



RESOLVE™

INSOLVENCY AND BANKRUPTCY JOURNAL

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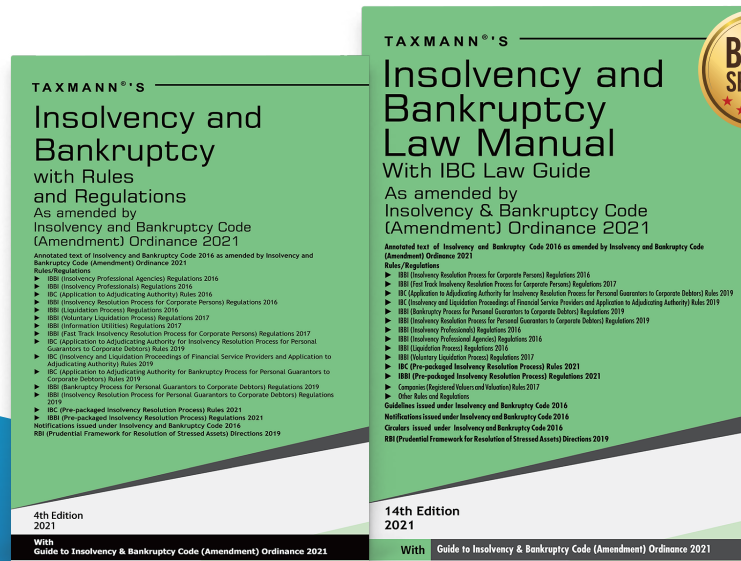
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Insolvency and Bankruptcy Code

Amended, Updated & Annotated text of Insolvency & Bankruptcy Code 2016



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As Amended by the
Insolvency and Bankruptcy Code
(Amendment) Ordinance 2021

**Updated till
15th May 2021**

	IBC Law Manual	IBC with Rules & Regulations
Guide to Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021	✓	✓
Tables showing enforcement of Provisions of IBC	✓	✓
Coverage of provisions of other Acts referred in the IBC	✓	✓
Previous Amendment at a Glance	✓	✗
Coverage of Rules & Regulations	All	Limited
Guidelines issued under the IBC	✓	✗
Notifications issued under the IBC	✓	✓
Circulars issued under the IBC	✓	✗
Coverage of RBI directions	✓	✓

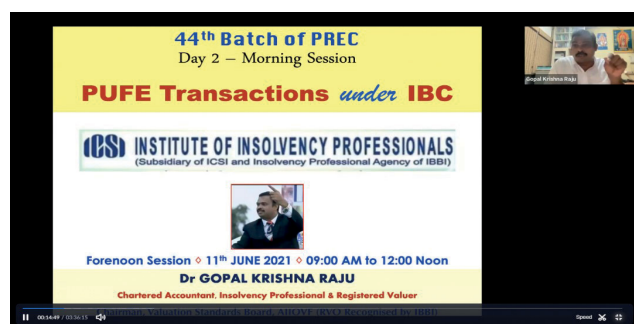


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Adv. Anirudh Wadhwa

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IP Pooja Bahry

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Duties of IP's
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◆ Workshop on 'Understanding Forensic Audit under IBC'

On 19th June, 2021, ICSI IIP organized a full day workshop on 'Understanding Forensic Audit under IBC'. It was attended by approximately 100 professional members.

The workshop was addressed by the eminent speakers namely, IP Aneetha and IP Revathi.

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AN INTERACTIVE WORKSHOP

Understanding Forensic Audit Under IBC

June 19, 2021; 10 AM to 5 PM

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Speakers

**IP Revathi
Ragunathan**

Session I - Forensic Audit
(Legal Provisions and
Relevant Statutes)

**IP Aneetha
Subramanian**

Session II - Forensic Review
(Specific Transactions and
Sample Reports)

CPE
4 Hrs *

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◆ Workshop on 'Impact of Limitation Act and Arbitration Proceedings under IBC'

On 26th June, 2021, ICSI IIP organized a full day workshop on 'Impact of Limitation Act and Arbitration Proceedings under IBC'. It was attended by 100 professional members. The workshop was addressed by the eminent speakers namely, IP Ashish Makhija and IP NPS Chawla.

26 JUN 2021

AN ONLINE WORKSHOP

IMPACT OF LIMITATION ACT AND ARBITRATION PROCEEDINGS UNDER IBC

10:00 AM - 05:00 PM

LIMITED SEATS AVAILABLE

Inaugural Address:
Shri P.K. Malhotra
Chairperson, ICSI IIP

Speakers:
IP Ashish Makhija
Session I
IP N.P.S. Chawla
Session II

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- **National Company Law Tribunal & Appellate Tribunal Bar Association v. Ministry of Corporate Affairs**
(2021) 127 taxmann.com 607 (SC) • P-217

Section 412 of the Companies Act, 2013 - National Company Law Tribunal - Selection of members - National Company Law Tribunal and Appellate Tribunal Bar Association had filed writ petition seeking a direction to respondent - MCA to fill up vacancies of Chairman, NCLAT and President of NCLT without any further delay - A further direction was sought to issue letters of appointment to candidates pursuant to selection procedure initiated in 2019 and to fill up remaining vacancies of Members of NCLT and NCLAT - Whether as Government had already initiated process of reappointment by writing to Chief Justice, reappointment process should be completed expeditiously, as there was no necessity of issuance of any advertisement for participation of other eligible candidates - Held, yes - Whether as strength of members of NCLT and NCLAT was depleting which would be detrimental to smooth functioning of Tribunals, Government was directed to complete process at earliest and not later than two months - Held, yes (Para 6)

- **IDBI Bank Ltd. v. Leather World India Ltd.**

(2021) 128 taxmann.com 324 (NCLT - Kolkata)

- P-220

Section 33, read with section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Initiation of - Applicant was a tenant of a shop and he had entered into a commission agreement with corporate debtor, whereby corporate debtor would utilise premises for its leather business - Corporate debtor defaulted in making payments to applicant and had unlawfully transferred premises to a third party - Adjudicating Authority passed order for liquidation of corporate debtor - Applicant filed application against Liquidator of corporate debtor seeking an order declaring that subject premises was outside scope of moratorium of corporate debtor and for direction to Liquidator for disbursement of sum admitted by Liquidator, in favour of applicant - Whether since corporate debtor was in liquidation, provision that governed initiation or continuation of legal proceedings was section 33(5), which does not prohibits continuation of any pending suits or legal proceedings - Held, yes - Whether since applicant had also instituted civil proceedings for various reliefs both in High Court as well as

in City Civil Court, there was no need for Adjudicating Authority to grant an order declaring that subject premises was outside scope of moratorium of corporate debtor and same was rejected - Held, yes - Whether as regards disbursement of claim admitted by Liquidator, same was not permissible until liquidation process itself came to an end and, therefore, prayer was rejected - Held, yes (Paras 4.6, 4.7, 4.8 and 4.9)

- **State Bank of India v. Limtex Tea & Industries Ltd.**

(2021) 128 taxmann.com 326 (NCLAT - New Delhi)

- P-227

Section 53, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and rule 11 of the National Company Law Tribunal Rules, 2016 - Corporate liquidation process - Asset, distribution of - Application under section 7 was filed by financial creditor against corporate debtor - NCLT by order dismissed application and released corporate debtor from rigour of 'Corporate Insolvency Resolution Process' and directed Interim Resolution Professional/Resolution Professional to handover records and assets of 'corporate debtor' to director of 'corporate debtor' immediately - Applicant bank submitted that during ongoing CIRP, defaults had been committed by corporate debtor in repayment of financial facilities availed from applicant bank, hence it had taken symbolic possession of land leased to appellant - Hence, applicant submitted that said land did not fall under category of 'assets of corporate debtor' and hence, same be returned to applicant bank and not to corporate debtor - However, it was found that applicant was not party in proceedings before Tribunal and had first time brought these new facts before Appellate Tribunal through intervention application, which could not be permitted - Whether therefore, instant application was to be dismissed as not maintainable - Held, yes (Paras 6 to 8)

- **Rakesh Kumar Agarwal v. Devendra P. Jain**

(2021) 128 taxmann.com 330 (NCLAT - New Delhi)

- P-236

Section 240A of the Insolvency and Bankruptcy Code, 2016 - Micro, small and medium enter-

prises - Application of Code to - Whether main object of Code is in resolving corporate insolvencies and not mere recovery of monies due and outstanding and as per preamble of IBC, liquidation is only last resort - Held, yes - Whether where liquidation process of corporate debtor was pending and during pendency of liquidation, Government of India issued notification dated 1-6-2020 by amending section 7 of MSME Development Act, 2006 by enhancing criteria for classifying entities as MSME, and appellant/promoter of corporate debtor pursuant to said notification fell under category of MSME, as per section 240A it would be eligible to participate and submit a scheme, to avoid liquidation of corporate debtor - Held, yes (Paras 42, 49, 50 and 51)

• **IDBI Trusteeship Services Ltd. v. Shiv Nandan Sharma (IRP of Saha Infratech Pvt. Ltd)**

(2021) 128 taxmann.com 358 (NCLAT-New Delhi)

• P-240

Section 64 of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authority - Applications, expeditious disposal of - CIRP initiated against corporate debtor was pending - Appellants financial creditors claiming to be assignees of financial debt had earlier filed two Interlocutory Application challenging decision of Resolution Professional to hold appellants as 'related parties' - One application was disposed of as infructuous and in second application interim relief to stay CoC meeting was not granted - Appellant, thus, filed instant appeals seeking to be part of CoC - They claimed that they would constitute 68 per cent of CoC and thus would have an important stake involved - However, it appeared that disputes regarding appellants to be related parties were yet to be decided one way or other by Adjudicating Authority - Whether therefore, fact that CIRP had already consumed so much of time, it would not be appropriate for Appellate Authority to entertain present appeals against impugned orders on basis that holding of meetings of CoC should have been stayed - Held, yes - Whether Adjudicating Authority was to be requested to consider and decide applications pending at earliest so that CIRP continues smoothly - Held, yes (Paras 6 and 9)

• **Binay Kumar Singhania Resolution Professional, In re**

(2021) 128 taxmann.com 334 (NCLAT-New Delhi)

• P-243

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Appellant was appointed as Resolution Professional (RP) in Corporate Insolvency Resolution Process (CIRP) against corporate debtor - CIRP started and appellant-Resolution Professional took all necessary steps in time as required under procedure in IBC - Thereafter, one ex-director of corporate debtor moved Appellate Tribunal in appeal against admission of application under section 7 - Appellate Tribunal *set aside* order of admission which had been passed by Adjudicating Authority - Subsequently, Adjudicating Authority *vide* order dated 27-1-2020, closed proceedings against corporate debtor - Financial creditor bank appealed against said order before Supreme Court and Supreme Court passed orders staying orders of Appellate Tribunal - Thereafter, financial creditor bank sought resumption of CIRP and extension of CIRP period - However, Adjudicating Authority declined prayer sought, observing that stay granted does not lead to automatic revival of Company Petition which had already been closed by Adjudicating Authority - Whether without restoration of Company Petition which was closed by Adjudicating Authority *vide* order dated 27-1-2020, CIRP could not have continued - Held, yes (Paras 8 and 10)

• **Satya Narayan Jhunjunwala v. Supriyo Kumar Chaudhuri**

(2021) 128 taxmann.com 346 (NCLAT-New Delhi)

• P-249

Section 35 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Liquidator - Powers and duties of - Applicant/liquidator of corporate debtor by way of instant application sought permission for immediate sale of inventory of corporate debtor by way of e-auction - Applicant submitted that there were certain expired finished products, *i.e.* Olein and Refined Palm Oil, forming part of inventory of corporate debtor and said inventory was not fit for human consumption, however, it was of use

for other edible oil manufacturers for purpose of reprocessing along with crude oil and industrial users such as soap manufacturers - Further, price of such inventory was highly volatile and may go down quickly - Whether in view of fact that inventory/goods were perishable in nature, applicant/liquidator was to be permitted to sell inventory of expired stock of Refined Palm oil by way of e-auction in a transparent manner to highest bidder, keeping in view interest of all stakeholders - Held, yes (Para 9)

- **Navneet Jain v. Manoj Sehgal**

(2021) 128 taxmann.com 332 (NCLAT-New Delhi)

• P-252

Section 29A of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution applicant - Persons not eligible to be - Resolution applicant (respondent No. 2) and suspended director of corporate debtor (respondent No. 3) were partners in two firms PF and PI - During Corporate Insolvency Resolution Process (CIRP) of corporate debtor, respondent No. 2 filed a resolution plan which was approved by Adjudicating Authority - Appellant claiming to be a promoter/shareholder of corporate debtorsubmitted that Respondent No. 2 was ineligible to submit resolution plan as he was related party to respondent No. 3 - Respondent No. 2 however relied on two retirement deeds to show that respondent No. 3 had retired as partner from both firms with effect from 31-10-2017 and hence, was eligible to submit resolution plan - However, retirement deeds had been disputed by appellant and appellant had placed on record, GST returns and Income-tax returns of both companies, viz. PF and PI which showed continued relationship of respondent No. 2 and respondent No. 3 with both firms, and hence they were related parties - Further, both respondents had not disputed GST and Income-tax returns, which were matters of public record - Whether therefore, respondent No. 2 was not eligible under section 29A to submit resolution plan *vis-a-vis* resolution of corporate debtor and hence, resolution plan so submitted and approved by Adjudicating Authority was to be *set aside* - Held, yes (Paras 23, 24, 31 and 32)

- **Dhan Prakash Gupta v. Daehsan Trading India (P.) Ltd.**

(2021) 128 taxmann.com 328 (NCLAT-New Delhi)

• P-256

Section 35, read with section 61 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Liquidator - Power and duties of - Liquidator of corporate debtor conducted auction of corporate debtor's subject property - Appellant was declared assuccessful bidder as per terms of process memorandum - Letter of intent was also issued - Draft Letter of intent and Process Memorandum clearly stipulated that an amount of Rs. 6 Lakhs towards Maintenance Security Deposit (MSD) was to be paid and would be a part of asset of successful bidder - Thus, appellant was in knowledge of additional Rs. 6 lakhs to be paid towards Maintenance Security Deposit (MSD), prior to acceptance of Letter of intent and fact that additional amount of Rs. 6 Lakhs payable towards MSD was not negotiable was admittedly brought to notice of appellant before signing of draft Letter of intent - Whether therefore, appellant having exercised their choice of being a successful bidder, Adjudicating Authority rightly directed appellant to pay Rs. 6 lakhs towards MSD in respect of property which was e-Auctioned by liquidator - Held, yes (Paras 9, 10 and 11)

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P.K. MALHOTRA

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

From Chairman's Desk

***When there is hope in the future,
there is power in the present.***

Dear Professional Members,

Hope you all are keeping well.

Businesses around the world are facing several challenges. While there are some which are struggling to survive, there are also others (especially in the technology sector) who have reported substantial increase in their business. Ultimately, when you chose to become an entrepreneur, challenges are inevitable, and our only endeavour has to be that we should be able to perform to the best of our potential and tap all opportunities available. The World is gradually emerging from the pandemic crisis, and the MSME sector has seen immense opportunities coming its way. Infact, the pandemic has also made consumers explore the option of going the digital way to avail different kinds of services. This is perhaps an indication of the way to the road ahead.

Five years have elapsed since the IBC got enacted. Looking back to the journey so-far gives us some sense of satisfaction and also a good reason to smile, especially keeping in view the abysmal state of things that we were there at the start of this journey. The challenges, however, are far from over, especially due to the present predicament thrown by the

impact of COVID-19 on the economies around the world. Thus, it is very important to chart out our future course of action and strategy which invariably has to take into account the learnings so far, and provide solution to the challenges at hand.

The current format of IBC law proceeds on the footing that there is a competitive pressure in asset/company takeover. However, what the nation has been experiencing in the past 2 years (approx.) is the influence of factors which are completely external to IBC and which have led to some major challenges in the resolution process. It is a well-known and widely acknowledged fact that in the absence of buyers, finding a resolution for the state of insolvency is practically non-existent. Thus, the success of any insolvency law is always predicated on existence of competition to acquire stressed assets; else, liquidation becomes a very poor alternate to it.

The two most talked about cases of resolution that we saw in this month are that of *Videocon* and *Jet Airways*. In the context of these cases, experts have started questioning the efficiency of IBC law citing that Banks have been able to recover only 5-6 per cent of the loans that they gave to *Jet Airways* and *Videocon* respectively, and that too after a lengthy bankruptcy process. Commentators have also gone to the extent of questioning as to why IBC is not giving the banks the mega bucks that it had promised, and a question is raised *if IBC is worth the efforts*. To answer all such questions, I believe that while the angst coming from the recoveries made from such cases is natural, but what we also need to realise is the fact that in a capitalist society, for the inefficient firms, there has to be an ease of exit and that exist has been made possible through the IBC process. Therefore, before we adopt any pessimist view on the state of things and make any disconcerting remarks on the efficiency of IBC law, we must also take into account as to what was the state of affairs prior to IBC, and what is the value left in the CD. Ultimately, insolvency is a result of operation of market forces, and therefore, the solution also needs to be market oriented. We must also remember that prior to the IBC the major thrust was on restructuring because lenders were not able to recover or resolve anything substantial under the BIFR regime, and it used to take 10 years (approx.) to conclude the proceedings. Even in case of SARFAESI which did initially perform on the expected line, the period of realisation from sale of assets stretched

between 7-8 years. In case of IBC, though there are admittedly some delays, but the same are attributable to the infrastructure issues. As regards the recovery percentage, in any bad asset, 30-35% recovery is not considered to be bad. In the case of *Jet Airways*, we must also try to comprehend the state of things from Buyers' perspective (*i.e.* what is he buying). It is a known fact that in the aviation sector, since the company hardly owns any asset and most of the assets are on either lease or rentals, the value of the enterprise is not substantial. If a CD in service sector (like the aviation sector) which does not possess much tangible assets (like those belonging to the power sector or the steel plants), the chances of making substantial recovery are very bleak. Moreover, we must never forget the fact that in these old cases (which were passed on from previous recovery law regimes), chances of eradication of value of enterprise shall be very high, and therefore, such backlog cases shall always suffer from low recovery rate, even if the bankruptcy process gets to a state of perfection. Here I would like to mention some of the positives of IBC: there were as many as 17,000 cases of loan defaults which involved over 5 lakh crore (INR) of loans which were resolved even before the insolvency process could be started. Moreover, the average time taken in completion of the process has also come down dramatically.

One of the my observations (and perhaps a suggestion) concerning an efficient, expedient and successful functioning of IBC regime is, that once an issue of law gets authoritatively settled through an Apex Court judgment (or even the Appellate Authority), parties should avoid the temptation of re-agitating or regurgitating those decided issues of law, and, unless and until, the concerned authority put its foot down by penalising such not-so-desirable practices of continuously re-evaluating settled principles of law (whether from Creditors' side or CD's side), our target of achieving success through IBC shall remain a very far-fetched dream. The other area wherein I believe that there is a scope of improvement concerns the speed of decision by the CoC. Since the IBC process is premised on the fact that commercial wisdom (rather than judicial wisdom) has to prevail in the matters of finding an appropriate resolution plan to a commercial insolvency, the decision making process by the lenders has to come expeditiously. Thus, there is a definite need to have such people in the CoC who not only know the

subject well, but also have the power (and authority) to take decisions on the spot. Such empowerment is needed not only for those who represent the creditors, but also for the Resolution Professional. Finally, I would like to reiterate that though *recovery from CDs* is undoubtedly one of the tests concerning efficiency of the law, but it is neither the only test nor the final test for it.

I acknowledge all the support and guidance that you have rendered to the Institute. Infact, it also reminds of a well-known saying that "*no one can whistle a symphony. It takes a whole orchestra to play it.*"

I wish to see all of you very soon. Please take a very good care of you and yours!



DR. BINOY J. KATTADIYIL

*Managing Director
ICSI Institute of Insolvency
Professionals*

Managing Director's Message

Dear Professional Members,

The end of May month, and the start of June month has its own importance for the stakeholders connected with the IBC since it a milestone in the life journey of IBC. Now, this year, as we complete successful functioning of the IBC for 5 years, especially keeping in view huge strides that it made during this time and the enormous difficulties that came its way. IBC got enacted on 28th May 2016, and CIRP Regulations were put into effect from 1st December 2016, and thus, in a very short period of time the legislation not only started operating, but the results thereof also surprised the stakeholders. The commitment to make this legislation work and yield results displayed itself in the form of not only the crucial measures/actions taken by the Government (including amendments brought to the Code), but also the ever-encouraging and inspiring working of hands-on Regulator (the IBBI), and the quick succession in which some landmark judgments were pronounced by Hon'ble SC which truly helped in settling down various legal propositions under the law. The

law was new to the creditors and the debtors, however, with a firm resolve from all stakeholders, we succeeded in making a seminal departure from the earlier abysmal state of affairs, thereby making us move on the path to glory. If I venture to ask myself as to what is it that we could have done better which we perhaps did not do in the formative (initial) years of this legislation, I really struggle (even with the wisdom of hindsight) to find any. Ultimately, what is it that we expect; we expect the Legislature and the Executive to frame and execute the law in its true spirit, we expect the Regulator to frame its Regulations expeditiously and in line with the words of the statute, we expect the judiciary to interpret the law in line with its objectives, and pronounce a final word on different legal issues agitated before it.

As I said, the successes that we made as a result of this legislation, in terms of finding an appropriate solution to the state of corporate insolvency are very much reflected in the improvement that we have made by several notches in India's position in the World Bank's *Ease of Doing Business Report*. We have achieved a lot through the IBC, and therefore, it is very much important for us to recount the success story now.

IBC arguably is one of the most path breaking economic reform legislations that we have seen in the history of independent India. There has been a paradigm shift in the borrowing-lending culture because of this legislation and it has facilitated the nation in making a major leap in the direction of eliminating some of the malpractices that were prevalent earlier in the borrowing and lending relationship in India (some borrowers use to intentionally default on loans without inviting much legal consequences deterring him from doing so). IBC, thus, administered a huge shock to those promoters and borrowers who were sanguine in their belief that they could default and still retain their power and position in the debtor company. Apart from this, IBC also shook those lending banks, who, out of their sense of complacency were freely indulging in the practice of *lending and pretending*, that is, lending and then looking the other way. In the pre-IBC India, there were many cases in which we saw the banking practice of ever greening of loans, *i.e.*, repeated restructuring of loans, prevalent. The same was also put an end to by the IBC, and if we recollect, prior to the IBC, by virtue of the Asset Quality

Review (AQR) which was got conducted by the Reserve Bank of India we got to know about the true numbers of staggering NPAs in the banking sector.

Under the IBC, the real focus has now got onto 'resolution' and the attempt is to put the company back on its feet, wherever feasible and practical. For this, the process provides that stress has to be identified at the earliest possible signs and measures have to be taken accordingly for its revival. In case, however, revival is not possible (within the timelines provided), then, to minimize further depletion of value of asset, the law provides for liquidation of assets as a default option. Liquidation, undoubtedly, is a measure of the last resort, and the focus has been on resolving insolvency through a resolution plan.

Though the broad features of the Code are now very well known, however, if I may recapitulate them, the same are: (a) speed is of absolute essence (if the timelines are not met, then the whole thing comes apart); (b) value maximization is to be achieved through timely resolution (this has been done realizing that passage of time is in inverse relation to value of assets); (c) information utilities have been conceptualized to serve as a ready bank of information (this leads to information symmetry); (d) Creditors have been put in control of the company through Insolvency Professionals; (e) entrepreneurship (who can takeover CD's assets for its efficient functioning) are encouraged.

