointly convened a Roundtable Discussion with the Insolvency Professionals and eminent experts in the field and to exchange views on the same and submitted the consolidated views of them to IBBI.

The Report on proposed Pre-pack framework may be viewed at:
https://ibbi.gov.in/uploads/whatsnew/34f5c5b6fb00a97d-c4ab752a798d9ce3.pdf

- **IBBI notified the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2021.**

On 14th January, 2021, The Insolvency and Bankruptcy Board of India (IBBI) through notification No. (IBBI/2020-2021/GN/REG068) has notified the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2021.The notification seeks to amend IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2020.

As per the amended regulation:

- Governing Board of IPA shall evaluate its performance in a financial year within 3 months of closure of year. Self-evaluation report is made mandatory for IPAs to publish at their websites.
- IPA shall designate or appoint a compliance officer who shall be responsible for ensuring compliance within the Code and regulations.
- Compliance Officer shall submit compliance certificate to the IBBI annually.

The amended regulation may be viewed at:

https://ibbi.gov.in/uploads/legalframwork/d4ee22fc271516082e29f7c93d39c4b3.pdf

GROUP INSOLVENCY FRAMEWORK IN EUROPEAN UNION

1. INTRODUCTION

Group Insolvency is a framework where if multiple entities of a single corporate group go insolvent, their resolutions can be consolidated in one court so that firstly, the group can be restructured as a whole and secondly, its combined assets can be utilised in the best interest of both the group corporate and the debtor. This structure allows substantive consolidation which enables clubbing of assets and liabilities of the group members in a way that they can be treated as a single economic organism.

Globally, Group Insolvencies are either dealt by way of *Procedural Co-ordination or Substantive Consolidation.*

"Procedural co-ordination" refers to co-ordination of the administrations of two or more insolvency proceedings in respect of enterprise group members. "Procedural Co-ordination" has no legal definition but refers to what in practice may be varying degrees of co-ordination of the conduct and administration of multiple insolvency proceedings commenced with respect to two or more enterprise group members involving one or possibly more courts. Although administered in a co-ordinated manner,

the assets and liabilities of each group member involved in the procedural co-ordination remain separate and distinct, thus preserving the integrity and identification of individual group members and the substantive rights of claimants.

The European Union (EU) and Germany have recently amended their insolvency legislation to provide for treatment of group insolvencies. Both jurisdictions essentially obligate insolvency representatives of group companies as well as courts involved to co-operate and co-ordinate with each other. Both, EU and Germany also permit commencement of "group co-ordination proceedings", which is a voluntary mechanism managed by a group co-ordinator.

"Substantive consolidation" is the treatment of the assets and liabilities of two or more enterprise group members as if they were a single insolvency estate. Countries like Australia have provisions as part of their Insolvency Legislations for Substantive Consolidation in way of "pooling" of assets of the Group Companies. Some countries like the United States have handled various insolvencies by Substantive Consolidation even in the absence of any specific provisions for the same.

In a number of significant insolvencies like WorldCom and Nortel, the U.S. and Canadian Courts have used a blend and variations of both these methodologies, by means of Partial Consolidation and Modified *Pro Rata* Allocation to deal with the distinct facts at hand.

2. EUROPEAN UNION LEGISLATION

In recognition of the complexities of insolvency proceedings for groups of companies, the European Union has also introduced legislation, namely the Recast Insolvency Regulation, which aims to facilitate better co-operation between insolvency administrators and courts in various member States, as well as the possibility of co-ordination proceedings for the management of those proceedings. The Group Insolvency in European Union nations is governed by Regulation (EU) 2015/848 of the European Parliament and Council of 20 May 2015 on insolvency proceedings. This Regulation was brought in place after replacing Council Regulation (EC) No.1346/2000 of 29 May 2000.

Some Salient features of the Regulations in place are as under:

- The European Union has legislated to facilitate effective cooperation between all insolvency administrators and all insolvency courts involved in the numerous insolvency proceedings taking place in different member States.
- Co-operation obligations for insolvency administrators arise under this regulation where two or more group companies of the same group have initiated insolvency proceedings. Under the Recast Insolvency Regulation they are required to *(i)* communicate relevant information with each other as soon as is practicable and insofar as confidentiality arrangements allow, *(ii)* cooperate, as is required, for the progression of the insolvency proceedings (insofar as doing so is not contrary to national law and does not give

rise to conflict of interest issues), *(iii)* consider the possibility of a collective management of group affairs, and *(iv)* consider negotiating and drafting a proposal for a co-ordinated restructuring of the group.