The biggest gift from IBC (as a legislation), to me, is that, it has put *fear of God* in the minds of some unscrupulous persons. In the pre-IBC regime, the debtor-creditor relationship..... Besides this, IBC has also facilitated *freedom of exit* to businesses which was otherwise missing in the erstwhile insolvency law regime in the country. Ultimately, in a capitalist society, for inefficient firms, there has to be an ease of exit, and that exit has been made possible through the IBC process which got enacted only in the year 2016. Before the IBC came into force, the major thrust from the lenders was on restructuring the loans because lenders could never be able to recover or resolve anything under the BIFR regime, and even under SARFAESI, the average time was around 7-8 years.

Though presently we are living in somewhat difficult times (due to the pandemic effect on the economy), but what we must

realise is that no adversity is there forever and that change is the only constant in this world, this silver lining should us all of us keep moving ahead, and ensure that when the things get better, we should be able to pick up the strings from where we left, and build a better world for us and for the future generations.





INTERVIEW



Dipti Mehta

*FCS (Insolvency Professional)
Director at Mehta & Mehta
Legal & Advisory Services
Pvt. Ltd.*

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, scope of Insolvency and Bankruptcy code.

My overall experience as an Insolvency Professional (IP) in terms of assignments handled, fees received, scope of insolvency and Bankruptcy Code, is quite exciting, challenging, and courageous. Yes, when any profession has this feature than of course it will be stressful as well. But the same get reduced with experience. As regard the fees, initially it seems good return. But as one enters the process and time taken, infrastructure required and daily challenges faced to solve the situation, then the same appears to be less or at least deserving amount. Further, as time passes and when IP do not get any remuneration for months and years then it is costly professional. As IP cannot avoid the process and allow it to be totally stopped and has no choice but to bear entire infrastructure cost from his/her own pocket and also incur some expenses to ensure some compliances. As regard scope of IBC Code, yes it should be effective for all kind of Debtors. But in view of current infrastructure availability, it is proper that the same will be effective only after proper infrastructure is implemented. Even

though IBC's scope is implemented to a limited extent, it has such a big impact that it should be implemented properly with complete infrastructure. As regards scope of IBC and its impact, I just say one line that it has impacted Each and Every person of the country, directly and indirectly. This is the most effective law in the country implemented until now, which has such a huge impact.

2. How practicing as an Insolvency professional has impacted your CS practice? How are you managing both the professions? How different is Insolvency profession from other professions?

Practicing as an Insolvency professional impacted to a great extent to my CS practice. Both are subject to continuous change. You are expected to update in knowledge in both the profession. Further, IBC is evolving as a Code and profession, so there were and are many issues requiring clarification. But due to experience and good infrastructure already established for my CS practise, I was able to handle both the profession. Though, any work at its initial stage is difficult and stressful. But over the period as one gains the experience and hold on the subject, one can handle it with little comfort. Hence, though IP as a profession itself is challenging, but with time, as I gained the experience and developed the good infrastructure for IP profession, I was able to handle both the profession. Today, I am addressing the webinars about the both the profession with equal ease.

I believe, Insolvency profession utilise all the

experience, intellectual and interpersonal skill of IP. Other profession expects technical knowledge of the law, its Updation and judicious mind and interpretation skill. While for IP profession the same is must and expected to be used at any moment and decision as regard the same to be taken in fraction of seconds. In addition to that IP is expected to know and actually deal and take decisions as regards all the laws applicable to the Corporate Debtor, Knowledge of the function of all department, including sales and marketing, including tendering and bidding and take decisions in that regard for day to day functioning and business of the company. Further, IP act in difficult and worst period of the organisation.

3. How are you managing your ongoing assignments of CIRPs during this COVID outbreak?

I am doing all the work online. I am doing all the meetings online. However, accounting and audit got delayed as the auditor needs all the documents which were in physical form. Also, e-auction was delayed. Further, as the Hon'ble NCLT work was delayed, and all the decision were delayed and hence the process got delayed.

4. What are challenges you face at ground level as an IP and how you deal with it?

There are many challenges for IP. Non-cooperation from promoter and not providing information, lack of fund with the Corporate Debtor-still to continue the process-sometimes with your money,

Lack of practical and legal understanding of IBC code and its implications among creditors and Corporate Debtors, lack of faith among each stakeholders leading to difficulty in arriving at amicable solution to different difficult situation, delay in process due to delay in process of Judiciary, non-payment of IP professional fees for months and years, continuous calls for payment from creditors and many more.

As regard non-cooperation-I explain the law and my role and independence to each stakeholder and respect their position and explain their role and at last legal consequences of non-cooperation. As regard lack fund and non-payment of remuneration-no option. But I have other practice, it helps me to support my infrastructure for my IP practice. As regard lack of practical and legal knowledge of all stakeholders, I explain the same to all including the creditors who repeatedly call for recovery without irritation, as I keep in mind that they all have suffered. Of course, I also faced gherao by workers, twice. I was not allowed to leave the CD workplace till one hour. But I handled with calm and with the help of few workers among them, who understand the situation.

5. How was your experience of working with the promoters, Board of Directors etc.? How they perceive this insolvency regime?

I have mixed experience. I have dealt with promoters who were very professional and supportive. I also dealt with promoters, who never met me and sent their representative and then try to control me as well. There

were promoters who behaved very nicely initially and as I started performing my duty were turning out to be different personality as well. There were promoters, who were never traceable. So, each CD is different experience. IP must, deal with each one differently. But one thing was common, each promoter finds themselves helpless before IBC.

6. What are your views on framework of Pre-packaged Insolvency Resolution Process and Individual Insolvency? How it will impact the overall functionality of Insolvency and Bankruptcy Code?

As regard Pre-pack, there is doubts as regard its success among stakeholders. Unless it starts and results are visible, one cannot comment. Though, in many countries it has been successfully implemented. But each country and its situation are different. But still it is a good effort to try to resolve the situation before IBC process start. But the condition of non-impairment of the claim of Operation creditors remains as a concern. Drafting base plan suitable to FC and as per law and which can be implemented successfully, in the situation of company, will require real good understanding between promoters and creditors. As regard individual insolvency (Personal Guarantor) the same is going to have a big impact. But again, its implementation and successful execution, is going to be challenging and will have many more litigations. As I mentioned prepack, once successfully implemented in few cases, it will have a good opportunity for CD as a last resort. As regard Individual insolvency,

it will have a big implication. One will be careful in default.

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?

I think everyone who is understanding IBC, has understood the need of robust Judiciary infrastructure for its successful implementation. Absence of the same has led to various complications and high cost. As regards Regulator, any new law and regulator has challenges, initially. However, over the period the same get settled. In the limited time, the Regulator has performed very well. Its involvement with all stakeholders, especially professional has developed, which helps in efficient administration of law.

8. What is your take on the recent Supreme Court Judgment on personal guarantors?

I fully agree to the same. It brought clarity on the provisions.

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

Rather than advise, I would like to inform them that this profession demands lot of involvement as regard time, intellectual and dealing with several people and hence it is challenging. So, one must be ready to face and solve different difficult and complicated issues and situation, regularly calmly and in efficient manner, as per the law, after interpreting the legal provisions, if the same is not clear.

10. Lastly, how significantly do you think the ICSI Institute of Insolvency Professionals (ICSI IIP) serves the profession of Insolvency Professionals and what suggestion you want to give for the improvement?

As regard ICSI IIP, I will be biased in my opinion, as it belongs to the professional body to which I am associated over the years and my all success in the life goes to the said Institute. Further, I do not have much idea about other Institutions.

But I can say that I am happy with its services. And no suggestions.

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Insight!

The Code of Conduct for Committee of Creditors



Rakesh Kumar Jain

FCS (Insolvency professional)

The Insolvency & Bankruptcy Code of India 2016 (IBC) envisages a regime of Creditor in control than the earlier regimes of Debtor in control. The Committee of Creditors (CoC) is an important pillar of the Corporate Insolvency Resolution Process. In *Swiss Ribbon v. Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) and *Committee of creditors of Essar Steel India Ltd. v. Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) the Hon'ble Supreme Court has emphasized on the commercial wisdom of CoC in approval of resolution plan and its related aspects.

Interim Resolution Professional (IRP) is the creator of the CoC and is guided by CoC. The beauty of the IBC code is that creator is guided by the creation because of the fiduciary role of CoC members in resolution of the corporate stress during Creditor in Control regime. Like CoC, Insolvency Professional is also an important pillar of the Corporate Insolvency Resolution Process.

The Insolvency & Bankruptcy Board of India (IBBI) has played an important role by creating Code of Conduct for Insolvency Professionals in the 1st Schedule of the Insolvency & Bankruptcy

Board of India (Insolvency Professionals) Regulations, 2016. Some of the important features of the Code of Conduct for Insolvency Professions are integrity, objectivity, independence, impartiality, professional competence, confidentiality & compliance of IBC time lines. IBBI has made a detailed guidelines for the code of conduct for the Insolvency Professionals.

However, there is no such Code of Conduct prescribed for CoC members either in IBC or in the regulations framed by (IBBI). IBC does not empower IBBI to make regulations on the conduct of CoC members. However, Hon'ble Adjudicating Authority (AA) & IBBI are very much concerned on the delay in compliance of strict time lines prescribed by the IBC and the regulations framed by IBBI for the completion of the Corporate Insolvency Resolution Process.

By order dated 7th June, 2018 in the matter of *SBJ Exports & Mfg. (P.) Ltd. v. BCC Fuba India Ltd.* (2018) 99 taxmann.com 124 (NCLT-New Delhi) the Hon'ble AA observed: ". An unenviable situation has been created by the conduct of the members of the CoC. Despite the fact that the Resolution Professional apprised the CoC that the period of 180 days is to expire on 12-2-2018 and sanction be granted for moving an application before the Adjudicating Authority for extension of the period. The CoC has behaved the way we have recorded in the preceding paras.". It further observed: "A strange phenomena has developed insofar as the functioning of the CoC is concerned. In a number of cases it has now been seen

that Members of the CoC are nominated by Financial Creditors like Banks without conferring upon them the authority to take decision on the spot which acts as a block in the time bound process contemplated by the Insolvency and Bankruptcy Code, 2016. Such like speed breakers and roadblocks obviously cause obstacles to achieve the targets of speedy disposal of the CIR process.". It directed: "In view of the above we direct the Resolution Professional to bring this order to the notice of the CoC so that appropriate steps be taken.

A copy of this order be sent to the Insolvency and Bankruptcy Board of India for taking suitable action in respect of the conduct of the Members of CoC in the present matter as well as in the day to day functioning of the Members of CoC generally speaking.".

In the other matter of *Jindal Saxena Financial Services Pvt. Ltd. v. Mayfair Capital (P.) Ltd.* (2017) 83 taxmann.com 177 (NCLT - New Delhi) the Hon'ble Adjudicating Authority noted that there were four financial creditors who attended the first meeting of the CoC. In the said meeting, the CoC did not approve appointment of interim resolution professional (IRP) as resolution professional (RP) since two of the four financial creditors, having aggregate voting rights of 77.97% required internal approvals from their competent authorities. It observed: "We deprecate this practice. The Financial Creditors/Banks must send only those representatives who are competent to take decisions on the spot. The wastage of time causes delay and allows depletion of value which is



sought to be contained. The IRP/RP must in the communication addressed to the Banks/Financial Creditors require that only competent members are authorized to take decisions should be nominated on the CoC. Likewise, Insolvency and Bankruptcy Board of India shall take a call on this issue and frame appropriate Regulations.”.

Accordingly IBBI issued a circular No. IBBI/CIRP/016/2018 dated 10th August, 2018 *directed that* the interim resolution professional or the resolution professional, as the case may be, is directed that he shall, in every notice of meeting of the CoC and any other communication addressed to the financial creditors, other than creditors under [section 21 \(6A\)\(b\)](#), require that they must be represented in the CoC or in any meeting of the CoC by such persons who are competent and are authorised to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditors.

1. Necessity of Code of Conduct for CoC members.

Sometimes, CoC members have different and conflicting interests and expectations which results in friction amongst CoC members which lead to inconsistency of actions. In a survey it was found that 90% RP felt there needs to be greater clarity in relation to the Roles and the Responsibilities of the members of CoC in terms of Statutory Regulations.

CoC members should act in a fiduciary role of preserving and protecting the interests of all stakeholders and not just of their own interests. This can be possible by

incorporation of a legal provision to this effect in IBC. There should be a provision in law to ensure that CoC members should take care of the CD, the unsecured creditors and other claimants who rank lower in the waterfall mechanism under [section 53](#) of the Code than the members of the CoC themselves. There should be a separate chapter on the Code of Conduct in IBC. Alternately, IBBI may be authorised to frame regulations for the Code of Conduct for CoC members.

2. Expectations from CoC

The role of the CoC is one of the fiduciary duty with an implied covenant of good faith and fair dealings with all stakeholders. There are several expectations of various stakeholders from CoC such as;

- (a) CoC members should be able to take decisions at the CoC itself. They should come well prepared to take the decisions at the meeting. Time is essence in IBC.
- (b) CoC members should attend the meeting in time. If not able to attend the meeting, they can ask for video conferencing or ask for leave of absence.
- (c) CoC members should focus on revival of the company. It has been observed that CoC members focus on recovery of their money. If there is a resolution, recovery is bound to come.
- (d) CoC members should read the agenda notes thoroughly. If they need any clarification, it should be sought from IRP/RP well in advance. by them

3. Role of CoC in dealing with Insolvency Professionals.

CoC members should have a check on the activities of the IRP/RP. They should help the IRP/RP in following the strict time lines prescribed in IBC and the CIRP regulations framed by IBBI. CoC may grant speedy approvals to RP under [section 28](#) of IBC. Time lines should be fixed for approvals of CoC. In case, there are no cash flows in the hands of RP, there should be a provision for contribution by the CoC members who are benefitted by the CIRP process. CoC members should have a professional approach while dealing with IRP/RP and the Resolution Applicants. They should not resort to cost cutting measures which are inconsistent with the requirements of IBC. After all, the end objective of IRP/RP and CoC is to achieve the resolution of the Corporate Debtor (CD) in a timely manner.

CoC members who have specific expert reports, relevant information, contractual information, Audits and forensic investigations should share the same with RP. This would enhance the quality of information available to Resolution Applicants for better bids.

The remuneration of IRP/RP which was agreed to be paid by the members of CoC should be released by them immediately on raising of invoices by the IRP/RP. This will enable IRP/RP to focus more on CIRP instead of going to the Adjudicating Authority for redressal of their grievances on their remuneration. This will also reduce the workload of AA.

Replacement of IRP/RP should be carried out transparently. Sometimes, it becomes

unproductive as new IRP/RP takes time to understand the complex issues faced by the ex-IRP/RP. Also, outgoing Insolvency Professionals become slow in the activities in completion of the time lines than prescribed in regulations under [Regulation 40A](#) of CIRP Regulations. Replacements should be considered in exceptional circumstances in order that CIRP process is carried out in an expeditious manner. Replacement of IRP/RP is prerogative of CoC and no reasons are required for replacements. However, the independence of the Insolvency Professional, and the process transparency would be strengthened, if the reasons of replacements are recorded in writing. Any misconduct or unlawful activities on the part of IRP/RP should be brought to the notice of the AA and the IBBI. There should be some guidelines for replacement of IRP/RP to ensure that replacements are fair, transparent and are actually needed for accomplishment of the objective of CIRP Process.

Conclusively, there is an urgent need of incorporation of the legal provisions in the code and the regulations relating to code of conduct of the CoC members. This would help in speedier resolution of the CD and all the stakeholders shall be benefitted by successful implementation of code of conduct for CoC members and the Insolvency Professionals. CoC Members and the IRP/RP need to work in tandem to achieve the desired objective of speedier resolution of the Corporate Debtor.

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Insolvency Resolution Process for Personal Guarantor to Corporate Debtor under Insolvency and Bankruptcy Code, 2016

1. Introduction to Personal Guarantor and Guarantee



Mitali Shah

FCS (Insolvency professional)

Personal Guarantor has been defined under [section 5\(22\)](#) of the Insolvency and Bankruptcy Code, 2016 ("IBC") as "an individual who is the surety in a contract of guarantee to a corporate debtor." A contract of guarantee and surety are defined under [section 126](#) of the Indian Contract Act, 1872 as "a contract to perform the promise, or discharge the liability, of a third person in case of his default." The person who gives such guarantee is called the '*surety*' and the person in respect of whose default such guarantee is given is called the '*principal debtor*', and the person to whom the guarantee is given is called the '*creditor*'. Therefore, in general terms-a personal guarantee is a promise, given by an individual to ensure that the principal debtor will repay its obligations towards the creditor and, if the principal debtor fails to do so, then such individual who is called as Personal Guarantor will be liable to repay the said obligation.

Notably, the contract of guarantee is an independent contract and [section 128](#) of the Indian Contract Act, 1872 provides that the liability of the surety will be co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. It means, the creditor is not obliged to exhaust all its remedies against the principal debtor before approaching the guarantor. In simple terms, in the event of default, the creditor is free to directly initiate recovery actions against the guarantor without even approaching the principal debtor.

2. Report Working Group on Individual Bankruptcy Process dated March 2019

A working group submitted its report in March 2019 discussing the manner of implementation of law and regulations to deal with the Individual bankruptcy proceedings. The Working Group discussed the agenda behind introducing such provisions in law that aims at:

- ◆ “Providing a fair and orderly process for dealing with the financial affairs of insolvent individuals.
- ◆ Providing effective relief or release from the financial liabilities and obligations of the insolvent.
- ◆ Providing mechanisms that enable both debtor and creditor to participate with the least possible delay and expense.
- ◆ Providing the correct ex-ante incentives so that individuals are not able to unfairly strategize during the process of bankruptcy.”

Thus, the intention behind introducing the Personal Insolvency in IBC is to provide a simpler, time effective and transparent platform to creditors to recover their dues and also for the Debtors to discharge their obligations without going into undue litigations. Accordingly, Part III of the IBC was introduced providing framework on Insolvency of Firms and Individuals comprising of personal guarantors. These provisions aim at replacing the existing two legislations namely Provincial Insolvency Act, 1920 (“Provincial Act”) and the Presidency-Towns Insolvency Act, 1909 (“Presidency Act”) that dealt with individual bankruptcy.

Part III as initially drawn is applicable on three cases: (i) personal guarantors to corporate debtors; (ii) partnership firms and proprietorship firms (“individuals with business”); and (iii) other individuals (“individuals without business”). The Working Group noted that the conditions and factors involved in the insolvency procedures of individuals with business are likely to be different from individuals without business. Hence, it shall be more effective to have different framework for both class of Debtors where it may require a more simple and with less involvement of Adjudicating Authorities and processing cost. Hence, it was concluded to notify the provisions of Part III of IBC in phases and that there should be separate set of rules and regulations for each class.

The Working group while further discussing the provisions of Part III of IBC also emphasized on the fact that giving personal guarantees for loans taken by corporations is prevalent practice in India. Where the principal debtor defaults in repayment of debt to the creditor, the creditor may choose to go after the personal guarantor for repayment of their debt. Hence, insolvency proceedings of a corporate debtor and its personal guarantor will be closely linked to each other. It was concluded to draw links between insolvency proceedings of a personal guarantor and its corporate debtor and same can be achieved through subordinate legislation. Consequently, it shall be more efficient to have a separate set of rules and regulations which are only applicable to proceedings regarding personal guarantors.

3. Applicability of Part III of IBC on Personal Guarantors

[Section 2](#) of IBC describing the class of persons to whom provisions of IBC was amended in 2018 with retrospective effect from 23-11-2017 adding personal guarantors to corporate debtors as clause (e) of [Section 2](#).

Part III of IBC provides framework for initiating insolvency and bankruptcy proceedings against partnership firms and individuals that also includes personal guarantors, however, the same was not notified to be effective till 2019. The Central Government *vide* notification dated 15-11-2019 has brought into force the provisions related to Part III but only with respect to the personal guarantor of a Corporate Debtor as defined in IBC. IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 and Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 has been formulated defining the procedure on how to complete the process in a smooth and effective manner.

4. Challenging the Constitutional Validity of Part III of IBC

As soon as the provisions for Personal Guarantors came into force, it led to initiation of proceedings by financial institutions against promoters of some of the largest NPAs in the Country for which CIRP/liquidation is undergoing under IBC comprising some of the renowned names in business industry. However, sooner these provisions faced the resistance from such

individuals that come under the category of personal guarantors challenging the constitutional validity and matter reached before High Court through petitions under [Article 32](#) of Constitution of India.

The major crux of the argument of challenge to the Notification dated 15-11-2019 was that the Central Government (CG) has enforced the provisions of IBC in excess of the authority extended to CG under [section 1\(3\)](#) of IBC where it has been stated that provisions of IBC shall come into force from such date as CG appoint by way of notification in official gazette. The parties contended that [Section 1\(3\)](#) only permits CG to appoint different dates for applicability of different provisions of IBC, however, it does not allow to extend the provisions to specific class of persons and not to others. It is, therefore, *ultra vires*.

There were other arguments raised by petitioners such as by virtue of [Section 133](#) of the Indian Contract Act allowing to discharge the liability of the surety on account of any variance in terms of the contract between principal debtor and creditor, without his/her consent. As per the petitioners, once the resolution plan is approved under [section 31](#) of IBC, the personal guarantors should have been discharged by virtue of [Section 133](#). The petitioners also raised argument of double claims being filed by creditors for same debt amount before Corporate Debtor as well as the Personal Guarantors.

The Supreme Court transferred these petitions to itself by virtue of [Article 139A](#) of the Constitution of India so as to settle the issue arising from these petitions. In its landmark judgment dated 21st May 2021

filed "[Lalit Kumar Jain v. Union of India \(2021\) 127 taxmann.com 368 \(SC\)](#)", the Supreme Court has upheld the constitutionality validity of notification dated 15-11-2019 issued by the Central Government for notifying the related provisions of IBC on personal guarantors. The Supreme Court while dismissing the writ petitions, observed and clarified on various issues that arose from notification dated 15-11-2019 summarized as under:

- ◆ There is sufficient indication in IBC- by [Section 2\(e\)](#), [Section 5\(22\)](#), [Section 60](#) and [Section 179](#) indicating that personal guarantors, though forming part of the larger grouping of individuals, were to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through the same adjudicatory process and by the same forum (though not insolvency provisions) as such corporate debtors. The notifications under [section 1\(3\)](#), (issued before the impugned notification was issued) disclose that IBC was brought into force in stages, regard being had to the categories of persons to whom its provisions were to be applied. The impugned notification, similarly *inter alia* makes the provisions of the Code applicable in respect of personal guarantors to corporate debtors, as another such category of persons to whom the Code has been extended. It is held that the 75 impugned notification was issued within the power granted by Parliament, and in valid exercise of it. The exercise of power in issuing the impugned notification under [section 1\(3\)](#) is therefore, not ultra vires; the notification is valid.
- ◆ Approval of a resolution plan under [section 31](#) of IBC does not *ipso facto* discharge a personal guarantor of her or his liabilities under the contract of guarantee. The approved resolution plan can only lead to a revision of amount or exposure of Personal Guarantor to the creditors of Corporate Debtor. The Petitioners to the petitions had relied on [Section 133](#) of the Contract Act allowing to discharge the liability of the surety on account of any variance in terms of the contract between principal debtor and creditor, without her or his consent. The Apex Court clarified that [Section 31](#) makes it clear that the approved resolution plan is binding to all class of stakeholders which also includes guarantor, so to avoid any of their attempt to escape liability under the provisions of the Contract Act.
- ◆ The Supreme Court has also clarified that for the same set of debts, claims can be made both against the principal borrower and the guarantor (however, the net recovery from the one has to be reduced by what has already been recovered from the other one) thereby recognising the principle of "*double dip*". It was also clarified that concept of double dip is not same as double proof which in substance prevents the same debt being made against the same estate, leading to the payment of a double dividend out of one estate.

The judgment is among the remarkable decisions of Supreme Court on IBC. The judgment will see a significant effect leading to multiple applications being filed by creditors in coming one year under IBC to initiate proceedings against personal guarantors for recovery of their dues. A large no. of cases is expected to be filed with NCLT against personal guarantors to larger/medium NPAs that are already facing their fate in CIRP and have been indulged in fraudulent activities and promoters/directors have been found to be involved in siphoning of public money, thereby preventing these persons from escaping their liability. The judgment shall also be of critical help in applications that were filed and initiated against personal guarantors under Part III of IBC but were stayed/not decided on account of issue of resolution plan of Principal Borrower being pending before Adjudicating Authorities.

5. Process of Insolvency of Personal Guarantors and Challenges that may arise.

- ◆ [Sections 94-120](#) of IBC have been notified on 15-11-2019 that provides for framework for insolvency process of personal guarantors.
- ◆ Under the said process, debtor who commits defaults or the creditor, either personally or through a resolution professional (RP) may file an application to Adjudicating Authority (AA) for initiating the process.
- ◆ There shall be an interim moratorium from the time application is filed



till it is admitted during which any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed and the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

- ◆ AA on receipt of application shall confirm the appointment of RP who shall within 10 days of his appointment submit a report to AA recommending to approve/reject the application. On approval of the application, the insolvency process of personal guarantor begins and moratorium under [section 101](#) commences that ends on completion of 180 days or on date of approval of resolution plan by AA, whichever earlier.
- ◆ During such moratorium stay of

legal proceedings against Debtor continues. RP shall follow the process of inviting and preparing the list of claims of creditors in the manner as mentioned in IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

- ◆ The Debtor shall prepare a resolution plan in consultation with RP which later places before AA along with a report prepared by him within the period of 21 days from the last date of submission of claim. Repayment plan should contain a proposal to the creditors for restructuring of his debt. RP is then required to hold meeting of creditors on approval of the resolution plan which requires voting of more than three-fourth in value of the creditors.
- ◆ RP shall place the report of meeting of creditors before AA with final resolution plan for its approval/rejection.
- ◆ Where the plan is approved, RP shall supervise the implementation of the plan and once the plan has been successfully implemented, shall file with AA for discharge order. In case, the plan is rejected, Creditors are entitled to file for bankruptcy of Debtor under the provisions of IBC.

The implementation of the insolvency resolution process, however, is likely to face challenges. Some of them are explained below...

- ◆ The assets of Personal Guarantor *i.e.* Debtor in the present case comprises of assets in his/her name, whereas in most cases it is expected that funds may have been diverted by these persons. Hence, it is unlikely to find any significant assets in the name of such personal guarantors, they may have invested the funds in the name of their family members or relatives/friends. This is possible in case of Corporates where siphoning of funds has been identified and criminal cases have been filed against their promoters/directors.
- ◆ The present assets available with Personal Guarantor may not be equivalent to assets at the time of giving personal guarantee for Corporate Debtor towards the loan facility availed. There is no mechanism to determine in such case, how and where the assets disposed off.
- ◆ Unlike CIRP/Liquidation, there is no mention of conducting valuation of assets of Personal Guarantor to determine their actual worth and to ensure whether the value of assets is enough to meet the amount proposed by Personal Guarantor in his/her resolution plan.
- ◆ It is specifically mentioned that RP shall ensure the implementation of resolution plan and once the plan has been implemented, he shall apply for discharge *i.e.* his/her role continues after approval

of resolution plan by AA. There is no clarity whether such role shall continue if the repayment plan stretches for a long time say more than a year and how his fees shall be taken up.

- ◆ Unlike corporates, individuals are not expected to maintain any books of accounts or any records of dues pending for payment. Hence, it shall be difficult for RP to verify third party claims other than lenders whom personal guarantee has been given by individuals for which documents are available and verifiable. Individuals *i.e.* debtors may take it as opportunity to place false claimants to extract funds through resolution plan. RP in such circumstances, is likely to reject such claims leading to many litigations thus delaying the process.

6. Concluding remarks

The insolvency of personal guarantors is among the critical issues that have been in talks since the introduction of IBC in 2016. It cannot be denied that promoters/directors have a major and crucial role in working of Corporate Debtors and any failure on part of Corporate Debtor to honour their commitment in repayment

of their dues is directly attributed to their working. This hold true specially when these Companies are admitted in CIRP and Resolution Professional came across avoidance transactions being undertaken classified as preferential/undervalued/extortionate/fraudulent, thereby indicating that there has been siphoning of funds from Company's account. As a normal practice, promoters/directors give their personal guarantee to lenders while applying for loan on behalf of Companies and thus become liable to repay the dues, in case the Company fails to meet their obligation. The Supreme Court judgment has been clear that those behind the doors of the corporate mismanagement cannot escape their liability on the pretext of the approval of the resolution plan under IBC.

Though the judgment has cleared the legal path for approaching against these personal guarantors under IBC, however, it is expected that the implementation of process is likely to meet various challenges. It is important to meet these challenges by bringing timely modification/amendments to law and regulations as and when require so as to ensure the smooth functioning of insolvency process and meet its purpose within the time bound manner which is the intent behind IBC.

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Regulating Insolvency Professional (IP) through Authorization For Assignment (AFA)



Umesh Chand Goyal
(Insolvency Professional)

Insolvency Professional is an important pillar under the Insolvency & Bankruptcy Code, assuming the responsibility of running the Corporate Debtor under Insolvency Resolution Process, performing the critical role to achieve the very purpose of maximizing the value of the CD enshrined in the IBC. Contemporary provisions for regulating the profession are the need of the hour, sought to be achieved by introducing the requirement of Authorization for Assignment and Continuing Professional Education.

1. Becoming an Insolvency Professional

The Insolvency and Bankruptcy Board of India (IBBI) is performing a pivotal role in regulating the matter connected with insolvency and bankruptcy through Insolvency Professional Agencies. The first point of connect for the person aspiring to become an Insolvency Professional is the IBBI for enrolling for taking up Limited Insolvency Examination (LIE), against payment of a prescribed fee. Passing LIE examination is the landmark achievement and is the testimony for having acquired the knowledge required for the insolvency profession.

The Requirement for becoming an Insolvency Professional, as per [Regulation 5\(a\)](#) of the IBBI (Insolvency Professionals) Regulations 2016, is that an individual has passed the Limited Insolvency Examination within twelve months before the date of his application for enrolment with the insolvency professional agency. [Regulation 5\(c\)](#) provides that an individual has - (iii) fifteen years' of experience in management, after receiving a Bachelor's degree from a university established or recognised by law; or (iv) ten years' of experience as - (a) chartered accountant registered as a member of the Institute of Chartered Accountants of India, (b) company secretary registered as a member of the Institute of Company Secretaries of India, (c)

- (i) abide by such other conditions as may be imposed by the Board.

On receiving Certificate of Registration from the IBBI, the aspirant now becomes Insolvency Professional, authorised to accept various assignments under the IBC. There was no further requirement till 31st December, 2019.

2. Evolution of requirement of Authorisation For Assignment (AFA)

The IBBI has made Regulations for Insolvency Professionals and these have been modified from time to time. IBBI (Insolvency Professionals) Regulations 2016 (commonly referred to as IP Regulations). [Regulations 4, 5, 6](#) and [7](#) deal with Eligibility, Qualification & experience, Application for certificate of registration and Certificate of Registration. The provisions on AFA has been incorporated under [Regulation 7A](#), inserted in the IP Regulations *vide* IBBI Notification No. IBBI/2019-20/GN/REG045 dated 23rd July, 2019 (w.e.f. 23-7-2019), is as under:

“7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be: Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-

- (a) 31st December, 2019; or
- (b) the date of expiry of his authorisation for assignment.”

The above notification dated 23rd July, 2019 is applicable from 1st January, 2020 and was issued well before the stipulated date. After this notification, Insolvency Professionals holding Certificate of Registration granted by the IBBI, are to apply for Authorisation For Assignment (AFA) to the Insolvency Professional Agency with which they have enrolled.

Since the AFA is granted by the IPA, IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 were also amended by inserting clause 12A, *vide* Notification No. IBBI/2019-20/GN/REG043, dated 23rd July, 2019 (w.e.f. 23-07-2019), as under:

12A. Authorisation for Assignment :-

- (1) The Agency, on an application by its professional member, may issue or renew an authorisation for assignment.
- (2) A professional member shall be eligible to obtain an authorisation for assignment, if he-
 - (a) is registered with the Board as an insolvency professional;
 - (b) is a fit and proper person in terms of the *Explanation* to clause (g) of [regulation 4](#) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;
 - (c) is not in employment;
 - (d) is not debarred by any direction or order of the Agency or the Board;
 - (e) has not attained the age of seventy years;

- (f) has no disciplinary proceeding pending against him before the Agency or the Board; (g) complies with requirements, as on the date of application, with respect to-
 - (i) payment of fee to the Agency and the Board;
 - (ii) filings and disclosures to the Agency and the Board;
 - (iii) continuous professional education; and
 - (iv) other requirements, as stipulated under the Code, regulations, circulars, directions or guidelines issued by the Agency and the Board, from time to time.
- (3) An application for issue or renewal of an authorisation for assignment, shall be in such form, manner and with such fee, as may be provided by the Agency:

Provided that an application for renewal of an authorisation for assignment shall be made any time before the date of expiry of the authorisation, but not earlier than forty- five days before the date of expiry of the authorisation.
- (4) The Agency shall consider the application in accordance with the bye-laws and either issue or

renew, as the case may be, an authorisation for assignment to the professional member in Form B or reject the application with a reasoned order.

- (5) If the authorisation for assignment is not issued, renewed or rejected by the Agency within fifteen days of the date of receipt of application, the authorisation shall be deemed to have been issued or renewed, as the case may be, by the Agency.
- (6) An authorisation for assignment issued or renewed by the Agency shall be valid for a period of one year from the date of its issuance or renewal, as the case may be, or till the date on which the professional member attains the age of seventy years, whichever is earlier.

The provisions and directions to IPAs on AFA are quite elaborate and designed to have effective control on the Insolvency Professionals. While the validity of AFA is one year, application for renewal is to be made any time before the expiry of AFA but not earlier than 45 days before the date of expiry. These provisions will ensure that no IP shall have the AFA validity for a period of more than 13 months at any point of time. This requirement also ensures that IPA will get its Annual Fee from its professional member, who are engaged in Insolvency Profession.

Continuing Professional Education is the necessity of any profession, but critical for the Insolvency Profession where the responsibilities on the shoulders of an IP are huge. For the purpose, the IBBI

issued guidelines on Continuing Professional Education for Insolvency Professionals (commonly referred to as CPE guidelines) on 6th August, 2019 in consultation with all the three Insolvency Professional Agencies (IPAs). The guidelines also have come into force with effect from 1st January, 2020, the date when guidelines on AFA came into force. The guidelines *inter alia* provides that an IP shall undertake CPE in compliance with these Guidelines to keep his registration valid. Authorisation for assignment shall not be issued or renewed to an IP who fails to comply with these Guidelines. These Guidelines shall not apply to IPs who have completed the age of 65 years. An IP has to undertake a minimum of 10 credit hours of CPE each calendar year and a minimum of 60 credit hours of CPE in each rolling block of three calendar years, provided that an IP is not required to undertake any CPE in the calendar year in which he is registered.

3. Similar requirements for authorisation in other professions

Various professions are regulated by their respective regulators. Requirement of continuing education is in place. Authorisation for profession is also required and is to be renewed periodically. IPs (Chartered Accountant, Cost Management Accountant and Company Secretary, having experience for at least 10 years) are conversant with the concept as they obtain Certificate of Practice (COP) which is to be renewed every year. IPs from legal profession are also conversant with the concept of Certificate of Practice,

which is renewed every 5 years. IPs with management experience of 15 years would have undergone and complied with



similar provisions in the form of e-learning, continuous upgradation of knowledge and skill by way of on the job training etc.

4. Supervision and control for compliance of provisions of AFA and CPE

The above provisions on AFA and CPE came into effect from 1st January, 2020. IPAs monitor their members and call for clarifications for any violation noticed or reported to it. The IBBI also exercises its responsibility for compliance of the above provisions and issue Show Cause Notice (SCN) for any violations. Many instances have surfaced where the IP gave his consent for Interim Resolution Professional/Resolution Professional/Liquidator to the applicants moving the application before the NCLT before December 2019 and the application was admitted subsequently (after 1-1-2020) when the IP was not holding AFA.

Regulation 7A is clear that an insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be. Accordingly, the IP, who have given consent form before 1st January, 2020, should have obtained AFA immediately. Else, he should have not undertaken the assignment (by making appropriate submission before the Adjudicating Authority) and the AA would have appointed another IP as IRP/RP.

5. Conclusion

IBC 2016 is in operations since early 2017 for practically 3 years as the year 2020 has impact on operations due to COVID 19 pandemic. The IBBI has been pragmatic by constantly reviewing various

Regulations made under IBC. Modification in IP Regulations by inserting **Regulation 7A** will enable adequate control over Insolvency Professionals. The IBBI guidelines on CPE are vital steps for fortifying the skill set of IPs, an important pillar of the IBC regime.

6. About the Author

Umesh Chand Goyal, M.Com, M.B.A, CAIIB, ID (IICA) is having 39 years of rich and varied experience in the field of Credit Management, Foreign Exchange, Restructuring of loans, BIFR matters, AAIFR matters, Administration, Business Development while working with State Bank of India, in Top Executive Grade. Presently, he is a Designated Partner with India's oldest and largest IPE AAA Insolvency Professionals LLP.

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The Constitutional Validity of the Insolvency & Bankruptcy Code, 2016



Karan N. Sanghavi

M.Com, ACA, ID

Part A: The Debtor's Paradise:

Almost every developed country in the world has formulated a law clearly defining the process and procedural aspects of bankruptcy, the US has Chapter 11 Bankruptcy, the UK has Insolvency Act, 1986, Germany has the German Insolvency Code of 1999 and so on. The Insolvency & Bankruptcy Code of 2016 was one of the inordinate economic reforms introduced by the Modi Government.

The Indian economy was a debtor's paradise in the pre-IBC era. Existing laws like SARFAESI Act, RDDBFI Act, SIC Act etc. were the only available routes to insolvency. These however took years and in some cases even decades to come to resolution. The result, debtors and wilful defaulters have taken banks and financial institutions for a ride. IBC was a game-changer, defining a timeline, consolidating and super-ceding all the existing provisions in the Indian Law.

Part B: Introduction to the constitutional provisions:

Article 14	The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
Article 19 (1) (g)	General right available to all the citizens of the country to carry on any type of business, occupation or profession
Article 141	The law declared by the Supreme Court shall be binding on all Courts within the territory of India. Thus, the general principles laid down, by the Supreme Court are binding on each individual including those who are not a party to an order.
Article 142	This Article allows the Supreme Court to pass any order necessary to do "complete justice" in any case. "The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it."

Part C: Challenging the Constitutionality of the IBC:

The IBC was challenged mainly on the ground of it being arbitrary and violative of [Article 14](#). [Article 14](#) provides that all persons shall be equal before law and shall be protected equally by the law. Where an act is alleged to be arbitrary, it is implied (in that assertion) that it is unequal, and hence, in violation of the mandate of [Article 14](#).

1. Section 12A

This provision allows withdrawal of CIRP proceedings through an application filed with the AA with the approval of 90% of the Committee of Creditors. In the challenge proceedings it was argued that the threshold of 90% was “arbitrarily” high.

The Supreme Court observed that it is necessary that the body overseeing and administering the resolution process must be consulted. 90%, which is almost all the financial creditors, is therefore just as it involves every financial creditor to put their heads together to decide on the decision to allow the withdrawal of a CIRP application. Moreover, NCLT & NCLAT under [section 60](#), always have the power to overturn such a decision.

2. Section 29A

This provision was introduced by the Hon'ble Finance Minister through the IBC (Amendment) Ordinance, 2017. It defines who can and who cannot file an application for corporate insolvency resolution. [Section 29A\(c\)](#) put a blanket ban on all promoters from applying. It was hence argued that [Sec. 29A\(c\)](#) treated unequal as equal therefore was discriminatory. Where a



person was ineligible merely because they were related to a person ineligible under [section 29A](#). The Supreme Court revisited the definition of a “related party” and held that these ought to be connected with the resolution applicant and hence their exclusion was not a Constitutional vice in the IBC.

3. Section 53

Lastly this was challenged on the ground that in an event of liquidation, the Operational Creditors would get nothing as they would rank below all the creditors. This would be discriminatory and hence in violation of [Article 14](#).

The Supreme Court observed that this distinction is necessary as financial creditors are secured and operational creditors are unsecured. Repayment of financial debt was necessary capital infused into the economy, this amount can be further advanced to entrepreneurs that would in turn create jobs and positively impact the economy. Hence in view of the intelligible differentia between the financial creditors and operational creditors, [Section 53](#) was held constitutionally valid.

Part D: Landmark Case laws:

Case Law	Provisions Challenged
<i>Swiss Ribbons Pvt. Ltd. v. Union of India</i> (2019) 101 taxmann.com 389/152 SCL 365 (SC)	7, 8, 9, 210, 12A, 29A, 29A(c), 29A (j), 21, 24, 14, 5(7), 5(8), 7(1), 7(4), 7(5), 21(6A), 21(6B), 3(9)(c), 214(e), 65, 75, 60, 30(4), 31, 30(2)(b), 18, 41, 42, 40, 28, 5(24A), 29A(h), 240(A), 52(1)(f)
<i>Arcelormittal India (P.) Ltd. v. Satish Kumar Gupta</i> (2018) 98 taxmann.com 99/150 SCL 354 (SC)	3(37), 7, 7(4), 7(5), 7(6), 7(7), 12, 12(1), 12(2), 12(3), 16, 17, 18(1), 21, 22, 25, 25(2)(i), 28, 29, 29A, 29(A) (c), 29(A)(g), 30, 30(2), 30(2)(e), 30(3), 30(4), 31, 33, 60(5), 61, 61(3), 62
<i>Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.</i> (2017) 88 taxmann.com 180/(2018)45 SCL 236 (SC)	8, 9, 9(3)(c) and 238
<i>Chitra Sharma v. Union of India</i> (2018) 96 taxmann.com 216/148 SCL 833 (SC)	7, 14(1)(a), 21, 29A, 30(4), 31, 33(1) and 238
<i>Manish Kumar v. Union of India</i> (2021) 123 taxmann.com 343 (SC)	7, 11, 32A

1. *Swiss Ribbons Pvt Ltd. v. Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC)

The most important argument was that the differentiation between financial creditors and operational creditors is in violation of [Article 14](#) of the Constitution of India. Further, [Section 12A](#) of the Code requires the approval of at least 90% of the total voting share of the committee of the creditors (COC) before initiating the settlement process between creditors and corporate debtors. Thus, unlimited power is given to the COC which may allow them to misuse it. The treatment made to the operational creditor under the IBC Code under the Corporate Insolvency Resolution Process (CIRP) where they have no right to say and same lies at the mercy of committee of creditors (COC) was challenged on

the ground that the same is in violation of [Article 14](#).

The Court observed that financial creditors are in a better position than corporate debtors to assess the viability and feasibility of the business. Financial creditors such as banks and financial institutions are involved in lending money, whereas operational creditors which deal with only goods and services and dues occurred with it are not in a position to assess the business. Hence also confirming the validity of [Section 53](#), that was also challenged.

The Swiss case decision by the Supreme Court in 2019 is the landmark development in the Insolvency regime of India. The Court relied on the statistics of the resolutions and settlement post-IBC Code. This judgment shows that the Supreme Court should intervene only in cases where the exercise

of any legislative enactment *prima facie* seems to be arbitrary. This judgment has further made the foundation of the Insolvency Code stronger with certain directions to implement it. This judgment further helps to mitigate fears among investors in acquiring assets through this Code. The recent move made by the central government to establish the Circuit bench at Chennai shows the impact of the Swiss case

2. *Arcelormittal India (P.) Ltd v. Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL 354 (SC)

[Section 29A\(c\)](#) states that a person shall not be eligible to submit a resolution plan if such person or any other person acting jointly or in concert with such person, *inter alia*, has an account, or an account of a corporate debtor under the management and control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor. Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of the resolution plan.

ArcelorMittal India Private Limited (“AMIPL”) and Numetal Limited (“Numetal”) submitted resolution plans. However, the Resolution Professional found AMIPL and Numetal to be ineligible under [section 29A](#) of the IBC.

The Court observed the following:

State of ineligibility as per [Section 29A\(c\)](#) of the IBC is when the resolution plan is submitted by a resolution applicant and not prior to that

Any person who wishes to submit a resolution plan happen to either manage or control or be promoters of a corporate debtor, who is classified as a non-performing asset and whose debts have not been paid off for a period of at least one year before commencement of the corporate insolvency resolution process, becomes ineligible to submit a resolution plan.

If a person wishes to submit a resolution plan jointly or in concert with others (as described above), they must first pay off the debt of the said corporate debtor classified as an NPA in order to become eligible under [section 29A\(c\)](#) of the IBC.

The Court observed that the period of time spent in litigation before the NCLT or the NCLAT with respect to any issues arising from the corporate insolvency resolution process shall be excluded from the 270 (two hundred seventy) days period stipulated under [section 12](#) of the IBC.

The Court, finally, held that both AMIPL and Numetal were ineligible to submit resolution plans in accordance with [Section 29A\(c\)](#) of the IBC. However, upon the request of the Committee of Creditors of ESIL, the Court has exercised its extraordinary power under [Article 142](#) of the Constitution and has granted one more opportunity to AMIPL and Numetal to pay off the NPAs of their related corporate debtors within a period of 2 (two) weeks from the date of receipt of the Judgment in

accordance with the proviso to [Section 29A\(c\)](#) of the IBC. If such payments are made within the aforesaid period, both resolution applicants can re-submit their resolution plans (submitted earlier) to the Committee of Creditors who are required to consider and decide within 8 (eight) weeks from the date of the judgment. In the event the Committee of Creditors fails to make such decision with the requisite majority, ESIL shall go into liquidation.

3. *Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.* (2017) 88 taxmann.com 180/(2018)45 SCL 236 (SC)

[Section 8](#) deals with the concept of delivering of demand notice by the operational creditor to the corporate debtor with regard to payment of the amount due to him. Further [Section 9](#) of the Code deals with the application for the initiation of insolvency process against the corporate debtor being filed by the operational creditor as prescribed under the Act. [Section 238](#) further deals with the concept of overriding effect of the Code over other laws.

The appeal filed before the Supreme Court raised the following two issues:

- ◆ Whether in relation to an operational debt, the provision contained under [section 9\(3\)\(c\)](#) of the Insolvency and Bankruptcy Code, 2016 is mandatory?
- ◆ Whether the lawyer is eligible to issue demand notice of an unpaid operational debt on behalf of operational creditor?