- Co-operation obligations for the insolvency courts arise under the same circumstances as those for insolvency administrators. The regulation stipulates that insolvency courts must communicate with and provide assistance to one another (insofar as confidentiality and procedural rights are respected) as appropriate. Such co-operation might include *(i)* co-ordination with regard to the appointment of insolvency administrators, *(ii)* the sharing of information, *(iii)* conducting hearings, *(iv)* co-operating with one another in the management of assets and affairs, and *(v)* approving protocols.

- There are also co-operation obligations between the insolvency administrators and insolvency courts which, like the obligations set out above, require co-operation and communication (insofar is legally permissible) for the achievement of effective administration across the group.

- The European Union has made it possible for an office holder of a group company to request a judicially recognized (but voluntary) arrangement for the appointment of an insolvency practitioner with the remit of presiding over, and achieving the co-ordination of, the various insolvency proceedings (provided at least two group companies of the same group have initiated insolvency proceedings).

- Subject to various conditions and the approval of a co-ordination plan proposal (details of which are out the scope of this overview), co-ordination proceedings will be opened after the 30 day notice period, assuming no objections have been received in that time, and a co-ordinator will be appointed. The co-ordinator must carry out his tasks and exercise his rights impartially and with due care. He must make recommendations for the co-ordination of proceedings across the group and propose a group co-ordination plan that:

    I. provides for an integrated approach to resolve the insolvencies of group members;

    II. re-establishes a positive economic performance of the group (or at least part of it);

    III. settles disputes between group members; and

    IV. Encourages the establishment of agreements between office holders.

- The co-ordinator can request a stay of six months or lift an existing stay in the proceedings of any

group member, insofar as it benefits creditors. The consolidation of the insolvent estates or insolvency proceedings is forbidden. Although the coordinator's plan is not binding on the participating group companies, the participating office holder must give consideration to its content.

3. CONCLUSION

European Courts have also been required to respond to issues arising from insolvencies of groups of companies. In ***Rastelli Davide e C. Snc v Jean-Charles Hidoux***, the European Court of Justice was presented with the question of whether insolvency proceedings opened in respect of a company established in one member State could be extended to a company with a registered office in another member State on the basis that the property of the two companies had been intermixed. In this regard the court found that a court of a member State that has opened main insolvency proceedings against a company (assuming the Centre Of Main Interest (COMI) of the debtor is situated in the territory of that member state) can join to those proceedings a second company whose registered office is in another member State, but only if the second company's COMI is also situated in the first member State.

The European courts have therefore ruled that the European Insolvency Regulation can be interpreted, under certain conditions, to allow for insolvency proceedings of a member State to cross borders (to a certain extent) and include another company from another member State.

ORDER FORM 2021

Name of Products	Price : ₹
☐ **COMBO** Company & SEBI Laws + Insolvency & Bankruptcy Laws FEMA/Banking & Insurance Laws + Competition Laws	18,900*/-
☐ **Company & SEBI Laws Module**	7,500*/-
☐ **Insolvency & Bankruptcy Code Module**	6,500*/-
☐ **FEMA/Banking & Insurance Laws**	6,700*/-
☐ **Competition Laws**	10,300*/-

*GST @18% extra

Pay by Cheque:

Please send your cheque/demand draft in favour of **Taxmann Publications Private Limited** at:
Taxmann, 59/32, New Rohtak Road, New Delhi-110005

Pay by NEFT:

Make payment by NEFT in favour of following account details and send us the remittance details at sales@taxmann.com:

Name of the Account	**Taxmann Publications Pvt. Ltd.**
Account Number	**4611673257**
Name of the Bank	**Kotak Mahindra Bank**
Address	**D-10, No. 1 and 2, Local Shopping Centre Vasant Vihar, D Block, New Delhi-110057**
IFSC Code:	**KKBK0000182**
MICR Code:	**110485013**
SWIFT Code:	**KKBKINBB**
GSTIN of Taxmann Publications Pvt. Ltd.	**07AAACT2774P1ZT**

Contact Details

Name ..... Designation .....

Name of the Firm/Organization .....

GSTIN .....

Flat/Door No. ..... Street/Road No. .....

City: ..... State: ..... Pin code: ☐☐☐☐☐☐

Email: ..... Phone/Mobile No. ☐☐☐ ☐☐☐☐☐☐☐☐☐☐

PLEASE FILL ALL THE FIELDS TO ACTIVATE YOUR SUBSCRIPTION

For more details call **011-45562222** or give a missed call at **91-8688939939** | e-mail : **sales@taxmann.com**

INSTITUTE OF INSOLVENCY PROFESSIONALS

A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)

'ICSI House', 3rd Floor, 22, Institutional Area,
Lodhi Road, New Delhi - 110 003