That [section 9\(3\)\(c\)](#) of the Code is not mandatory but directory in nature. The

counsel further stated that the section is procedural in nature and hence there is no condition to be fulfilled before filing of the application under [section 9\(1\)](#). Further, [section 9\(5\)](#) makes it clear that if the certificate is not obtained by the financial institution of the corporate debtor regarding the unpaid amount of operational debt then in such case, this ground does not make the application to be rejected. It was further contended by the counsel that [Section 30](#) of The Advocates Act and judgments with effect therefrom, the word “practice” when read in context to Advocates include practice in tribunals also. In other words, [Section 30](#) of Advocates Act empowers the Advocates enrolled to practice in NCLT as well as NCLAT. The counsel further contended that [section 5](#) of the Code laid down the definition of the term “person” which includes the person resident outside India, if read in relation to the operational debtor the same gives the impression that the operational creditor who is resident outside India is also eligible to file application against the corporate debtor for the initiation of the insolvency proceedings under the provision of Code.

The Court in the present case rightfully protected the rights of the operational creditors as in this case. Those operational creditors who are resident of outside India if get cheated or affected by the act of the corporate debtor to whom the provisions of IBC 2016 would apply then in such case, the judges have to apply the modern approach towards the strict provisions of the code in such manner that the innocent person will not get affected and get justice.

As in the present case, the court protected the rights of the operational debtor by using literal approach towards the provision of [section 9](#) of the Code. Also, to not to deprive the Advocates from practice of their profession, the Court held that depriving them for such practice will attract the violation of [Article 19](#) of the Constitution of India.

From the present case, it can be concluded that the operational creditor can appoint a lawyer in order to issue the demand notice to the corporate debtor before initiating the insolvency proceedings against him.

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

Aggrieved by the NCLT's order initiating CIRP against Jaypee Infratech Ltd., various home buyers who had invested their money in numerous residential projects of JIL and its parent company Jaiprakash Associates Limited (JAL) came before the Supreme Court by way of multiple Writ Petitions and Special Leave Petitions. Their main grievance was that despite being vital stakeholders they had no locus in the CIRP, therefore the provisions of the IBC should be declared ultra vires. They also wanted equal status as financial creditors as their claims were not covered under any of the provisions of the pre-amended IBC.

To ensure that home buyers are protected, the Supreme Court nominated a senior counsel to represent the cause of the home buyers in the Committee of Creditors (CoC). Later on, the Insolvency and Bankruptcy Board of India (IBBI) also introduced Form F for categories other than financial and operation creditors to file their claims.

Shortly after expiry of the CIRP period for JIL, the IBC was amended by way of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 (Ordinance) with effect from June 06, 2017. The Ordinance included home buyers as financial creditors under the IBC, which allows them to initiate CIRP and be a part of the CoC under [section 7](#) and [Section 21](#) respectively.

The Jaypee Case has captured the essence of the Resolution as being a market driven one, wherein primacy is given to the commercial decisions. The Supreme Court also noted that the IBC at its time of enactment did not capture and recognize the interests of the home buyers, which have now been safeguarded by way of the Ordinance.

The Supreme Court while recognizing the home buyers as financial creditors has left the question open as to whether the home buyers are secured or unsecured creditors. An important aspect of the judgment is that the Supreme Court did not accede to payment of amounts deposited by the promoter to home buyers on the ground that it would be a preferential payment to one class of creditors.

5. *Manish Kumar v. Union of India* (2021) 123 taxmann.com 343 (SC)

Allottees of real-estate projects can make application for initiation of CIRP against the corporate debtor only if the application has been made jointly by not less than 100 allottees of a particular project; or 1/10th of the total number of allottees of the particular project whichever is lower.

[Section 32A](#) provided that all the liability of corporate debtor, committed prior to

commencement of Corporate Insolvency Resolution Process ('CIRP') shall be discharged post CIRP provided that there is a change in the management and control of the corporate debtor, and the person who shall have the control and right over management of corporate debtor as per resolution plan should not be in any manner involved in the default or abetted in the default.

Petitions were filed by real-estate creditors, who alleged that the impugned amendment is contravening the provision of [Article 14](#). It was alleged that by imposing the thresholds for real-estate creditors, the object of the law stands defeated and the Ordinance not only deprives the real-estate creditors from their right per [section 7](#) but also violates the provision of [Article 14](#). The principal argument was based on the fact that there is already a threshold limit of amount of default of Rs. 1 Crore, and any further threshold limit would be discriminatory for the real-estate creditors, without any intelligible differentia. It was argued by the Petitioners that the immunity granted to the corporate debtor and its assets acquired from the proceeds of crimes and any criminal liability arising from the offences of the erstwhile management for the offences committed prior to initiation of CIRP further jeopardizes the interest of the allottees/creditors. It was contended that such cleansing would cause huge losses which is sought to be prevented under the provisions of the Prevention of Money Laundering Act, 2002. Hence, [section 32A](#) was argued to be arbitrary, ultra-vires and violative of [Article 300A](#) and [Articles 14, 19](#) and [21](#).

The main purpose of [section 32A](#) was to

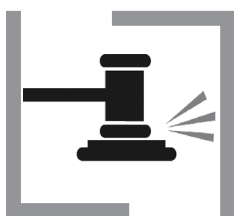
give a fresh start to the corporate debtor after the resolution applicant has taken over the management of the corporate debtor pursuant to the resolution plan. The Apex Court observed that "the extinguishment of the criminal liability of the Corporate Debtor is important for the new management to make a break with the past and start on a clean slate. [Section 32A](#) cannot be held as unconstitutional, as all necessary checks and balances have been provided for to avoid misuse.

Part E: Conclusion

The Supreme Court concluded with significant observations, has laid down the road map for future experiments in the legislating business and commercial laws in India. Indian Bankruptcy Code 2016 is an experimental law, such an experiment is the grave responsibility of the government and denial of such a right to experiment shall have serious consequences to India as a nation. Operational effectiveness of the code is constantly being monitored by the Central Government through committees of experts set up on this behalf.

The pre-IBC era was one that could be labeled a Debtor's paradise and a Creditor's hell. The wisdom behind which the IBC was formulated has caused this paradise to be lost and has reshaped the Indian Economy to its rightful position and placed itself better in the ease of doing business rankings, globally. The IBC 2016, although a relatively young law, is promising and has the potential to be a game-changer for the Indian Economy & the India growth story!

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(2021) 127 taxmann.com 607 (SC)

SUPREME COURT OF INDIA

National Company Law Tribunal & Appellate Tribunal Bar Association v. Ministry of Corporate Affairs

L. NAGESWARA RAO, HEMANT GUPTA AND S. RAVINDRA BHAT, JJ. WRIT PETITION(S) (CIVIL) NO(S). 510 OF 2021
MAY 31, 2021

Section 412 of the Companies Act, 2013 - National Company Law Tribunal - Selection of members - National Company Law Tribunal and Appellate Tribunal Bar Association had filed writ petition seeking a direction to respondent - MCA to fill up vacancies of Chairman, NCLAT and President of NCLT without any further delay - A further direction was sought to issue letters of appointment to candidates pursuant to selection procedure initiated in 2019 and to fill up remaining vacancies of Members of NCLT and NCLAT - Whether as Government had already initiated process of reappointment by writing to Chief Justice, reappointment process should be completed expeditiously, as

there was no necessity of issuance of any advertisement for participation of other eligible candidates - Held, yes - Whether as strength of members of NCLT and NCLAT was depleting which would be detrimental to smooth functioning of Tribunals, Government was directed to complete process at earliest and not later than two months - Held, yes (Para 6)

FACTS

- ◆ The National Company Law Tribunal and Appellate Tribunal Bar Association had filed writ petition seeking a direction to the respondent - MCA to fill up

the vacancies of Chairman, NCLAT and President of NCLT without any further delay.

- ◆ A further direction was sought to issue letters of appointment to the candidates pursuant to the selection procedure initiated in 2019 and to fill up the remaining vacancies of Members of NCLT and NCLAT.
- ◆ The petitioner has also sought a direction to extend the term of six Members of the NCLT and NCLAT for a further period of five years as they are completing the tenure by June, 2021.

HELD

- ◆ As the Government had already initiated the process of reappointment by writing to the Chief Justice, the reappointment process should be completed expeditiously, as there was no necessity of issuance of any advertisement for participation of other eligible candidates.
- ◆ Reappointment of Members can be considered separately without waiting for the process of fresh appointments to commence.
- ◆ As the strength of the Members of the NCLT and NCLAT was depleting which would be detrimental to the smooth functioning of the Tribunals, the Government was directed to complete the process at the earliest and not later than two months. (Para 6)

A.S. Chandhiok, Virender Ganda, Sr. Advs. **Ajay Kumar Jain, Rakesh Kumar, Vipul Ganda, Vishal Ganda, Satyajit A. Desai, Ms. Aastha Trivedi, Ms. Guresha Bhamra, Tejasvi Chaudhry, Satya Kam Sharma**, Advs. and **Ms. Anagha S. Desai**, AOR for the Petitioner. **R. Balasubramaniam**, Sr. Adv., **K.K. Venugopal**, AG, **Balbir Singh**, ASG, **Zoheb Hossain, Ms. Shradha Deshmukh, Ms. Chinmayee Chandra, Shyam Gopal, Ankur Talwar, Ms. Suhasini Sen**, Advs. and **Gurmeet Singh Makker**, AOR for the Respondent.

ORDER

1. The National Company Law Tribunal and Appellate Tribunal Bar Association has filed this Writ Petition seeking a direction to the respondent to fill up the vacancies of Chairman, NCLAT and President of NCLT without any further delay. A further direction was sought to issue letters of appointment to the candidates pursuant to the Selection procedure initiated in 2019 and to fill up the remaining vacancies of Members of NCLT and NCLAT. The petitioner has also sought a direction to extend the term of six Members of the NCLT and NCLAT for a further period of five years as they are completing the tenure by June, 2021.

2. When the matter was listed on 24-5-2021, Mr. Balbir Singh, learned Additional Solicitor General submitted that the process for appointment of candidates who have been selected pursuant to the procedure which was initiated in 2019 shall be expedited and orders of appointment shall be issued soon. In respect of the process to be initiated for filling up the existing vacancies, a search-cum-Selection Committee has to be constituted and we direct that the

Selection Process shall be initiated at the earliest.

3. In so far as the extension of the term of the Members of the NCLT and NCLAT who are completing their tenure in June, 2021 is concerned, the learned Attorney General for India refers to section 413 of the Company's Act, 2013 according to which the President or other members of the Tribunal shall hold office for a period of 5 years and shall be entitled for reappointment for another term of 5 years. He submitted that the government has initiated the process for reappointment by requesting the Hon'ble the Chief Justice of India to constitute a committee for the purposes of the reappointment of members to the NCLT and NCLAT.

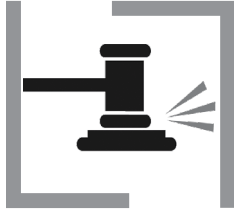
4. Mr. Amarjit Singh Chandhiok, learned senior counsel appearing for the petitioner submitted that he cannot have any objection to the process of reappointment being initiated immediately but requested that the members who are completing their tenure should be permitted to continue till the process of reappointment is completed. He brought to our notice that there are 39 members at present for a sanctioned strength of 63 and the depletion of the

strength of the members will adversely affect the smooth functioning of the Tribunals.

5. Mr. Amarjit Singh Chandhiok, learned senior counsel was supported by Mr. Pradeep Rai, and Mr. Ajay Jain who argued that the members who are completing their tenure should be permitted to continue in the interest of justice and for the smooth functioning of the Tribunals.

6. As the Government has already initiated the process of reappointment by writing to the Hon'ble Chief Justice, we trust and hope that the reappointment process should be completed expeditiously, as there is no necessity of issuance of any advertisement for participation of other eligible candidates. Reappointment of members can be considered separately without waiting for the process of fresh appointments to commence. As the strength of the members of the NCLT and NCLAT is depleting which would be detrimental to the smooth functioning of the Tribunals, we direct the Government to complete the process at the earliest and not later than two months.

7. Writ petition and pending applications, if any, shall stand disposed of.



(2021) 128 taxmann.com 324 (NCLT - Kolkata)

National Company Law Tribunal, Kolkata Bench

IDBI Bank Ltd. v. Leather World India Ltd.

RAJASEKHAR V.K., JUDICIAL MEMBER AND

HARISH CHANDER SURI, TECHNICAL MEMBER IA (IB) NO.1687 (KB) OF 2019

CP (IB) NO. 432 (KB) OF 2018 JUNE 14, 2021

Section 33, read with **section 14** of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Initiation of - Applicant was a tenant of a shop and he had entered into a commission agreement with corporate debtor, whereby corporate debtor would utilise premises for its leather business - Corporate debtor defaulted in making payments to applicant and had unlawfully transferred premises to a third party - Adjudicating Authority passed order for liquidation of corporate debtor - Applicant filed application against Liquidator of corporate debtor seeking an order declaring that subject premises was outside scope of moratorium of corporate debtor and for direction to Liquidator for disbursement of sum admitted by Liquidator, in favour of applicant - Whether since corporate debtor was in liquidation, provision that governed initiation or continuation of legal proceedings was **section 33(5)**, which does not prohibits continuation of any pending suits or legal proceedings - Held, yes - Whether since applicant had also instituted civil proceedings for various reliefs both in High Court as well as in City Civil Court, there was no need for Adjudicating Authority to grant an order declaring that subject premises was outside scope of moratorium of corporate

debtor and same was rejected - Held, yes - Whether as regards disbursement of claim admitted by Liquidator, same was not permissible until liquidation process itself came to an end and, therefore, prayer was rejected - Held, yes (Paras 4.6, 4.7, 4.8 and 4.9)

Siddharth Chatterjee, **Ms. Urmila Chakraborty**, and **Debnath Bhattacharya**, Advs. for the Appellant. **Shaunak Mitra**, Adv., **Arun Kumar Gupta**, PCA and **Anil Agarwal**, Liquidator for the Respondent.

ORDER

1. Preamble

1.1 IA (IB) No. 1687/KB/2019 in CP (IB) No. 432/KB/2018 sees a battle of the Anils - Mr Anil Arora, the applicant who claims tenancy of a shop room at the ground floor of the premises bearing No. 15, Lindsay Street, Police Station New Market, Kolkata 700 087, pitted against Mr Anil Agarwal, the liquidator of the first respondent company.

2. The applicant's case

2.1 The applicant is a tenant in respect of a shop room at the ground floor of the premises bearing No. 15, Lindsay Street, Police Station New Market, Kolkata 700 087.

2.2 The applicant had entered into a commission agreement with the corporate debtor on 13-11-2014 for a period of nine years, whereby the corporate debtor would utilise the premises for its leather business and shall pay the applicant as the commission agent, commission at 3% of the total sale on a monthly basis, subject to a minimum guaranteed return of Rs. 2.00 lakh.

2.3 The monthly commission as above was required to be paid within the 10th day of every month, in default of which the corporate debtor was liable to pay interest @12% per annum.

2.4 From April 2016 onwards, the corporate debtor started defaulting in making payments to the applicant. Between April 2016 and February 2017, the corporate debtor made part payments of Rs. 8,10,000/- , leaving a total of Rs. 30,19,513/- upto November 2017 inclusive of interest, as unpaid.

2.5 On 13-6-2016, the corporate debtor sought to reduce the monthly guaranteed return of Rs. 2.00 lakh to Rs. 1.10 lakh on grounds of losses sustained in its business. The applicant has, therefore, filed a civil suit bearing CS No. 12/2018 before the Hon'ble Calcutta High Court for the said sum of Rs. 30,19,513/- in January 2018. Subsequently, several interlocutory applications bearing GA No. 349/2018 and GA No. 1604/2018 were also filed before the Hon'ble Calcutta High Court, which are pending adjudication. In GA No. 349/2018, the Hon'ble Calcutta High Court passed an order restraining the corporate debtor from creating any third party interest over the subject premises.

2.6 The premises were taken on rent by the applicant's father, late Hiralal Arora, to run his business in the name and style of M/s H. Lal & Co., a sole proprietorship, in the year 1950 from one Peter Basil, being joint owner with his sister, Pamela Basil. In 1970, Peter Basil left India and settled in Australia. His sister Pamela continued to stay in her half portion of the premises till her death. After Peter Basil shifted to Australia, the applicant has been paying rent to the Rent Controller, Govt of West Bengal. Following the death of Peter Basil, his sister Pamela became the absolute owner of the said premises. However, she never claimed any rent for the said premises, which continued to be in enjoyment and occupation of M/s H. Lal & Co. as tenant.

2.7 That the applicant is a tenant in the said premises is known to the corporate debtor, and the corporate debtor has accepted the applicant as the tenant in respect of the said premises, by virtue of the commission agreement dated 13-11-2014.

2.8 The applicant has given only right of user in respect of the said premises to the corporate debtor, and the latter is neither the owner nor a tenant in the said premises.

2.9 The applicant has come to know that the corporate debtor has unlawfully transferred the premises to a third party, which is now carrying on business and operations under the name and style of Prince Majestic wherein one Vidhan Fashions is claiming franchise thereof from March 2018, before the order of admission dated 13-6-2018 passed by this Adjudicating Authority.

2.10 The applicant's information is that the corporate debtor has already transferred the premises to Vidhan Fashion for a sum of Rs. 20.00 lakh and that the corporate debtor is earning a whopping sum of Rs. 4.00 lakh per month from the said premises, despite having no right, title or interest in respect thereof.

2.11 The applicant had sent an email dated 26-8-2018 to the Respondent No. 2/Liquidator, asking for refund of the amount collected from third party and also for giving back vacant and peaceful possession of the premises. However, the liquidator has not acted in accordance with the requests.

2.12 The applicant is not only entitled to the premises, but also to the sums collected from the third party. Additionally, it is also entitled to the minimum commission guarantee of Rs. 2.00 lakh per month in terms of the commission agreement dated 13-11-2014.

2.13 The applicant had filed CA (IB) No. 981/KB/2018 in CP (IB) 432/KB/2018, for an order directing the respondents to give back vacant and peaceful possession of the premises to the applicant. The annual accounts of the corporate debtor for the year 2014-15 would reveal that the said premises are not the asset of the corporate debtor. When the said application was taken up on 21-1-2019, the Adjudicating Authority did not consider the submissions made and instead directed the applicant to file its claim with the liquidator, who was to consider the claim on its own merit. The Adjudicating Authority passed the order for liquidation of the corporate debtor on 29-1-2019. Now, therefore, the

order dated 21-1-2019 has merged with the order dated 29-1-2019.

2.14 Being aggrieved by both the orders, the applicant preferred Company Appeal (AT) (Insolvency) Nos. 295/2019 and 296/2019 before the Hon'ble NCLAT, New Delhi. By an order dated 27-1-2019, the appeals were dismissed. Civil Appeals Nos. 6592/2019 & 6593/2019 to the Hon'ble Supreme Court were also dismissed.

2.15 In the meantime, the applicant lodged proof of claim with the liquidator, claiming a sum of Rs. 67,07,118, which has been duly admitted by the liquidator under communication dated 1-4-2019.

2.16 The said premises is burdened with onerous covenants for the corporate debtor as the corporate debtor has to pay a sum of Rs. 2.00 lakh on monthly basis to the applicant. Therefore, the premises should be disclaimed in favour of the applicant. The applicant is entitled to a vesting order, especially since there are no other claimants in respect of the said premises.

2.17 The liquidator has filed CA (IB) No. 1415/2019, seeking direction upon the respondents therein to provide vacant possession of the shop-room in the said premises. Since the applicant has not been made a party to this application, the applicant asked for a copy of the application from the liquidator *vide* his email dated 13-11-2019, but the liquidator refused to provide the same *vide* his reply email dated 13-11-2019.

2.18 The applicant also seeks disbursement of the amount admitted in his favour by the liquidator.

2.19 In these circumstances, the applicant seeks the following prayers: —

- (a) An order of disclaimer of the premises at No. 15, Lindsay Street, Police Station-New Market, Kolkata 700 087 in favour of the applicant herein;
- (b) Alternatively, an order declaring that the premises at No. 15, Lindsay Street, Police Station-New Market, Kolkata 700 087, is outside the scope of the moratorium of the corporate debtor;
- (c) Direction on the liquidator for disbursement of Rs. 67,07,118 admitted by the liquidator, in favour of the applicant;
- (d) Order directing the respondents to refund the amount collected from Vidhan Fashions each and every month;
- (e) Order directing the respondents to pay commission fee to the applicant at the rate of 3% of the total sale on a monthly basis, subject to the minimum guarantee of Rs. 2.00 lakh under the commission agreement dated 13-11-2014, till the actual physical possession of the property is handed back to the applicant;
- (f) An order directing the respondents to give back vacant, peaceful and actual possession of the said premises to the applicant;
- (g) Direction on the liquidator for serving a copy of the application in CA (IB) No. 1415/KB/2019 filed by the

liquidator, and an opportunity be given for filing a reply thereto.

3. The liquidator's reply

3.1 The liquidator has filed a reply, wherein he has questioned the maintainability of the application, which has been filed under section 333 of the Companies Act, 2013. The liquidator states that the application is filed on a mere apprehension, and that cannot be the basis for maintaining an application. He has also drawn attention to the order dated 27-3-2019 passed by the Hon'ble NCLAT, dismissing the appeals filed by the applicant. The order of dismissal has also been sustained by the Hon'ble Supreme Court.

3.2 The liquidator has also received the claim of the applicant to the tune of Rs. 67,07,118/-, which has been duly verified and admitted.

3.3 The liquidator has also referred to the fact that the applicant has filed a Title Suit in a city civil court praying for permanent injunction. The suit is still pending for adjudication. The applicant filed for winding up of the corporate debtor before the Hon'ble Calcutta High Court, whose proceedings have been stayed since moratorium has kicked in following the order of admission dated 13-6-2018 passed by this Adjudicating Authority. The applicant has, therefore, approached every forum to take possession of the said property.

3.4 The liquidator has also received a letter dated 14-12-2020 from Lloyd Erectors Pvt. Ltd., wherein it was informed for the very first time that Lloyd Erectors Pvt. Ltd. had purchased the premises No. 15, Lindsay

Street (previous numbered as 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15I, 15J, 15K 15L) known as Lindsay Mansion from Peter Alan Basil by way of a registered deed of conveyance dated 30-4-1988, registered as Document No. 4708/1988, Book I, Vol.137, pages 52 to 68 before the Registrar of Assurances, Kolkata. It was also mentioned that shop No. 15D was tenanted to Hiralal Arora, sole proprietor of M/s H. Lal & Co. The applicant herein is the legal heir to Hiralal Arora who is claiming back the premises even though he has no legal right over the property.

4. Analysis of the contentions & orders on each of the prayers

4.1 We have perused the application and the reply of the liquidator, and heard the learned counsel appearing for each of them.

4.2 At the outset, we note that there are discrete causes of action combined in a single application. We can think of no reason other than saving of application fees for such a move. Let us examine the prayers once by one.

Prayer (a)

4.3 Prayer (a) is for an order of disclaimer of the premises at No. 15, Lindsay Street, Police Station-New Market, Kolkata 700 087 in favour of the applicant.

4.4 This is ostensibly on the ground that onerous covenants supposedly are attached to the property. We are not required to go into the veracity of the commission agreement dated 13-11-2014. However, even from a bare reading of the commission agreement of 13-11-2014, which is the

basis of such claim, there is nothing that can be attributed to the property itself, even if the commission agreement is taken at face value. It only casts a burden on the corporate debtor to make payments—that too if the commission agreement is otherwise sustainable in law. Therefore, this prayer of the applicant for disclaimer of onerous covenants is hereby rejected.

Prayer (b)

4.5 Prayer (b) is for an order declaring that the premises at No. 15, Lindsay Street, Police Station-New Market, Kolkata 700 087, is outside the scope of moratorium of the corporate debtor.

4.6 The CIRP has come to an end with the order dated 29-1-2019 ordering the liquidation of the corporate debtor. With this, the moratorium that kicked in with the order of admission dated 13-6-2018 has also run its course. Since the corporate debtor is in liquidation, the provision that now govern initiation or continuation of legal proceedings is section 33(5), which reads as follows: -

“(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.”

4.7 While section 14 of the Insolvency & Bankruptcy Code, 2016, is a broad-spectrum moratorium prohibiting all kinds of action against the corporate debtor, section 33(5)

confines itself only to initiation of legal proceedings by or against the corporate debtor. The proviso to section 33(5) makes it clear that the liquidator may institute a suit or legal proceeding for and on behalf of the corporate debtor, after obtaining the prior approval of the Adjudicating Authority. There is no bar engrafted into section 33(5) which prohibits continuation of any pending suits or legal proceedings.

4.8 In the present case, since the applicant has also instituted civil proceedings for various reliefs both in the Hon'ble Calcutta High Court as well as in the city civil court, there is no need for this Adjudicating Authority for grant of prayer (b), and the same is hereby rejected.

Prayer (c)

4.9 Prayer (c) is for disbursement of claim admitted by the liquidator, which is not permissible until the liquidator process itself comes to an end. Therefore, this prayer is rejected.

Prayer (d)

4.10 Prayer (d) is for an order directing the respondents to refund the amount collected from Vidhan Fashions on each and every month.

4.11 This prayer cannot be granted without determining the issue of ownership and possession of the property. Since that issue is sub judice before the Hon'ble Calcutta High Court and the city civil court, this prayer is rejected.

Prayer (e)

4.12 Prayer (e) is for an order directing the respondents to pay commission fee

to the applicant in terms of agreement dated 13-11-2014.

4.13 Since the claim of the applicant has already been adjudicated and admitted in full, all that is required to be done at this stage is to sit back and wait for the liquidation process to be completed, at the end of which disbursement will take place in accordance with law. Therefore, this prayer is rejected as premature at this stage.

Prayer (f)

4.14 This is for an order directing the respondents to give back vacant peaceful and actual khas possession of the said premises.

4.15 This Adjudicating Authority had considered application bearing IA No. 138/2021, in which an order dated 12-4-2021 was passed. It was directed that in view of contesting claims made regarding ownership and possession, the liquidator shall hand over physical possession of the premises to the person from whom the corporate debtor took possession, since the corporate debtor was not the owner of the premises. Accordingly, the liquidator has since handed over possession to Mr Anil Arora, the applicant herein.

4.16 In view of this, prayer (f) has become infructuous.

Prayer (g)

4.17 This is for a direction to the liquidator for service of a copy of the application being CA (IB) No. 1415/KB/2019 filed by the liquidator, and for an opportunity to be given to the applicant to file appropriate reply therein.

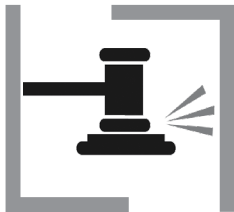
4.18 The liquidator is the applicant in that application, and therefore, the dominus litus. If at all the applicant feels that he is entitled to be heard, he ought to file an intervention petition in IA No. 1415/KB/2019. This prayer in the present application is, therefore, refused.

5. Orders

5.1 IA No. 1687/KB/2020 stands disposed of in accordance with the above directions.

5.2 The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

5.3 A certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.



(2021) 128 taxmann.com 326 (NCLAT - New Delhi)

National Company Law Appellate Tribunal, New Delhi

State Bank of India v. Limtex Tea & Industries Ltd.

ANANT BIJAY SINGH, JUDICIAL MEMBER AND

MS. SHREESHA MERLA, TECHNICAL MEMBER

I.A. NO. 966 OF 2021

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1496 OF 2019†

JUNE 10, 2021

Section 53, read with **section 7**, of the Insolvency and Bankruptcy Code, 2016 and **rule 11** of the National Company Law Tribunal Rules, 2016 - Corporate liquidation process - Asset, distribution of - Application under **section 7** was filed by financial creditor against corporate debtor - NCLT by order dismissed application and released corporate debtor from rigour of 'Corporate Insolvency Resolution Process' and directed Interim Resolution Professional/Resolution Professional to handover records and assets of 'corporate debtor' to director of 'corporate debtor' immediately - Applicant bank submitted that during ongoing CIRP, defaults had been committed by corporate debtor in repayment of financial facilities availed from applicant bank, hence it had taken symbolic possession of land leased to appellant - Hence, applicant submitted that said land did not fall under category of 'assets of corporate debtor' and hence, same be returned to applicant bank and not to corporate debtor - However, it was found that applicant was not party in proceedings before Tribunal and had first time brought these new facts before Appellate Tribunal through intervention application, which could not be permitted - Whether therefore, instant application

was to be dismissed as not maintainable - Held, yes (Paras 6 to 8)

CASE REVIEW

Limtex Tea & Industries Ltd. v. Shri Bihariji Cold Rollers (P.) Ltd. (2021) 128 taxmann.com 325 (NCLT - Kol.) affirmed (**See Annex**)

Abhijeet Sinha, CS, **Suhita Mukhopadhyay**, **Avirup Chatterjee** and **Saikat Sarkar**, Advs. for the Appellant. **Shantanu Parashar** and **Abhishek Sharma**, Advs. for the Respondent.

ORDER

1. I.A. No. 966 of 2021 in Company Appeal (AT) (Insolvency) No. 1496 of 2019 has been filed on 27-5-2021 by the Applicant- 'State Bank of India'.

2. Company Appeal (AT) (Insolvency) No. 1496 of 2019 initially filed by one Durga Prasad Agarwal (Appellant No. 1). By order dated 15-12-2020 an I.A. No. 2910 of 2020 preferred by Legal Heirs of the Late Durga Prasad Agarwal (Appellant No. 1) intimating this Appellate Tribunal that during the pendency of this Appeal the Appellant No. 1 expired on 14-11-2020 and his Legal Heirs namely Smt. Sangita

Agarwal, Ankur Agarwal and Harsh Agarwal were allowed to substitute and they have pursued the Appeal and the Respondents have no objection for the said Legal Heirs of Appellant No. 1 - Late Durga Prasad Agarwal brought on record.

3. After hearing the parties Judgment was pronounced on 3-3-2021 passed the following order;

- ◆ "For the reason(s) aforesaid, we set-aside the impugned order dated 21-11-2019 in CP (IB) No. 535/KB/2018 passed by Ld. Adjudicating Authority, National Company Law Tribunal, Kolkata Bench, Kolkata and dismiss the Application under section 7 of the IBC filed by the 'Limtex Tea & Industries Limited/ Financial Creditor'.
- ◆ In the result, 'Corporate Debtor' is released from the rigour of the 'Corporate Insolvency Resolution Process'. All actions taken by the 'Interim Resolution Professional/ Resolution Professional' and 'Committee of Creditors', if any, are declared illegal and set-aside. The 'Interim Resolution Professional/ Resolution Professional' is directed to handover the records and assets of the 'Corporate Debtor' to the Director of the 'Corporate Debtor' immediately.
- ◆ The matter is remitted to the Ld. Adjudicating Authority to decide only fees and costs of 'CIRP' payable to IRP/RP, which shall be borne by the Financial Creditor/ Respondent No. 1.
- ◆ The Appeal is allowed with the

aforesaid observations and directions. No costs.

- ◆ Let the Registry to communicate the Judgment to the Ld. Adjudicating Authority, National Company Law Tribunal, Kolkata Bench, Kolkata."

4. The instant I.A. No. 966 of 2021 filed by Applicant - 'State Bank of India' under Rule 11 read with Rule 31 of the National Company Law Appellate Tribunal Rules, 2016 in which following prayers is as under;

"25. In view of the facts and circumstances as mentioned hereinabove, the Applicant humbly prays as below:

- (i) The Hon'ble Appellate Tribunal may be pleased to pass an order clarifying that the property defined in para-7 (Land) of the Application is not covered by the direction mentioned in the judgment dated 3-3-2021 regarding handing over;
- (ii) The Hon'ble Appellate Tribunal may be pleased to pass an order directing the Resolution Professional to hand over the possession of the property (Land) described in para 7 of the Application to the Applicant Bank;
- (iii) The Hon'ble Appellate Tribunal may be pleased to pass an order directing the Resolution Professional to maintain 'Status Quo' with regard to the property described in para 2 of the Application till the disposal of the present Application.

- (iv) *Ad interim* orders in terms of the prayer (iii) above.
- (v) The Hon'ble Appellate Tribunal may be pleased to pass any such further or other order(s) as this Hon'ble Appellate Tribunal may deem fit and proper in the facts and circumstances of the case to grant justice to the Applicant."

5. Heard Learned Counsel for the Applicant on I.A. No. 966 of 2021. Learned Counsel for the Applicant made the following submissions which read as hereunder.

- (i) The repayment under the above-mentioned facilities is secured by the Deed of Guarantee executed by Late Mr. Durga Prasad Agarwal and Sangita Agarwal. Further, to secure the repayment Late Mr. Durga Prasad Agarwal and his wife, Smt. Sangita Agarwal created equitable mortgages in the land described herein below, by way of depositing the title deeds with the Applicant. The Deed of Guarantee along with the Supplementary Deed of Guarantee is Executed by Late Mr. Durga Prasad Agarwal and Smt. Sangita Agarwal.
- (ii) Out of Various mortgaged properties, the present application is concerned with the land described as:
 - (a) The pieces and parcels of land measuring a total area of 94 Satak, be the same a little more or less situated at Mouza Baniara, JL No. 26, RS Khatian Nos. 794, 185, 1054, 1160, LR Dag No. 1152, 1156,

under Police Station Domjur in the District of Howrah.

- (b) The pieces and parcels of land measuring a total area of 98 Satak, be the same a little more or less situated at Mouza Baniara, JL Nos. 26, RS Khatian Nos. 944, 1086, 1113, 637 and 337, RS Dag Nos. 1134, 1121, 1123, 1124, 1125, LR Khatian Nos. 844, 1086, 1113, LR Dag Nos. 1152, under Police Station Domjur in the District of Howrah.
- (iii) The above mentioned Land was leased for a period of 5 years to the Corporate Debtor by way of the Lease Deed dated 31-3-2010 executed by Late Mr. Durga Prasad Agarwal and Smt. Sangita Agarwal.
- (iv) In between, various defaults were committed by the Corporate Debtor in repayment of financial facilities availed from the Applicant Bank. Considering the defaults committed by the Corporate Debtor in its repayment obligation, the applicant bank invoked the securities provided by the Corporate Debtor and its promoters. After invocation of securities, the Applicant Bank took actions under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and took symbolic possession of the Land in question along with Bank of Baroda on 22-9-2015 in accordance with Section 13(4) of the Act read with Rule 9 of the Security Interest (Enforcement) Rules, 2002.

- (v) Thereafter, in the year 2018, a Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 was filed by Limtex Tea and Industries Limited against the Corporate Debtor. The said petition came to be admitted on 21-11-2019.
- (vi) After the admission order dated 21-11-2019, the Interim Resolution Professional (IRP), who later was appointed as Resolution Professional (RP), took charge of the assets including the Land in question and affairs of the Company and invited claims from the Public. Accordingly, the Applicant Bank being a Financial Creditor, filed its claims before the IRP in form C on 2-12-2019 to an extent of Rs. 96,67,40,673.31 as on 20-11-2019. The said claim was admitted by the IRP/RP in full and SBI became a member of the Committee of Creditors with 72.71% voting rights.
- (vii) When the resolution process was undergoing, the ex-directors/Promoters of Corporate Debtor preferred an appeal before the Hon'ble NCLAT against the order dated 21-11-2019 bearing Company Appeal (AT) (Insolvency) No. 1496/2019. That said appeal was allowed by the Hon'ble NCLAT on 3-3-2021. While allowing the Appeal, NCLAT *inter-alia* directed the RP to hand over the assets and properties of the Corporate Debtor to the Director of the Corporate Debtor.
- (viii) The above order of NCLAT dated 3-3-2021 was brought to the notice of COC on 15-3-2021. Thereafter, the RP took steps to communicate with the directors of Corporate Debtor in order to complete the handing over process. However, the RP was able to establish connection with the directors of Corporate Debtor only on 16-4-2021 was fixed for the handing over of the properties and assets of the Corporate Debtor. The Report of RP informing the Adjudicating Authority about the steps taken till 16-4-2021 is annexed herewith and marked as Annexure A-5.
- (ix) In between, when the RP brought the order dated 3-3-2021 to the knowledge of members of COC, SBI initiated a communication channel with the RP and informed him that ;(i) the Land is owned by Late Mr. Durga Prasad Agarwal (now it is owned by his legal heirs) and Mrs. Sangeeta Agarwal; (ii) the lease deed by which the Land was leased to the Corporate Debtor came to an end on 31-3-2015 in terms of the lease deed dated 31-3-2010; (iii) symbolic possession of the Land has already taken by the bank in terms of SARFAESI Act, 2002. In terms of these facts, a clarification was also sought from RP regarding any fresh lease deed between the Corporate Debtor and the owners of the Land. RP has verified that there is no fresh lease deed between the Corporate Debtor and landowners for lease of Land after 31-3-2021.

- (x) After this verification, it became absolutely clear to the Applicant Bank that the Corporate Debtor has no right over the said Land anymore and hence the said Land does not fall under the category of 'assets of the Corporate Debtor'. Accordingly, the Applicant Bank requested the RP to hand over the Land to the Applicant Bank and not to the Corporate Debtor. RP was contemplating over the issue and finally it was communicated to the Applicant Bank by the RP on 16-4-2021 that he is bound by the directions of NCLAT and hence he would be handing over all the properties, which were taken over from the Corporate Debtor by the RP pursuant to the order dated 21-11-2019 including the Land on 24-4-2021, unless a direction is sought from the Hon'ble NCLAT in this regard. The stand of the RP mandated the filing of the present Application.
- (xi) Accordingly, the Applicant has decided to file the application seeking clarification of the Judgment dated 3-3-2021 in respect to the Land in question. Hence, the Applicant is filing the present application. There is urgency in the matter, as the RP is due to handover the Land to Corporate Debtor on 24-4-2021, who have no right and title over the property.
- (xii) It is humbly submitted that the Applicant has already taken symbolic possession of the Land on 22-9-2015 in accordance with the SARFAESI Act, 2002. Further,

the Lease Deed dated 31-3-2010, by virtue of which the Corporate Debtor was enjoying the Land in question has already expired on 31-3-2015.

- (xiii) Further, it has been verified by the RP that there is no fresh lease deed on record of the Corporate debtor, which give it any right to enjoy the property as Lessee. Hence, the Corporate Debtor has no right or title over the Property, accordingly the Land does not form part of the assets and properties of the Corporate Debtor.
- (xiv) In light of the facts mentioned herein above, it is clear that the land does not form part of the Assets of the Corporate Debtor, and hence it is not liable to be returned to the Corporate debtor. On the Contrary, the Land was mortgaged to the Applicant and the symbolic possession of the Land has already been taken by the Bank since 22-9-2015. Accordingly, the Land ought to be handed over to the Applicant and not to the Corporate Debtor.
- (xv) It is further submitted that a clarification is required on the Judgment dated 3-3-2021 passed by this Tribunal to the extent that the said Land does not form part of the assets and properties of the Corporate Debtor and hence the Resolution Professional (RP) is not required to hand over the said Land to the Corporate Debtor. Rather he shall handover the Land to the Applicant, as the Land is in

symbolic possession of the Applicant since 22-9-2015.

6. From the perusal of the record and judgment delivered by this Tribunal admittedly, the Applicant is neither the party in CP (IB) No. 535/KB/2018 filed before the NCLT, Kolkata Bench wherein "M/s Limtex Tea & Industries Limited (Financial Creditor/Applicant) V/s M/s Shri Bihariji Cold Rollers (P) Limited- (Corporate Debtor)" and this Tribunal also the Applicant - 'State Bank of India' was not party in the proceedings. The Appellants are suspended Board of Director who preferred this Appeal i.e. Company Appeal (AT) (Insolvency) No. 1496 of 2019 being aggrieved by order

dated 21-11-2019 passed by NCLT, Kolkata Bench, Kolkata.

7. The applicant neither filed the intervention application before the NCLT, Kolkata Bench nor this Tribunal in the aforesaid proceedings. For the first time Applicant has filed the I.A. No. 966 of 2021 and brought new facts before this Tribunal through I.A. which cannot be permitted.

8. The Appeal was decided after hearing the parties, facts pleaded and argued between the parties. Therefore, I.A. No. 966 of 2021 under Rule 11 is not maintainable. In the facts and circumstances of the case, I.A. No. 966 of 2021 is dismissed as not maintainable accordingly.

ANNEX

(2021) 128 taxmann.com 325 (NCLT - Kol.)

NATIONAL COMPANY LAW TRIBUNAL, KOLKATA BENCH

Limtex Tea & Industries Ltd. v. Shri Bihariji Cold Rollers (P.) Ltd.

JINAN K.R., JUDICIAL MEMBER

AND HARISH CHANDER SURI, TECHNICAL MEMBER

C.P. (IB) NO. 535/KB/2018

NOVEMBER 21, 2019

N. Islam and **Hema Mukherjee**, Advs. for the Petitioner. **Avirup Chatterjee**, **Prasenjit Paul** and **Rishav Das**, Advs. for the Respondent.

ORDER

Harish Chander Suri Technical Member.

- This application under section 7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4, of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by M/s. Limtex Tea & Industries Limited, through its Authorised person Mr. Girijesh Kumar Singh, who

has been authorized by the Chairman of M/s. Limtex Tea & Industries Limited, hereinafter referred to as the "Financial Creditor" against M/s. Shri Bihariji Cold Rollers (P.) Ltd, a Corporate Entity, having its registered office at Kolkata, hereinafter referred to as the Corporate Debtor, seeking Corporate Insolvency Resolution Process of the Corporate Debtor on the ground that a loan of Rs. 25,00,000/- (Rupees Twenty Five Lacs Only) was given by the Financial Creditor to the Corporate Debtor through bank on 6th June, 2011 which was duly acknowledged by the Corporate

Debtor *vide* letter dated 6th June, 2011, *i.e.* loan on interest for short time and the Corporate Debtor was paying interest on the said loan.

2. It is submitted that on being demanded, the Corporate Debtor had paid the said sum of Rs. 25,00,000/- to the Financial Creditor *vide* account payee cheque bearing No. 930562, dated 27-4-2015 drawn on State Bank of India. When the said cheque was presented for payment, the same was dishonoured and returned with the remarks "Fund insufficient".

3. It is submitted that the Financial Creditor issued a demand notice dated 29th June, 2015 intimating the Corporate Debtor regarding the dishonour of the aforesaid cheque, and demanding the sum of Rs. 25,00,000/- within 15 days from the receipt of the notice, sent through speed post, the same was received by the Corporate Debtor on 30th June, 2015.

4. It is submitted that in spite of the demand notice, the Corporate Debtor has neglected to pay the said sum, thereby compelling the Financial Creditor to file a case under section 138/141 of N.I. Act, against the Corporate Debtor and its Directors.

5. It is submitted that on 23rd February, 2018, the Financial Creditor again sent a letter requesting the Corporate Debtor to pay their loan amount of Rs. 25,00,000/- but the Financial Creditor has received nothing till date.

6. In Form 1 part III, the Financial Creditor has proposed the name of Mr. Manish Jain to be appointed as the IRP, who has also *vide* letter dated 14th April, 2018 declared his eligibility for the appointment along with certificate of registration, if the application is admitted.

7. It is submitted that the loan of Rs. 25,00,000/- was a loan given on interest @ 15% p.a. In support of the application the Financial Creditor has filed a copy of the money receipt dated 6th June, 2011 duly acknowledged by the Corporate Debtor, a copy of the Bank statement issued by Syndicate Bank indicating that a sum of Rs. 25,00,000/- was transferred to Shri Bihariji Cold Rollers (P.) Limited on 6th June, 2011. The Financial Creditor has also placed on record copies of the ledger account from 1st April, 2011 onwards to show that the amount of interest was being received by the Financial Creditor on the interest due from the Corporate Debtor.

8. As regards limitation, it is submitted that since the cheque dated 27th April, 2015 was returned back by the Syndicate Bank on 22nd June, 2015 and a notice under section 138/141 of the N I Act was issued on 29th June, 2015 which was duly received by the Corporate Debtor followed by a reminder on 23rd February, 2018 and the present application has been filed on 17th April, 2018, *i.e.* very much within the period of limitation.

9. We have heard the Ld. Counsel for the parties who have taken us through various documents placed on record by them. We find that the application is complete in all respect and fulfils all the requirements under section 7 of the Code. The Financial Creditor has been able to prove that a sum of Rs. 25,00,000/- was disbursed to the Corporate Debtor as a loan on interest for a short time which the Corporate Debtor failed to repay although interest was being paid from time to time. The Corporate Debtor has unsuccessfully disputed the claim without any concrete evidence to prove the same. We find

the application in order and are of the considered view that the application of the Financial Creditor deserves to be allowed, thereby initiating Corporate Insolvency Resolution Process against the Corporate Debtor. We, therefore, admit the application upon the following directions/orders:-

ORDERS

- (i) The application filed by the Financial Creditor under section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, M/s. Shri Bihariji Cold Rollers (P.) Limited is hereby admitted.
- (ii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under section 15.
- (iii) Moratorium under section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:-
 - (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - (c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
 - (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
 - (iv) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
 - (v) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
 - (vi) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
 - (vii) **Provided** that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor

under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

(viii) Mr. Manish Jain, an Interim Resolution Professional having Registration No. IBBI/IPA-001/IP-P00582/2017-18/11023, Mobile No. 9830248684, is hereby appointed as Interim Resolution Professional by this Tribunal for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

(ix) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the

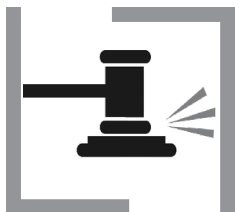
Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

(x) The Registry is hereby directed under section 7(7) of the Insolvency and Bankruptcy Code, 2016, to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through E-mail.

(xi) List the matter on 30th December, 2019 for filing of the progress report.

(xii) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

† Arising out of order passed by NCLT in *Limtex Tea & Industries Ltd. v. Shri Bihariji Cold Rollers (P.) Ltd.* (2021) 128 taxmann.com 325 (NCLT - Kol.).



(2021) 128 taxmann.com 330 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Rakesh Kumar Agarwal v. Devendra P. Jain

JARAT KUMAR JAIN, JUDICIAL MEMBER AND

KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1034 OF 2020†

JUNE 1, 2021

Section 240A of the Insolvency and Bankruptcy Code, 2016 - Micro, small and medium enterprises - Application of Code to - Whether main object of Code is in resolving corporate insolvencies and not mere recovery of monies due and outstanding and as per preamble of IBC, liquidation is only last resort - Held, yes - Whether where liquidation process of corporate debtor was pending and during pendency of liquidation, Government of India issued notification dated 1-6-2020 by amending **section 7** of MSME Development Act, 2006 by enhancing criteria for classifying entities as MSME, and appellant/promoter of corporate debtor pursuant to said notification fell under category of MSME, as per **section 240A** it would be eligible to participate and submit a scheme, to avoid liquidation of corporate debtor - Held, yes (Paras 42, 49, 50 and 51)

FACTS

- ◆ Appellant/promoters of corporate debtor filed an application under **section 10** which was admitted on 11-1-2018. The Adjudicating Authority appointed Resolution

Professional (RP) and declared moratorium.

- ◆ By virtue of admission the Adjudicating Authority appointed IRP and the IRP had taken over the charge and conducted the proceedings. While so the IRP issued Expression of Interest (EOI) on 15-2-2018 and only one application was received from 'G'. However, they had not filed any Resolution Plan to the EOI.
- ◆ Thereupon the Second EOI was issued on 9-8-2018 and in pursuance thereof one 'I' filed application along with other applicants. However, none of the Prospective Resolution Applicant submitted a Resolution Plan. In view of the situation in 7th CoC, a Resolution was passed for Liquidation of the corporate debtor by approving 97.37 per cent of the voting share.
- ◆ The RP filed application for liquidation of the corporate debtor and the Adjudicating Authority passed order liquidating the corporate debtor on 28-8-2019.

- ◆ Pursuant to the liquidation order, public announcement inviting claim from the creditors of the corporate debtor was published. In response thereof the creditors submitted their claims which were duly verified by the liquidator. The appellant/promoters of the corporate debtor submitted their scheme under [section 230](#) of the Companies Act, 2013 for sale of the corporate debtor as a going concern. The scheme submitted by the appellant was approved by stakeholders of the corporate debtor and accordingly an application was filed before the Adjudicating Authority.
- ◆ However, the said application was dismissed as withdrawn in view of notification dated 6-1-2020 issued by the Government of India whereby an amendment was made in [Regulation 2B](#) of the IBBI, Regulations 2016, by virtue of which the appellants became ineligible to submit a scheme of the liquidation process of the corporate debtor.
- ◆ Subsequently an amendment was made by the Government of India to MSME Act and changes were made in the criteria for classifying entities as MSME. In view of the amendment, the appellants became eligible to submit a scheme in the liquidation process. Hence, the appellant filed an application before the Adjudicating Authority seeking permission to propose a scheme and a direction to consider the said scheme in view of the amendment.

- ◆ The Adjudicating Authority passed impugned order, dismissing the above application as it was of the view that though, the corporate debtor fell under the category of MSME and thereby the promoters were eligible to submit the scheme, however, the corporate debtor was not MSME at the time of filing of [section 10](#) Application..

- ◆ On appeal:

HELD

- ◆ It is an admitted fact that the appellant/Promoters are not eligible to file even a scheme of arrangement under [section 230](#) of the Companies Act, 2013 by virtue of notification issued by the Government of India. It is also an admitted fact that the corporate debtor do not fall under the category of MSME and therefore, the promoter cannot file Resolution Plan in the CIRP Process. (Para 34)
- ◆ Subsequently, the Government of India *vide* notification dated 1-6-2020 has carried out certain changes in criteria for classification of Micro, Small and Medium Enterprises. (Para 35)
- ◆ As per the notification dated 1-6-2020 (S.O. 1702(E)). The [section 7](#) of Micro, Small and Medium Enterprises, Development Act, 2006 notifies certain changes and enhanced the limit thereby making eligible the enterprises under the classification of MSME. (Para 37)

- ◆ The contention of the appellants is that pursuant to the said notification the corporate debtor fall under the category of the MSME and as per [section 240A](#) of the IBC they are eligible to participate and submit a scheme, to avoid liquidation of the corporate debtor. The notification dated 1-6-2020 and [section 240A](#) of the IBC has been perused and in terms of above notification the corporate debtor falls into the category of MSME. The appellants vehemently contend that being existing promoters now they are eligible to submit a scheme. (Para 38)
- ◆ It is also seen that the appellants requested the liquidator to allow them for submission of scheme. From the records it is also seen that the matter was discussed in the 4th Meeting of stakeholders of the Corporate Debtor dated 17-8-2020. (Para 39)
- ◆ From the perusal of the extracts of minutes it is seen that the Financial Creditors and the appellant, the liquidator have participated in the meeting and resolved that the Promoters may submit the scheme and the scheme should be preferred over liquidation. (Para 40)
- ◆ In view of the discussions in the fourth Stakeholders meeting, the liquidator filed application before the Adjudicating Authority, seeking the permission of the Authority to allow this scheme of the appellant. However, the Adjudicating Authority passed the impugned order. (Para 41)
- ◆ The appellant contends that the Adjudicating Authority was of the view that the notification dated 1-6-2020 cannot be given a retrospective effect and in the said notification the implementation of the said notification is with effect from 1-7-2020. It is an admitted fact that the corporate debtor pursuant to the said notification dated 1-6-2020 is eligible to file a scheme since it has qualified to be an MSME. It is viewed that since the liquidation process is still pending and during the pendency of the liquidation the Government of India issued notification dated 1-6-2020 by amending [section 7](#) of MSME Development Act, 2006 by enhancing the criteria. Therefore, the Company which is still under liquidation and the said notification is very well applicable to the corporate debtor and they are eligible to file a scheme. (Para 42)
- ◆ In view of the aforesaid reasons and it is settled law as per the decisions of the Supreme Court that the liquidation is only the last resort and as per the preamble of the IBC the main object of the Code is in resolving corporate insolvencies and not the mere recovery of monies due and outstanding. (Para 49)
- ◆ For the foregoing reasons and relying upon the Judgments of the Supreme Court and this Tribunal it is viewed that the appellant is

eligible to submit a scheme by virtue of an amendment to [section 7](#) of Micro, Small and Medium Enterprises Development Act, 2006 *vide* notification dated 1-6-2020. Accordingly, the impugned order passed by the Adjudicating Authority is set aside. (Para 50)

- ◆ Thus, the appellants are allowed to submit a scheme of arrangement to the liquidator of the corporate debtor and the liquidator shall consider the scheme of arrangement in accordance with the law. (Para 51)

CASE REVIEW

Rakesh Kumar Agarwal v. Devendra P. Jain (2021) 128 taxmann.com 329 (NCLT - Ahd.) (para 50) *set aside*. (**See Annex**).

Swiss Ribbons (P.) Ltd. v. Union of India (2019) 101 taxmann.com 389/152 SCL 365 (SC); *Kridhan Infrastructure (P.) Ltd. v. Venkatesan Sankaranarayan* (2020) 122 taxmann.com 88/(2021) 163 SCL 198 (SC); *S.C. Sekaran v. Amit Gupta* (2019) 103 taxmann.com 222/152 SCL 536 (NCL - AT); *Ajay Agarwal v. Ashok Magnetic Ltd.* (2020) 116 taxmann.com 348 (NCL - AT) (para 50); *Siva Rama Krishna Prasad v. S. Rajendran, official liquidator* (Co. Appeal (AT) (Insolvency) Nos. 751 and 752 of 2020, dated 4-9-2020) and *Arokiasamy Joseb Raj v. Pathukasahasram Raghunathan Raman*

(2019) 109 taxmann.com 217 (NCL - AT) (para 50) *followed*.

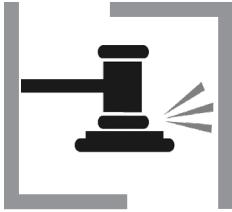
CASES REFERRED TO

Swiss Ribbons (P.) Ltd. v. Union of India (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 18), *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 19), *S.C. Sekaran v. Amit Gupta* (2019) 103 taxmann.com 222/152 SCL 536 (NCL - AT) (para 21), *Siva Rama Krishna Prasad v. S. Rajendran, official liquidator* (Co. Appeal (AT) (Insolvency) Nos. 751 and 752 of 2020, dated 4-9-2020) (para 21), *Y Shivram Prasad v. S. Dhanapal* (2019) 104 taxmann.com 377/153 SCL 294 (NCL - AT) (para 21), *Kridhan Infrastructure (P.) Ltd. v. Venkatesan Sankaranarayan* (2020) 122 taxmann.com 88/(2021) 163 SCL 198 (SC) (para 44), *Arcelormittal India (P.) Ltd. v. Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL 354 (SC) (para 45), *Meghal Homes (P.) Ltd. v. Shree Niwas Girni K.K. Samiti* (2007) 78 SCL 482 (SC) (para 45), *Ajay Agarwal v. Ashok Magnetic Ltd.* (2020) 116 taxmann.com 348 (NCL - AT) (para 46) and *Arokiasamy Joseb Raj v. Pathukasahasram Raghunathan Raman* (2019) 109 taxmann.com 217 (NCL - AT) (para 48).

Rajesh Bohra, Adv. for the Appellant. **Kunal Godhwani**, Adv. and **Abhishek Anand** for the Respondent.

† Arising out of order passed by National Company Law Tribunal, Ahmedabad Bench (AA) *Rakesh Kumar Agarwal v. Devendra P. Jain* (2021) 128 Taxmann.com 329.

For Full Text of the Judgment see
(2021) 128 taxmann.com 330 (NCLAT- New Delhi)



(2021) 128 taxmann.com 358(NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IDBI Trusteeship Services Ltd. v. Shiv Nandan Sharma (IRP of Saha Infratech Pvt. Ltd)

A.I.S. CHEEMA, CHAIRPERSON AND

V.P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NOS. 385 AND 386 OF 2021†

JUNE 9, 2021

Section 64 of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authority - Applications, expeditious disposal of - CIRP initiated against corporate debtor was pending - Appellants financial creditors claiming to be assignees of financial debt had earlier filed two Interlocutory Application challenging decision of Resolution Professional to hold appellants as 'related parties' - One application was disposed of as infructuous and in second application interim relief to stay CoC meeting was not granted - Appellant, thus, filed instant appeals seeking to be part of CoC - They claimed that they would constitute 68 per cent of CoC and thus would have an important stake involved - However, it appeared that disputes regarding appellants to be related parties were yet to be decided one way or other by Adjudicating Authority - Whether therefore, fact that CIRP had already consumed so much of time, it would not be appropriate for Appellate Authority to entertain present appeals against impugned orders on basis that holding of meetings of CoC should have been stayed - Held, yes - Whether Adjudicating Authority was to be requested to consider and decide

applications pending at earliest so that CIRP continues smoothly - Held, yes (Paras 6 and 9)

CASES REFERRED TO

Indu Kumar v. Saha Infratech (P.) Ltd. (2021) 127 taxmann.com 44 (NCLT - New Delhi) (para 11).

Ramji Srinivasan, Sr. Adv., **Atul Sharma**, **Ms. Renuka Iyer** and **Shivkrit Rai**, Advs. *for the Appellant*. **Ashish Makhija**, **Ashish Hira**, Advs., **K. Datta**, Sr. Adv., **Abhijeet Sinha**, **Nikhil Bamal** and **Raghavendra M. Bajaj**, Advs. *for the Respondent*.

ORDER

1. These two Appeals have been filed by two Financial Creditors claiming to be assignees of financial debt and on the strength of the same seeking to be part of the Committee of Creditors (CoC). It is claimed that the Appellants would constitute 68% of the CoC and thus they have an important stake involved. It appears that earlier an I.A No. 2167 of 2021 was filed by the Appellants and subsequently the same become infructuous. It is stated that

in that I.A, there was interim stay granted by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-II, in "[Indu Kumar v. Saha Infratech \(P.\) Ltd. \(2021\) 127 taxmann.com 44](#)". When the said I.A was coming up, other I.A Nos. 2286 and 2275 of 2021 came to be filed by the Appellants. I.A No. 2286 of 2021 was filed by 'IDBI Trusteeship Services Ltd.' and I.A No. 2275 of 2021 was filed by 'Assets Care & Reconstruction Enterprise Ltd.'. I.A No. 2286 of 2021 was filed challenging the decision of the Resolution Professional to hold the Appellant in Company Appeal (AT) (Insolvency) No. 385 of 2021 as 'related parties'. I.A No. 2275 of 2021 was filed for same reasons by the Appellant in Company Appeal (AT) (Insolvency) No. 386 of 2021. The applications were filed on 19th May, 2021.

2. The Adjudicating Authority on 24th May, 2021 passed the following orders in I.A No. 2286 of 2021, which reads as under:-

"ORDER

IA-2286/2021: Mr. Ashish Makhija appeared for RP and accepted the notice. RP is directed to file the reply within a week from today. Rejoinder, if any, be filed within two days after receipt of the reply.

List on 4th June, 2021 along with IA-2275/2021."

3. The Adjudicating Authority on 21st May, 2021 passed composite orders with regard to I.A No. 2167 of 2021, I.A No. 2275 of 2021 and other IAs. In IA No. 2167 of 2021, the following order was passed:-

"ORDER

IA/2167/2021: Heard the Ld. Counsel appearing for the IRP Mr. Ashish Makhija, Sr. Counsel Mr. Virender Ganda appearing for the Applicant No. 1 and Sr. Counsel Mr. Pramod Kumar Dubey appearing for Applicant No. 2.

In the course of hearing, the Counsel for the IRP submitted that the IRP has already filed an affidavit on 17-5-2021, by which he has informed the decision taken regarding the claims of both the Petitioners, which has also been communicated to the Petitioners through e-mail. Therefore, this Application has become infructuous. Mr. Virender Ganda, Sr. Counsel for ACRE ARC also submitted that in the facts and circumstances of the matter, the IA has become infructuous.

Therefore, the IA is dismissed, being infructuous."

4. As regards I.A No. 2275 of 2021 (against which Company Appeal (AT) (Insolvency) No. 386 of 2021 is filed), the Adjudicating Authority passed the following orders:-

"ORDER

** ** *

IA/2275/2021: Mr. Ashish Makhija appearing for the sole Respondent accepts the notice on his behalf. Hence, there is no need to issue notice upon the Respondent. Time of ten days is granted to file the Reply. List the matter on 12-6-2021.

In course of hearing, Mr. Pramod Kumar Dubey, Sr. Counsel for the IDBI submitted that he has filed an Application bearing IA/2286/2021, which is not listed today. The Registry if directed to list this Application on 24-5-2021.”

5. The present Appeals have been filed against such orders passed in I.A No. 2275 of 2021 and I.A No. 2286 of 2021, as interim relief to stay CoC was not granted.

6. Having heard Counsel for both sides, we find that this is a matter where Corporate Insolvency Resolution Process (CIRP) started on 28th February, 2020 against the Corporate Debtor- ‘M/s. Saha Infratech Pvt. Ltd.’ and the Corporate Insolvency Resolution Process is still pending. It appears that there are various disputes raised including issues relating to the admission of the claim of the Appellants are the issues. It also appears from Company Appeal (AT) (Insolvency) No. 385 of 2021 that the Interim Resolution Professional (IRP) had rather recorded that there were dues and recoverables from the Appellant. It also appears that there is dispute regarding the Appellants to be related parties. All these issues are yet to be decided one way or the other by the Adjudicating Authority. It would not be appropriate for us to entertain the present appeals against the impugned orders as stated above, on the basis that holding of CoC should have been stayed. When the Corporate Insolvency Resolution Process has already consumed so much of time considering the objects of the

Insolvency and Bankruptcy Code, 2016, it would not be appropriate to stay the holding of meetings of the CoC.

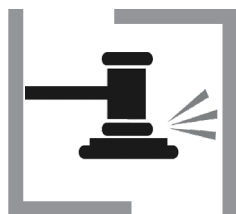
7. The Counsel for the Appellants claim that now the Applications before the Adjudicating Authority are fixed on 11th June, 2021. They request that the direction may be given to the Adjudicating Authority to decide the applications one way or the other on 11th June, 2021. The Counsel for the Appellants claim that they will be giving all the co-operation to the Adjudicating Authority. We expect all parties to co-operate.

8. It was also claimed by the Learned Counsel for the Appellants that the CoC meeting has been held on 23rd May, 2021 and even if any further meetings take place whatever they decide should be subject to outcome of the applications filed by the Appellants. Although the Learned Counsel for the Appellants making such request, it is not necessary for us to deal with this particular subject as it remains matter of law to be looked into at appropriate stage.

9. For such reasons, we dispose off these appeals with a request to the Adjudicating Authority to consider and decide the applications which are pending at the earliest so that the Corporate Insolvency Resolution Process continues smoothly.

10. With these observations, we dispose off both these appeals. Parties to cooperate before the Adjudicating Authority.

† Arising out of order passed in I.A. No. 2275 of 2021 and I.A. No. 2286 of 2021, dated 21-5-2021.



(2021) 128 taxmann.com 334 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Binay Kumar Singhanian Resolution Professional, In re

A.I.S. CHEEMA, CHAIRPERSON AND

DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 405 OF 2021†

JUNE 14, 2021

Section 5(8), read with **section 7**, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Appellant was appointed as Resolution Professional (RP) in Corporate Insolvency Resolution Process (CIRP) against corporate debtor - CIRP started and appellant-Resolution Professional took all necessary steps in time as required under procedure in IBC - Thereafter, one ex-director of corporate debtor moved Appellate Tribunal in appeal against admission of application under **section 7** - Appellate Tribunal *set aside* order of admission which had been passed by Adjudicating Authority - Subsequently, Adjudicating Authority *vide* order dated 27-1-2020, closed proceedings against corporate debtor - Financial creditor bank appealed against said order before Supreme Court and Supreme Court passed orders staying orders of Appellate Tribunal - Thereafter, financial creditor bank sought resumption of CIRP and extension of CIRP period - However, Adjudicating Authority declined prayer sought, observing that stay granted does not lead to automatic revival of Company Petition which had already been closed by Adjudicating Authority - Whether without restoration of

Company Petition which was closed by Adjudicating Authority *vide* order dated 27-1-2020, CIRP could not have continued - Held, yes (Paras 8 and 10)

CASE REVIEW

State Bank of India v. Genegrow Commercial (P.) Ltd. (2021) 128 taxmann.com 333 (NCLT - Kol.) (para 10) *affirmed* (**See Annex**).

CASES REFERRED TO

State Bank of India v. Genegrow Commercial (P.) Ltd. (2020) 118 taxmann.com 8 (NCLT - Kol.) (para 1) and *Bijay Kumar Agarwal v. State Bank of India* (2020) 118 taxmann.com 48 (NCL - AT) (para 2).

Dhanajaya Sud, Aditya Gauri and Naresh Kumar Agarwala, Advs. for the Appellant.

ORDER

1. Heard Ld. Counsel for the Appellant. The Appellant was appointed as Resolution Professional (RP) in against the Corporate Debtor - *State Bank of India v. Genegrow Commercial (P.) Ltd.* (2020) 118 taxmann.com 8 (NCLT - Kol.).

2. It is stated that the Corporate Insolvency Resolution Process (CIRP) started on 2nd August, 2019 and the Appellant - Resolution Professional was taking all the necessary steps in time as required under the procedure in Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code'). It is stated that one of the Ex-Director of the Corporate Debtor moved this Appellate Tribunal in Appeal against admission of the application under section 7 of I&B Code and this Appellate Tribunal had in *Bijay Kumar Agarwal v. State Bank of India (2020) 118 taxmann.com 48 (NCL - AT)* (Annexure 10 at Page 137) *set aside* the order of admission which had been passed by the Adjudicating Authority (National Company Law Tribunal) Kolkata Bench, Kolkata. It is stated that subsequently on 27th January, 2020, the Adjudicating Authority closed the proceedings against the Corporate Debtor passing order (Annexure 11 at Page 155). It appears that being aggrieved by the order of this Appellate Tribunal, the State Bank of India had gone in Appeal before the Hon'ble Supreme Court of India in Civil Appeal No. 2715 of 2020.

3. On 3rd November, 2020, it is stated Hon'ble Supreme Court passed orders staying the orders of this Appellate Tribunal till the next date of hearing.

4. It is stated that the matter is still pending before Hon'ble Supreme Court. Appellant claims that he was informed about the order dated 3rd November, 2020 passed by the Hon'ble Supreme Court by Financial Creditor on 20th January, 2021 and he convened 5th meeting of the Committee of Creditors (CoC) and CoC resolved to authorise the Appellant to seek exclusion of period of 363 days *i.e.* from 23rd January

2020 till 20th January, 2021 (the date when the RP was informed about the orders of Hon'ble Supreme Court). The Appellant claims that he moved I.A. (IB) No. 200/KB/2021 before the Adjudicating Authority to exclude the period but the Adjudicating Authority has dismissed the I.A. as premature.

5. We have perused the impugned order. In the common order dated 3rd May, 2021, the Adjudicating Authority first dealt with one I.A. (IB) No. 1327/KB/2020 filed by one of the Financial Creditor - State Bank of India, where the said Financial Creditor sought resumption of the CIRP and extension of CIRP period but the Appellant opposed the application questioning the locus of the Financial Creditor to move such application before the Adjudicating Authority and claimed that the Applicant had not taken steps to revive the Company Petition CP (IB) 353/KB/2018 which has been disposed off. The Resolution Professional submitted before the Adjudicating Authority that the matter in Hon'ble Supreme Court has been tagged with Civil Appeal in the matter of 'Piramal Enterprises Ltd. vs. Vishnu Kumar Agarwal' and that the issue was under consideration of the Hon'ble Supreme Court. The Adjudicating Authority after hearing the parties in I.A. (IB) No. 1327/KB/2020 observed in Para 11 as under:-

'The Hon'ble Supreme Court, in *Shree Chamundi Mopeds Pvt. Ltd. v. Church of South India Trust Association*, has expounded the difference between 'stay' of an order and 'setting aside' of the order. The Hon'ble Supreme Court elaborated that - "while considering the effect of an interim order staying the operation of the order under challenge,

a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in restoration of the position as it stood on the date of passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. (para 10)''

6. On such analysis, the Adjudicating Authority declined the prayer sought observing that the stay granted does not lead to automatic revival of the Company Petition which has been already closed by the Adjudicating Authority.

7. Consequent to such observation and findings in I.A. (IB) No. 1327/KB/2020, the

Adjudicating Authority disposed off I.A. (IB) No. 200/KB/2021 as premature and this is order in I.A. (IB) No. 200/KB/2021 which is impugned before us.

8. After going through the matter and hearing Learned Counsel for the Appellant, it appears to us that without restoration of the Company Petition which was closed by the Adjudicating Authority *vide* order dated 27th January, 2020 (Annexure 11 at Page 165), the CIRP cannot continue.

9. Learned counsel for the Appellant submits that he will take necessary steps to move Hon'ble Supreme Court for directions.

10. It is open for the Appellant to take appropriate steps for appropriate remedy. As far as present appeal is concerned we find it difficult to take a different view than which has been taken by the Adjudicating Authority in treating I.A. (IB) No. 200/KB/2021 as premature. In the facts of the matter, we dispose off the present appeal with observations as above.

ANNEX

(2021) 128 taxmann.com 333 (NCLT - Kolkata)

NATIONAL COMPANY LAW TRIBUNAL, KOLKATA BENCH

State Bank of India v. Genegrow Commercial (P.) Ltd.

RAJASEKHAR V.K., JUDICIAL MEMBER

AND HARISH CHANDER SURI, TECHNICAL MEMBER IA (IB) NOS. 1237/KB/2020 & 200/KB/2021

CP (IB) NO. 353/KB/2018

MAY 3, 2021

Joy Saha, Sr. Adv., **S.M. Gupta**, PCS, **Swatarup Banerjee**, Adv., **Arun Kumar Gupta**, PCA, **Binay Kumar Singhania**, RP, **D.N. Sharma** and **Ms. Swati Agarwal**, Advs. *for the Appearing Parties.*

ORDER

IA(IB) No. 1327/KB/2020

V.K. Rajasekhar, Judicial Member. - Application bearing IA(IB) No. 1327/KB/2020

has been filed by the Financial Creditor in CP(IB) No. 353/KB/2018, the brief facts of which are set out below.

2. The Applicant submits that the underlying company petition bearing CP(IB) No. 353/KB/2018 was allowed by this Adjudicating Authority *vide* order dated 2-8-2019 and the Corporate Debtor was admitted into Corporate Insolvency Resolution Process (CIRP). Against the aforesaid order, a member of suspended Board of Directors approached the Hon'ble National Company Law Appellate Tribunal (NCLAT). By an order dated 23-1-2020, the Hon'ble NCLAT allowed the said appeal and directed this Adjudicating Authority to close proceedings in CP(IB) No. 353/KB/2018. Pursuant thereof, this Adjudicating Authority *vide* order dated 27-1-2020, closed the proceedings in CP(IB) No. 353/KB/2018.

3. Aggrieved by the said order dated 23-1-2020, the Applicant/Financial Creditor herein preferred an appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court, *vide* its order dated 3-11-2020 has stayed the order dated 23-1-2020 of the Hon'ble NCLAT.

4. In view of the Hon'ble Supreme Court's order dated 3-11-2020, the Applicant has prayed for resumption of CIRP and extension of CIRP by 30 days to complete the CIRP. The applicant has also prayed for injunction restraining the management, directors, officers, servants, agents, men of assigns of the Corporate Debtor from dealing with or encumbering or creating any third party rights on the assets of the Corporate Debtor in any way.

5. Mr. Binay Kumar Agarwal, the Resolution Professional who is arrayed

as Respondent No. 2, submitted that the Financial Creditor has no locus to apply for resumption of the CIRP or for extension of time under section 12(2) of the Insolvency and Bankruptcy Code, 2016 (the "Code"). The order passed by Hon'ble Supreme Court dated 3-11-2020 does not automatically revive the CIRP of the Corporate Debtor. The Hon'ble NCLAT's order dated 23-1-2020 has only been stayed and not set aside.

6. Respondent No. 2 submitted that the underlying company petition bearing CP(IB) No. 353/KB/2018 has been disposed of. The Applicant has not taken any steps to revive the said company petition. Respondent No. 2 has already issued email containing the notice for convening the fifth meeting of the Committee of Creditors (CoC) which is illegal. The Hon'ble Supreme Court has tagged the underlying company petition with *Piramal Enterprises Ltd. v. Vishnu Kumar Agarwal* (Civil Appeal No. 878 of 2019) since the point of law involved in the underlying company petition is already under consideration in the Piramal Enterprises case.

7. We have heard both the sides and perused the records. Although many other ancillary points were raised, the short point for consideration is whether the present application is maintainable at this stage. The other points do not really merit consideration.

8. The underlying company petition bearing CP(IB) No. 353/KB/2018 had been admitted by this Adjudicating Authority *vide* order dated 2-8-2019. Pursuant to the order of the Hon'ble NCLAT dated 23-1-2020 to close the CIRP in the CP(IB) No. 353/KB/2018,

this Adjudicating Authority *vide* its order dated 27-1-2020 closed the proceedings and disposed of the matter. On an appeal filed by the Applicant herein, the Hon'ble Supreme Court has stayed the order of Hon'ble NCLAT dated 23-1-2020.

9. As rightly pointed out by the answering Respondent, the Hon'ble Supreme Court has only directed the stay of order of Hon'ble NCLAT, the said order has not been set aside. Until the order of Hon'ble NCLAT closing the CIRP is set aside, and as long as the matter is sub judice before the Hon'ble Supreme Court, this Adjudicating Authority does not have the jurisdiction to order resumption of the CIRP.

10. Moreover, the underlying company petition has been disposed of pursuant to the order of the Hon'ble NCLAT dated 23-1-2020 by this Adjudicating Authority *vide* order dated 27-1-2020. Unless this company petition is restored, the CIRP is *not est*, and the question of its resumption does not arise.

11. The Hon'ble Supreme Court, in *Shree Chamundi Mopeds (P.) Ltd. v. Church of South India Trust Association* (1992) 3 SCC 1 has expounded the difference between 'stay' of an order and 'setting aside' of the order. The Hon'ble Supreme Court elaborated that - "while considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order

which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. (para 10)"

12. Applying the ratio of this decision to the facts of the present case, we cannot grant the prayers sought for in the application, since the effect of stay of order of the Hon'ble NCLAT by the Hon'ble Supreme Court does not lead to automatic revival of the underlying company petition which has already been closed by this Adjudicating Authority.

13. Therefore, the application bearing IA(IB) No. 1327/KB/2020 has got to be dismissed and it is ordered accordingly.

IA(IB) No. 200/KB/2021

14. The present application bearing IA(IB) No. 200/KB/2021 has been filed by the Applicant who was appointed as the Resolution Professional of the Corporate Debtor in the CP(IB) No. 353/KB/2018, praying for exclusion of 363 days from CIRP period that had been taken up in litigation and further extension of the said period by ninety days starting from 29-1-2020.

15. As we have already observed in the preceding paragraphs, the underlying company petition bearing CP(IB) No. 353/KB/2018 has been disposed of by this Adjudicating Authority in pursuance of the order of the Hon'ble NCLAT and the same is receiving consideration of the Hon'ble Supreme Court. There is nothing to do be done at this stage except to wait for the final orders of the Hon'ble Supreme Court on the issue.

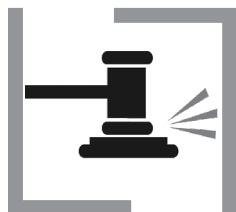
16. In such circumstances, the present application for exclusion and extension of time is premature and ought to be dismissed. IA(IB) No. 200/KB/2021 is, therefore, dismissed as premature at this stage. Liberty is, however, granted to the Resolution Professional to file appropriate applications in this regard after the Hon'ble Supreme Court's final orders are received

in this matter, if the same is maintainable at that stage.

17. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

18. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

† Arising out of order passed by NCLT in *State Bank of India v. Genegrow Commercial (P.) Ltd.* (2021 128 taxmann.com 333 (NCLT - Kol.).



(2021) 128 taxmann.com 346 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Satya Narayan Jhunjunwala v. Supriyo Kumar Chaudhuri

JARAT KUMAR JAIN, JUDICIAL MEMBER AND

KANTHI NARAHARI, TECHNICAL MEMBER

I.A NOS. 959 & 960 OF 2021

COMPANY APPEAL (AT) (INSOLVENCY) NOS. 832 & 846 OF 2020

JUNE 10, 2021

Section 35 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Liquidator - Powers and duties of - Applicant/liquidator of corporate debtor by way of instant application sought permission for immediate sale of inventory of corporate debtor by way of e-auction - Applicant submitted that there were certain expired finished products, *i.e.* Olein and Refined Palm Oil, forming part of inventory of corporate debtor and said inventory was not fit for human consumption, however, it was of use for other edible oil manufacturers for purpose of reprocessing along with crude oil and industrial users such as soap manufacturers - Further, price of such inventory was highly volatile and may go down quickly - Whether in view of fact that inventory/goods were perishable in nature, applicant/liquidator was to be permitted to sell inventory of expired stock of Refined Palm oil by way of e-auction in a transparent manner to highest bidder, keeping in view interest of all stakeholders - Held, yes (Para 9)

Mohit Chaudhary, Ms. Garima Sharma, Malak Bhatt, Ms. Neeha Nagpal and Udbhav Nanda, Advs., for the Appellant. **Ramji Srinivasan**, Sr. Adv., **Indranil Ghosh**, Orijit

Chatterjee, Ms. Swati Dalmia, Akash Yadav, Plazer Mokhtan, Advs., Aman Sighania, Bishwajit Dubey, Ms. Ritika Sinha and Madhav Kanoria, Advs. for the Respondent.

ORDER

Kanthi Narahari, Technical Member - The Applications being I.A 959 of 2021 and 960 of 2021 are filed by the first Respondent praying the Tribunal to grant the following reliefs *viz*:

- (a) Grant early date of hearing of the Appeal to enable the learned Senior Counsel for the Respondent Nos. 1 to advance remaining arguments and
- (b) Grant Permission for immediate sale of inventory of the Corporate Debtor/JVL Agro Industries Ltd. More fully described in paragraph 'z' by way of e-auction and
- (c) To proceed with the e-auction of the assets of the Corporate Debtor/JVL Agro Industries Ltd. As per the provisions of the Insolvency and Bankruptcy code, 2016 and the regulations framed thereunder and

(d) Such further or other orders as this Hon'ble Appellate Tribunal may deem fit and proper.

2. Shri Ramji Srinivasan, Learned Senior Counsel appearing for the Applicant/R-1 submitted that during the course of arguments before this Bench the Appellant put forth submissions to the effect that the Applicant/R-1 intends to sell the assets of the Corporate Debtor through e-auction scheduled to be held on 4-3-2021 and 5-3-2021 and on this ground sought an *ad interim* stay. However, the same was opposed by him, whereupon it fell from the Bench that in case the assets of the Corporate Debtor were sold during the pendency of the Appeal then the Appeal would be rendered in fructuous. To address such concern raised by the Hon'ble Bench, he informed the Bench that he would advise his client namely the Applicant/R-1 to defer the e-auction.

3. The Learned Senior Counsel for the Applicant submitted that in view of the advise and considering that the Appeal had reached an advance stage of hearing the e-auction process scheduled on 4-3-2021 and 5-3-2021 cancelled. The Appeal came up for hearing on 4-3-2021 and the Counsel appearing for the Appellant argued and concluded the arguments. Due to paucity of time the Learned Senior Counsel appearing for the Respondent was unable to begin his arguments. The matter was fixed on 12-4-2021 however, due to unavailability of the Learned Senior Counsel for the Applicant the Appeal was adjourned to 27-4-2021. Due to rise in second wave of Covid-19 pandemic the said Appeal was not taken up for hearing. By Circular of this Hon'ble Appellate

Tribunal the Appeal has been adjourned/re-scheduled to 18-6-2021.

4. The Learned Senior Counsel further submitted that there are certain expired finished products, *i.e.* Olein and Refined Palm Oil, forming part of the inventory of the Corporate Debtor. The said inventory is not fit for human consumption, however, it is of use for other edible oil manufacturers for the purpose of reprocessing along with the crude oil and industrial users such as soap manufacturers. Around 600 tonnes (approx) of Olein and 100 tonnes (approx) of Refined Palm oil is lying in the storage tanks at the Corporate Debtors plant premises situated at Haldia, West Bengal.

5. The Learned Senior Counsel for the Applicant/R-1 submitted that the aforesaid inventory is deteriorating and in the interest of the stakeholders it is prudent to sell the same at the earliest. The Price of Olein and Refined Palm oil have increased significantly in the last few weeks and if the same is sold forth with, it will be beneficial to the stakeholders. The Price of such inventory is highly volatile, it can go down very quickly. In view of the reasons the Learned Senior Counsel prayed this Bench to permit the Applicant/R-1 to sell the aforesaid inventory *i.e.* 600 tonnes of expired stock of Olein and 100 tonnes of expired stock of Refined Palm Oil lying in the storage tanks at the Corporate Debtors plant premises situated at Haldia, West Bengal.

6. The Learned Counsel appearing for the Respondent/Appellant filed Reply- Affidavit in I.A. No. 960 of 2021 and submitted that the reliefs sought in the application with regard to fixing/listing of the Appeal for

hearing, they do not have any objection and the Appeal is already listed for hearing on 18-6-2021. With regard to sale of inventory as described in paragraph 'z' by way of e-auction he submitted that in view of the date fixed for hearing the relief *i.e.* sale of inventory as described in paragraph 'z' of the application may not be allowed.

7. The Learned Counsel submitted that the Applicant/R-1 failed to tell the date when the said finished products have expired and why the Applicant allowed the said stock to be expired and why the Applicant did not made efforts to sell the finished stocks prior to filing of the present Application keeping in view that the Corporate Debtor was to be kept as a going concern as per the order dated 2-11-2020 of this Hon'ble Tribunal. Further, the Applicant failed to mention the price of the Olein and Refined Palm oil. The Learned Counsel for the Appellant submitted that the Applicant/R-1 had not given any details of price with regard to inventory as mentioned in paragraph 'z' of the application, therefore, it cannot be presumed that the prices have increased significantly.

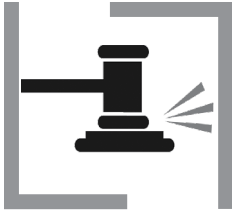
8. Heard the Learned Counsel appearing for the respective parties. It is an admitted fact that the inventory as mentioned in paragraph 'z' *i.e.* Olein and Refined Palm

oil is perishable goods. There is no denial that the stock of Olein and Refined Palm oil expired and cannot fit for human consumption.

9. We are of the view that the said inventory can be used for other purpose. If the said inventory/stock is kept for long time the same may not be useful for other purpose also. In view of the reason that the inventory/goods are perishable in nature we are of the view that the said inventory be permitted to sell by e-auction keeping in view of the interest of all the Stakeholders. Without going into other technicalities at this stage we hereby pass the following Order:

- (a) We hereby allow the Applicant/Liquidator to sell the inventory *i.e.* 600 tonnes (approx) of expired stock of Olein and 100 tonnes (approx) of expired stock of Refined Palm oil by way of e- auction in a transparent manner to the highest bidder.
- (b) The sale proceeds shall be kept in a separate interest bearing bank account.

10. With the aforesaid Order both the applications, *i.e.* I.A 959 of 2021 and 960 of 2021 stand disposed of. No order as to costs.



(2021) 128 taxmann.com 332 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Navneet Jain v. Manoj Sehgal

JUSTICE A.I.S. CHEEMA, OFFICIATING CHAIRPERSON AND

DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 573 OF 2020†

JUNE 1, 2021

Section 29A of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution applicant - Persons not eligible to be - Resolution applicant (respondent No. 2) and suspended director of corporate debtor (respondent No. 3) were partners in two firms PF and PI - During Corporate Insolvency Resolution Process (CIRP) of corporate debtor, respondent No. 2 filed a resolution plan which was approved by Adjudicating Authority - Appellant claiming to be a promoter/shareholder of corporate debtor submitted that Respondent No. 2 was ineligible to submit resolution plan as he was related party to respondent No. 3 - Respondent No. 2 however relied on two retirement deeds to show that respondent No. 3 had retired as partner from both firms with effect from 31-10-2017 and hence, was eligible to submit resolution plan - However, retirement deeds had been disputed by appellant and appellant had placed on record, GST returns and Income-tax returns of both companies, viz. PF and PI which showed continued relationship of respondent No. 2 and respondent No. 3 with both firms, and hence they were related parties - Further, both respondents had not disputed GST and Income-tax returns, which were matters of public record - Whether therefore,

respondent No. 2 was not eligible under **section 29A** to submit resolution plan *vis-a-vis* resolution of corporate debtor and hence, resolution plan so submitted and approved by Adjudicating Authority was to be *set aside* - Held, yes (Paras 23, 24, 31 and 32)

FACTS

- ◆ Resolution applicant (respondent No. 2) and suspended director of corporate debtor (respondent No. 3) were partners in two firms PF and PI.
- ◆ Appellant claiming to be a promoter/shareholder of the corporate debtor claimed that during the Corporate Insolvency Resolution Process (CIRP) of corporate debtor, respondent No. 2 (who was allegedly a related party of respondent No. 3 as per **section 29A**) filed a resolution plan. It was noted that while the resolution plan was approved by the Committee of Creditors in its meeting held on 14-12-2019 and submitted for approval to the Adjudicating Authority, the appellant sent communication to the Resolution Professional raising the issue of ineligibility of respondent No. 2 to submit a resolution Plan as he was related party to respondent

No. 3, the suspended director of corporate debtor. The Adjudicating Authority dismissed said application whereupon the appellant preferred appeal before the NCLAT.

- ◆ The appellant placed on record additional facts and information in the form of GST and Income-tax returns of two firms, PF and PI, to show that respondent No. 2 and respondent No. 3 were still partners in the two aforementioned firms.
- ◆ Respondent No. 2 however claimed that, as per the two retirement deeds, respondent No. 3 had retired as partner in the two firms with effect from 31-10-2017. These retirement deeds were presented to the Resolution Professional (respondent No. 1) who on finding respondent No. 2 as eligible to file resolution plan submitted these retirement deeds before the Adjudicating Authority. Hence, respondent No. 2 was not a related party to respondent No. 3 on the date he submitted the resolution plan to the Resolution Professional on 6-6-2018.
- ◆ The NCLAT disposed off this appeal directing the Adjudicating Authority to look into the documents filed before the Adjudicating Authority regarding eligibility when considering the resolution plan for final approval.
- ◆ The Adjudicating Authority looked into the eligibility of respondent No. 2 as resolution applicant and passed a final order dated 8-6-2020 approving the Resolution Plan.
- ◆ On appeal:

HELD

- ◆ It is found that the Resolution

Professional while filing application did not give credence to the GST and Income-tax returns and later the Adjudicating Authority chose to rely on private documents *i.e.* two retirement deeds, whose authenticity had been disputed by the appellant and dismissed the application. The applicant approached the NCLAT in appeal against this order but was not granted leave. Hence he could not file appeal. In the meanwhile, final order came to be passed approving the resolution plan. (Para 21)

- ◆ The claim of the appellant that the order of Adjudicating Authority could not be formally challenged before the NCLAT for want of necessary permission by the NCLAT and in the meantime the resolution plan was approved is acceptable. (Para 22)
- ◆ It is worth reiterating that the appellant has placed on record, GST returns and Income-tax returns of both the companies, *viz.* PF and PI, to show that the successful resolution applicant respondent No. 2 and the suspended director of the corporate debtor *i.e.* respondent No. 3 are related parties, and hence the successful resolution applicant was not eligible under [section 29A](#) of IBC to submit a Resolution Plan *vis-a-vis* the resolution of corporate debtor. He has contended that the respondents have relied upon the Retirement Deeds presented by respondent No. 2 to show that respondent No. 3 had retired from two aforesaid firms with effect from 31-10-2017. (Para 23)

- ◆ Respondent No. 1's claim that the retirement deeds should be accepted as [section 29A](#) does not envisage any inquiry in the authenticity of retirement deeds is not sustainable because the retirement deeds have been, at the first instance, been disputed by the appellant and the appellant has placed documents in the form of GST and Income-tax returns which point towards the discrepancy in the retirement deeds. Moreover, none of the respondents have disputed the GST and Income-tax returns, which are matters of public record. In the face of these documents the alleged retirement deeds appear suspect. (Para 24)
- ◆ Now coming to the contents of the Income-tax Returns, it is seen that the Income-tax return for the assessment year 2018-19 filed by respondent No. 2 on behalf of PF include the name of respondent No. 3 as a partner of PF. It is filed on 13-8-2018, much after 31-10-2017, the alleged date of retirement as claimed by Respondent No. 3. Similarly, the Income-tax return for the assessment year 2019-20 filed on behalf of PF by respondent No. 2 on 29-8-2019 includes the name of respondent No. 3 as a partner. (Para 25)
- ◆ Further in the Income-tax return of PI for assessment year 2018-19 filed by respondent No. 2 on 17-8-2018, respondent No. 3 is shown as a partner. Also, in the Income-tax return for the assessment year 2019-20 filed on 20-9-2019, on behalf of PI by respondent No. 2, respondent No. 3 is shown as a partner. (Para 26)
- ◆ Looking at the GST Returns, it is found that in the GST Returns filed on 24-6-2019 of PF, respondent No. 3 is shown as a partner. Furthermore, in the GST Return for PI filed on 26-6-2019, respondent No. 3 has been shown as a partner. (Para 27)
- ◆ The retirement deeds show the date of retirement of respondent No. 3 from the two firms with effect from 31-10-2017. Even if it is presumed that on the date respondent No. 2 submitted the resolution plan to Resolution Professional i.e. on 6-6-2018, respondent No. 3 was not a partner in the two firms, and became a partner again later. Some document should have been presented to show when respondent No. 3 again became a partner. Such a document or evidence has not been presented. Hence, it would be logical to infer that the authenticity of retirement deeds is suspect in the face of continued relationship appearing from the Income-tax and GST returns. (Para 28)
- ◆ Furthermore, a discrepancy in the age of respondent No. 3 observed in the partnership deed (which is shown as 43 years) and in the Retirement Deed (which is shown as 45 years) pertaining to PF also strengthens suspicion as to the reliability of the retirement deed. A similar discrepancy has also been observed in respondent No. 3's age shown in partnership deed and retirement deed pertaining to PI, wherein his age is shown as 42 years and 47 years respectively, while the difference between the dates of execution of these deeds is a little over one year. These discrepancies also make the

authenticity of the two retirement deeds suspect. (Para 29)

- ◆ In the light of the aforesaid discussion, the contention of the appellant that respondent No. 2 and respondent No. 3 were connected parties as per [section 29A](#) at the time the resolution plan was submitted by the respondent No. 2 is found convincing. This leads to the obvious and inevitable conclusion that respondent No. 2 was not eligible to submit the resolution plan and hence the resolution plan so submitted and approved by the Adjudicating Authority was bad in law. (Para 31)
- ◆ The following orders are passed:
 - (A) The Impugned Order approving the resolution plan is, therefore, set aside. The resolution plan is rejected as it was submitted by a person hit by [section 29A](#). All actions taken in implementation of the resolution plan which were approved by the order dated 8-6-2020 are declared *null* and *void* as the approved resolution plan contravenes [section 30\(2\)](#). The matter is remitted back to Adjudicating Authority. The Adjudicating Authority is requested to pass orders of liquidation under [section 33](#) and further incidental orders in that context.
 - (B) Since the earlier Resolution

Professional failed to examine resolution plan as required under [section 30\(1\)](#) read with [section 30\(2\)](#) and an ineligible person was supported in the face of documents to the contrary, he shall be replaced and another appropriate Resolution Professional shall be appointed as liquidator under [section 34\(4\)](#).

- (C) In the facts of the matter, respondents No. 2 and 3 are saddled with costs Rs. 4 lakhs and in case of default, the Adjudicating Authority to take appropriate action for non-compliance and recovery. (Para 32)

CASE REVIEW

Phoenix ARC (P.) Ltd. v. Sarbat Cottfab (P.) Ltd. (2021) 128 taxmann.com 331 (NCLT - Chd.) (para 32) *set aside* (**See Annex**).
Arcelormittal India (P.) Ltd. v. Satish Kumar Gupta (2018) 98 taxmann.com 99/150 SCL 354 (SC) (para 30) *distinguished*.

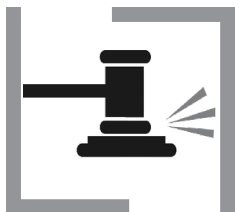
CASES REFERRED TO

Phoenix ARC (P.) Ltd. v. Sarbat Cottfab (P.) Ltd. (CA No. 354 of 2018 and CP (IB) No. 123 (Chd.) of 2017, dated 8-6-2020) (para 1) and *Arcelormittal India (P.) Ltd. v. Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL 354 (SC) (para 30)

S.K. Jain, Adv. for the Appellant. **Ms. Varsha Banerjee, Mohak Sharma, Rajeev Gupta, Suresh Dutt Dobhal** and **Nirmal Goenka**, Advs. for the Respondent.

† Arising out of order passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh in *Phoenix ARC (P.) Ltd. v. Sarbat Cottfab (P.) Ltd.* (2021) 128 taxmann.com 331.

For Full Text of the Judgment see
(2021) 128 taxmann.com 332 (NCLAT- New Delhi)



(2021) 128 taxmann.com 328 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Dhan Prakash Gupta v. Daehsan Trading India (P.) Ltd.

ANANT BIJAY SINGH, JUDICIAL MEMBER AND

MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 820 OF 2020†

JUNE 1, 2021

Section 35, read with **section 61** of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Liquidator - Power and duties of - Liquidator of corporate debtor conducted auction of corporate debtor's subject property - Appellant was declared assuccessful bidder as per terms of process memorandum - Letter of intent was also issued - Draft Letter of intent and Process Memorandum clearly stipulated that an amount of Rs. 6 Lakhs towards Maintenance Security Deposit (MSD) was to be paid and would be a part of asset of successful bidder - Thus, appellant was in knowledge of additional Rs. 6 lakhs to be paid towards Maintenance Security Deposit (MSD), prior to acceptance of Letter of intent and fact that additional amount of Rs. 6 Lakhs payable towards MSD was not negotiable was admittedly brought

to notice of appellant before signing of draft Letter of intent - Whether therefore, appellant having exercised their choice of being a successful bidder, Adjudicating Authority rightly directed appellant to pay Rs. 6 lakhs towards MSD in respect of property which was e-Auctioned by liquidator - Held, yes (Paras 9, 10 and 11)

CASE REVIEW

Dhan Prakash Gupta v. Daehsan Trading India (P.) Ltd. (2021) 128 taxmann.com 327 (NCLT - Chennai) (para 11) affirmed (See Annex).

Ms. Ekta Choudhary, Adv. for the Appellant, **Anant A. Pavgi**, (Caveator) and **Ms. R.V. Yajura**, (Caveator) for the Respondent.

† Arising out of order of NCLT Chennai Bench in *Dhan Prakash Gupta v. Daehsan Trading India (P.) Ltd. (2021) 128 taxmann.com 327*.

For Full Text of the Judgment see
(2021) 128 taxmann.com 328 (NCLAT- New Delhi)



Code of Conduct for Insolvency Professionals

1. Information Management

The Insolvency and Bankruptcy Code casts a duty on the Insolvency Professionals to maintain all records related to the assignments undertaken by them and also provide the information/records thereof to IBBI as well as Insolvency Professional Agencies, whenever required. The records an IP maintains, in relation to the steps that he took and the conclusions that he arrived at *vis-à-vis* his assignments, should be sufficient enough to enable a reasonable and informed third party to reach a view as regards the appropriateness of his actions.

2. Code of Conduct

With reference to 'Information Management', the Code of Conduct for Insolvency Professionals, specified under first schedule to Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 provides that:

- ◆ An insolvency professional must make efforts to ensure that all communication to the stakeholders, whether in the form of notices, reports, updates, directions, or clarifications, is made well in advance and in a manner which is simple, clear, and easily understood by the recipients.
- ◆ An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.
- ◆ An insolvency professional must not make any private communication with any of the stakeholders unless required by the Code, rules, regulations and guidelines thereunder, or orders of the Adjudicating Authority.
- ◆ An insolvency professional must appear, co-operate and be available for inspections and investigations carried out by the Board, any person authorised by the Board or the insolvency professional agency with which he is enrolled.
- ◆ An insolvency professional must provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled.

- ◆ An insolvency professional must be available and provide information for any periodic study, research and audit conducted by the Board.

3. Statutory Provisions

- ◆ As per [Regulation 7\(2\)\(g\)](#) of the IBBI (Insolvency Professionals) Regulations, 2016, the registration granted to an Insolvency Professional shall be subject to the condition that he maintains records of all assignments undertaken by him under the Code for at least three years from the completion of such assignment.

◆ **Authority of IBBI to conduct inspection of records**

As per [Regulation 3\(4\)\(a\)](#) of the IBBI (Inspection and Investigation) Regulations, 2017, the IBBI shall conduct inspection, *inter alia*, to ensure that the records are being maintained by an Insolvency Professional in the manner required under the relevant regulations.

◆ **Furnishing of records to Inspecting Authority**

As per [Regulation 4\(2\)](#) and [4\(4\)](#) of the IBBI (Inspection and Investigation) Regulations, 2017, the IBBI may require Insolvency Professional or an associated person to submit records, as may be required, before the commencement of inspection. It shall be the duty of the Insolvency Professional and an associated person to produce before the Inspecting Authority such

records in his custody or control and furnish to the Inspecting Authority such statements and information relating to its activities within such time as the Inspecting Authority may require.

- ◆ As per [Regulation 39A](#) of the IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, the Interim resolution professional or the resolution professional, as the case may be, shall preserve a physical as well as an electronic copy of the records relating to corporate insolvency resolution process of the corporate debtor as per the record retention schedule as may be communicated by the IBBI in consultation with Insolvency Professional Agencies.
- ◆ **IBBI's circular dated 4th January, 2021 on retention of records relating to Corporate Insolvency Resolution Process**

Period for which records must be preserved

An Insolvency Professional shall preserve

- (a) an electronic copy of all records (physical and electronic) for minimum period of eight years;
- (b) a physical copy of physical records for a minimum period of 3 years from the date of completion of the CIRP or the conclusion of any proceeding relating to CIRP, before the Adjudicating Authority (AA), Appellate Authority or Court, or any matter pending with the IBBI, whichever is later.

An Insolvency Professional shall preserve records relating to that period of a CIRP which he has handled, irrespective of the fact that he did not continue the assignment till its conclusion. For example, an IP served for three months as RP before he was replaced by another IP, who served till conclusion of the CIRP. The former shall preserve records relating to the first three months, and the latter shall preserve records relating to the balance period of the CIRP.

Manner of record keeping

An Insolvency Professional shall preserve the records at a secure place and ensure that unauthorised persons do not have access to the same. For example, he may store copies of records in electronic form with an Information Utility. Notwithstanding the place and manner of storage, the Insolvency Professional shall be under obligation to produce records as may be required under the Code and the Regulations.

Records which are required to be preserved

An Insolvency Professional, in the matter of a CIRP, shall preserve the following copies of records relating to/forming basis for:

- (a) his appointment as IRP or RP, including the terms of appointment;
- (b) handing over/taking over by him;
- (c) admission of CD into CIRP;
- (d) public announcement;
- (e) the constitution of CoC and CoC meetings;
- (f) claims, verification of claims, and list of creditors;

- (g) engagement of professionals, registered valuers, and insolvency professional entity, including work done, reports etc., submitted by them;
- (h) information memorandum;
- (i) all filings with the AA, Appellate Authority and their orders;
- (j) invitation, consideration and approval of resolution plan;
- (k) statutory filings with IBBI and IPA;
- (l) correspondence during the CIRP;
- (m) insolvency resolution process cost pertaining to CIRP;
- (n) avoidance transactions or fraudulent trading; and
- (o) any other records, which is required to give a complete account of the CIRP.

◆ **Record keeping in case of Liquidation**

[Regulation 5\(2\)](#) of IBBI (Liquidation Process) Regulations, 2016 provides that liquidator shall preserve a physical as well as an electronic copy of the reports and minutes such as preliminary report, asset memorandum, progress report(s), sale report(s); minutes of consultation with stakeholders and the final report prior to dissolution for eight years after the dissolution of the corporate debtor.

[Regulation 6](#) of the IBBI (Liquidation Process) Regulations, 2016 provides that liquidator shall maintain the

following registers and books, as may be applicable, in relation to the liquidation of the corporate debtor, and shall preserve them for a period of eight years after the dissolution of the corporate debtor:

- (a) Cash Book
- (b) Ledger
- (c) Bank Ledger
- (d) Register of Fixed Assets and Inventories
- (e) Securities and Investment Register
- (f) Register of Book Debts and Outstanding Debts;
- (g) Tenants Ledger
- (h) Suits Register
- (i) Decree Register
- (j) Register of Claims and Dividends
- (k) Contributories Ledger
- (l) Distributions Register
- (m) Fee Register
- (n) Suspense Register
- (o) Documents Register
- (p) Books Register
- (q) Register of unclaimed dividends and undistributed properties; and
- (r) Such other books or registers as may be necessary to account

for transactions entered into by him in relation to the corporate debtor.

◆ **Submission of records to IBBI as well as IPAs**

As per [Section 208\(2\)\(d\)](#) of the Insolvency and Bankruptcy Code, 2016, an Insolvency Professional shall submit a copy of the records of every proceeding before the Adjudicating Authority to the Insolvency and Bankruptcy Board of India (IBBI) as well as to the Insolvency Professional Agency of which he is a member.

As per bye law 16 of the IBBI model bye laws, a professional member shall submit information, including records of ongoing and concluded engagements as an IP, in the manner and format specified by the respective Insolvency Professional Agency at least twice a year.

4. Regulatory Rulings

Insolvency Professional shared Information Memorandum prior to the issue of Invitation of Expression of Interest

Disciplinary Committee of IBBI *vide* its order dated 27th April 2020, IBBI/DC/23/2020, observed that resolution professional shared a confidential document *i.e.* IM discreetly with one of the resolution applicants prior to the issue of Form G for Invitation of Expression of Interest and even before the conduct of due diligence (by the RP) to ensure that they would qualify as eligible prospective resolution applicants. The Resolution Professional violated clause

17 of the code of Conduct. In view of the same, the Disciplinary Committee issued necessary directions.

Insolvency Professional failed to provide documents as sought by the IBBI

Disciplinary Committee of IBBI *vide* its order dated 27th February 2020, IBBI/DC/18/2020, observed that the Code casts an obligation upon the IP to co-operate with the Board and provide all information and records as may be required by the Board. However, in the present matter the RP, despite reminder, failed to provide documents as sought by the Board. The IP violated clause 19 of the code of Conduct. In view of the same, the Disciplinary Committee issued necessary directions.

Insolvency Professional failed to submit to the IBBI (Board) copy of the records of proceeding before the Adjudicating Authority

Disciplinary Committee of IBBI *vide* its order dated 12th November, 2018, IBBI/DC/12/2018, observed that the Insolvency Professional approached the AA for the extension of CIRP period and for approval of the resolution plan. He did not submit copies of these proceedings to IBBI in contravention of the provisions of [section 208\(2\)\(d\)](#) of the Code read with clauses 12 and 15 of the Code of Conduct. In view of the same, the Disciplinary Committee issued necessary directions.

Insolvency Professional conducted CoC meetings by audio mode only

Disciplinary Committee of IBBI *vide* its order dated 5th March 2021, IBBI/DC/68/2021 observed that the Insolvency Professional conducted CoC meetings only by audio

mode on 13 occasions, out of total 15 meetings has not provided facility to CoC members for effective participation, therefore, he has contravened [section 208\(2\)\(a\)](#) and [\(e\)](#) of the Code read

with clauses 10, 14 and 16 of the Code of Conduct. In view of the same, the Disciplinary Committee issued necessary directions.





FAQs on Appointment of Professionals under IBC

1. When shall Registered Valuers be appointed by the Insolvency Professional?

The resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date will appoint two registered valuers.

2. Who cannot be appointed as Registered Valuers as per [section 27](#) of the Code?

As per [Section 27](#) of the Code, following persons shall not be appointed as registered valuers:

- (a) a relative of the resolution professional;
- (b) a related party of the corporate debtor;

- (c) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or
- (d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.

3. What is the role of Committee of Creditors in appointment of Professionals?

The provisions of the Code empower the IPs to appoint and engage professionals to assist them in the discharge of their functions.

[Regulation 34](#) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 stipulates that the Committee shall fix the expenses to be

incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

4. What is the code of conduct an IP should follow regarding the appointment of professionals?

The Code of Conduct for IPs under the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 ("IP Regulations") w.r.t. appointment of professionals stipulate that -

- ◆ An IP should not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment.
- ◆ An IP shall not provide any service for or in connection with the assignment which is being undertaken by any of his relatives or related parties.

Further, an IP should maintain his integrity, objectivity, independence during the appointment of the various Professionals during the course of the CIRP.

5. Which provisions in the code give an Interim Resolution Professional or a Resolution Professional to appoint professionals for conducting CIRP?

As per [Section 20\(1\)](#) read with [Section](#)

[20\(2\)\(a\)](#) an IRP is required to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. And to this effect, the IRP shall have the authority to appoint accountants, legal or other professionals as may be necessary.

Further, as per [Section 25\(1\)](#) read with [Section 25\(2\)\(a\)](#) also casts a duty on the RP to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor and to this effect, the RP has been empowered to appoint accountants, legal or other professionals.

6. What disclosure an IP should make w.r.t. appointment of professionals under CIRP?

An insolvency professional shall disclose to the Insolvency Professional Agency (IPA) his relationship with Other Professionals (Registered Valuer(s)/Accountant(s)/ Legal Professional(s)/Other Professional(s)) appointed by him within three days of the appointment of such professionals.

Further, an IP while making cost disclosure as an IRP or RP mention the fees paid to the professionals appointed in the cost sheet submitted to IPA.

...



Notifications

Notification dated 21st June, 2021, specifies the members and their term as acting President of NCLT in terms of section 415 of the Companies Act, 2013¹

Member name	Term as acting President
Ms. Manorama Kumari, Member(Judicial)	02-6-2021 and up to 5-6-2021
Shri Rajeswara Rao Vittanalla, Member (Judicial)	06-6-2021 and up to 9-6-2021.
Shri Bhaskara Pantula Mohan, Member (Judicial)	10-6-2021 and up to three months

As per the notification dated 25 June, 2021, it has been ordered that the NCLT Benches will start regular hearing w.e.f. 1-7-2021 through Video Conference on all working days. All the Hon'ble Members shall attend the Bench from Court Rooms at their respective Headquarters through video conference.²

Notifications by other Authorities

The following rules have been amended to the Securities Contracts (Regulation) Rules, 1957³.

- ◆ Rule 19(2)(b)(iii) (amended)
- ◆ Rule 19(2)(b)(iv) (inserted)
- ◆ Rule 19A(5) (amended)

Please refer to the rules for further clarity.

Guidelines

Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2021

The IBBI is required under the IBC, 2016 (Code) to recommend name of an Insolvency Professional (IP) for appointment or replacement of an IP as Interim Resolution Professional (IRP), Resolution Professional (RP), Liquidator, or Bankruptcy Trustee, as the case may be under [Sections 16\(3\)\(a\), 16\(4\), 34\(4\), 97\(3\) r/w 97\(4\), 125, 146](#) and

147 of IBC, 2016, along with relevant rules. More details are available in the guideline. The Board has been making available Panels of IPs to the AA for appointment as IRP or Liquidator. The Adjudicating Authority has found such panels useful and efficient as it facilitates the board in speeding the CIRP process, such appointments of an IP as Resolution Professional/Liquidator, as the case may be should be treated as appointments on the recommendations of the board.

As per the guideline, the Board will prepare a common panel of IPs for appointment IRP, Liquidator, RP and BT and share the same with the AA. The panel will have a zone wise list based on their registered offices, and the validity of such panel shall be 6 months. To check the eligibility of an IP to be a part of the panel, and the list of existing zones and areas covered, please check the detailed guidelines.

Further, the board shall invite expression of interest from IPs in Form A and the same shall be submitted by a specified date. The eligible IPs will be included in the Panel in the order of the volume of ongoing processes they have in hand.

These guidelines will come into effect from July 1, 2021.

Guidelines for Technical Standards for the Performance of Core Services and Other Services under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017⁴

Regulation 13 under Chapter IV of the IBBI (Information Utilities) Regulations, 2017 provides that the Board may lay down Technical Standards through guidelines for the performance of core services and other services under the said Regulations. This report has made recommendations on 14 out of 18 matters for which technical standards are required to be laid down by IBBI through Guidelines issued under the Regulations. The Technical Standards cover the following matters in accordance with **Regulation 13** of the IBBI (Information Utilities) Regulations, 2017: -

- (a) standard terms of service;
- (b) registration of users;
- (c) unique identifier for each record and each user;
- (d) submission of information;
- (e) identification and verification of persons;
- (f) authentication of information;
- (g) verification of information;
- (h) data integrity;
- (i) consent framework for providing access to information to third parties;
- (j) security of the system;
- (k) security of information;
- (l) risk management framework;
- (m) preservation of information; and
- (n) purging of information

For further details please see the guidelines.

1. <https://ibbi.gov.in/uploads/legalframework/2ef94517f459de71a10782eb4be01d1a.pdf>
2. <https://ibbi.gov.in/uploads/legalframework/ac543006840abd6a5bc2a21849507cc5.pdf>
3. <https://ibbi.gov.in/uploads/legalframework/cfc752ae9fb5738a0b8e125a86c5f257.pdf>
4. <https://ibbi.gov.in/uploads/legalframework/98c1c43fb165be1c4e8c90244de1d4fe.pdf>



U.S. Bankruptcy Trustees: Eligibility, Conduct and Regulation

In the USA, there are Chapter 7 Bankruptcy Trustees who are the counter equivalent to Insolvency Professionals in India.

The United States Trustee establishes a panel of individuals qualified to be appointed as trustee in chapter 7 cases. The number of individuals on the panel is governed by the need to ensure the prompt, competent, and complete administration of cases, as well as by the need for fair distribution of case assignments. The United States Trustee maintains and conducts an open system for the recruitment of persons interested in serving on the panel of private trustees. The United States Trustee may not discriminate on the basis of race, color, religion, gender, national origin, or age in appointments to the panel, and, in this regard, must assure equal opportunity for all appointees and applicants.

1. Eligibility to serve on a panel

To be eligible for membership on a panel, a person must possess all of the qualifications established by the Attorney General of the United States under 28 U.S.C. § 586(d) and published in the Code of Federal Regulations at 28 C.F.R § 58.3. Further, panel members must be able to satisfy the eligibility requirements of

section 321 of the Bankruptcy Code for serving in a case. Prior to appointment, each person will be interviewed and informed of the performance expected, as well as the method by which that person will be assigned cases. The trustee's appointment to a panel is subject to the successful completion of an initial background investigation, and subsequent background checks conducted every five years. A background investigation includes a Background Questionnaire and a Questionnaire for Public Trustee Positions (Form SF-85P), name and fingerprint checks, a tax check with the Internal Revenue Service (IRS), and a report on credit history (with disclosure authorization), including any subsequent credit reports requested by the United States Trustee. The trustee must provide an Update to the Background Questionnaire annually. The trustee's appointment to the panel or the assignment of cases may be terminated based on unresolved problems discovered during the background investigation or subsequent background checks.

2. Qualifications for panel membership

The minimum qualifications for membership on the panel are set forth in 28 C.F.R. § 58.3(b).

The panel member must:

1. Possess integrity and good moral character.
2. Be physically and mentally able to satisfactorily perform a trustee's duties.
3. Be courteous and accessible to all parties with reasonable inquiries or comments about a case for which such individual is serving as private trustee.
4. Be free of prejudices against an individual, entity, or group of individuals or entities which would interfere with unbiased performance of a trustee's duties.
5. Not be related by affinity or consanguinity within the degree of first cousin to any employee of the Executive Office for United States Trustees of the Department of Justice, or to any employee of the Office of the United States Trustee for the district in which he or she is applying.
6. Be either:
 - ◆ A member in good standing of the bar of the highest court of a state or of the District of Columbia;
 - ◆ A certified public accountant;
 - ◆ A college graduate with a bachelor's degree from a full four-year course of study (or the equivalent) of an accredited college or university, with a major in a business-related field of study or at least 20 semester-hours of business-related courses; or hold a master's doctoral degree in a business-related field of study from a college or university of the type described above;

- ◆ A senior law student or candidate for a master's degree in business administration recommended by the relevant law school or business school dean and working under the direct supervision of: i. A member of a law school faculty; ii. A member of the panel of private trustees; iii. A member of a program established by the local bar association to provide clinical experience to students; or
 - ◆ Have equivalent experience as deemed acceptable by the United States Trustee.
7. Be willing to provide reports as required by the United States Trustee.
 8. Have submitted an application under oath, in the form prescribed by the Director, Executive Office for United States Trustees, to the United States Trustee for the district in which appointment is sought; provided, that this provision may be waived by the United States Trustee on approval of the Director.

3. Appointment to a panel

The trustee will receive an appointment to the panel of chapter 7 trustees for the district(s) in which he or she was selected to serve. The appointment may be suspended or terminated at any time pursuant to 28 C.F.R. § 58.6. D.

4. Eligibility to serve in a case

To be eligible to serve as a trustee in a chapter 7 case, a person must be:

- (1) competent to perform the duties of a chapter 7 trustee,
- (2) reside or have an office in the district where the cases are pending or in an adjacent district, and
- (3) be an individual or a corporation authorized by corporate charter or by-laws to act as a trustee. 11 U.S.C. § 321.

While corporations are eligible under section 321 for appointment as interim trustees in specific cases, each individual in a corporation who performs the duties of a trustee must individually satisfy the requirements of 28 C.F.R. § 58.3.

In view of the fiduciary duties of the trustee, the responsibility of the individual trustee to preside at meetings of creditors, possible complications as to coverage under blanket or separate bonds, and possible increases in expenses imposed on estates, corporate entities are rarely appointed. No professional corporation, partnership, or similar entity organized for the practice of law or accounting is eligible for appointment as a chapter 7 trustee.

To qualify to serve, the trustee must furnish a bond in favour of the United States that is conditioned on the faithful performance of the trustee's duties. 11 U.S.C. § 322.

Unless the United States Trustee directs otherwise, a panel trustee covered by a regional or district blanket bond does not

have to file a separate bond in each case. More information on bonds is provided later in this chapter. In addition, the trustee must undergo an initial background investigation and subsequent background checks every five years. 11 U.S.C. § 586(a), 28 C.F.R. § 58.3(b)(8).

5. U.S. Trustee Program

The Program was established by the Bankruptcy Reform Act of 1978 (11 U.S.C. § 101, *et seq.*) as a pilot effort encompassing 18 districts. It was expanded to 21 Regions nationwide, covering all Federal judicial districts except Alabama and North Carolina, by enactment of the Bankruptcy Judges, U.S. Trustees, & Family Farmer Bankruptcy Act of 1986 (Pub. L. 99-554, 100 Stat. 3088, reprinted in part at 28 U.S.C. § 581, note). The Program is funded by the United States Trustee System Fund, which consists primarily of fees paid by parties and businesses invoking Federal bankruptcy protection.

The primary role of the U.S. Trustee Program is to serve as the “watchdog over the

bankruptcy process.” As stated in the USTP Mission Statement:

The mission of the United States Trustee Program is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders - debtors, creditors, and the public.

The Attorney General is charged with the appointment of United States Trustees and Assistant United States Trustees. The Executive Office for U.S. Trustees (EOUST) in Washington, D.C., provides general policy and legal guidance, oversees the Program’s substantive operations, and handles administrative functions. The Director of the Executive Office, whose authority derives from the Attorney General, oversees a staff comprised of the Offices of the Director, General Counsel, Criminal Enforcement, Administration, Oversight, Planning & Evaluation, and Information Technology. The Executive Office also provides administrative and management support to individual U.S. Trustee Offices in their implementation of Federal bankruptcy laws.

REFERENCES

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https://www.justice.gov/ust/file/handbook_for_chapter_7_trustees.pdf/download

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<https://trusteeresourcegroup.com/bankruptcy-insurance/>

<https://www.law.cornell.edu/uscode/text/28/586>

<https://www.law.cornell.edu/cfr/text/28/58.6>

RESEARCH AT THE SPEED OF THOUGHT

FEMA Banking & Insurance



HIGHLIGHTS

- ▶ Covering almost everything on FEMA, Banking, Insurance and NBFC Laws
- ▶ An integrated database of Case laws, Acts, Rules, Circulars and Notifications
- ▶ Get practical guidance and solutions with Articles and Commentaries authored by Industry's Experts
- ▶ Largest database and powerful search features helps you in doing comprehensive and pin-pointed research
- ▶ Real time updates and analysis of all latest developments in FEMA, Banking and Insurance Laws



CASE LAWS

- ▶ Database of 2,300+ case laws with comprehensive and pin-pointed headnotes and digests
- ▶ Covering judgments of the Supreme Court, High Courts, ATFFE and PMLA Appellate Tribunal
- ▶ Every case law has been tagged with 10+ parameters which provide you only the relevant results



ACTS, RULES, CIRCULARS AND NOTIFICATIONS

- ▶ Always amended database of Acts, Rules and Forms



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