RESOLVE™

INSOLVENCY AND BANKRUPTCY JOURNAL

NO. 5 | PG. 1-100 | MAY 2021 | ₹ 500 (SINGLE COPY)

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

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

NEWS FROM THE INSTITUTE

◆ Pre-Registration Educational Course

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

ICSI IIP jointly with the other three Insolvency Professional Agencies conducted Pre-Registration Educational Course online from 26th April, 2021 to 2nd May, 2021.

◆ Workshop on 'Analysis of Supreme Court Judgments w.r.t. IBC'

On 8th May, 2021, ICSI IIP organized a full day workshop on `Analysis of Supreme Court Judgments w.r.t. IBC'. It was attended by 100 professional members. The workshop was addressed by the eminent speakers namely, Mr. Nainesh Sanghavi, IP Chaya Gupta and IP Gopal Krishna Raju.

◆ Workshop on 'Immunities accessible for Insolvency Professionals under IBC'

On 15th May, 2021, ICSI IIP organized a full day workshop on 'Immunities accessible for Insolvency Professionals under IBC'. It was attended by 100 professional members. The workshop was addressed by the eminent speakers namely, IP Anagha Anasingaraju, IP Sajeve Deora and IP Anil Katia.

◆ Workshop on 'Valuation under IBC'

On 22nd May, 2021, ICSI IIP organized a full day workshop on `Valuation under IBC'. It was attended by approximately 85 professional members. The workshop was addressed by the eminent speakers namely, IP Harish Dhamija and IP Rajesh Mittal.

◆ Workshop on 'Asset Reconstruction Companies w.r.t IBC: Need of the hour'

On 29th May, 2021, ICSI IIP organized a full day workshop on `Asset Reconstruction Companies w.r.t IBC: Need of the hour'. It was attended by100 professional members. The workshop was addressed by the eminent speakers namely, IP Alok Dhir and IP Satish Kumar Gupta.

'ICSI IIP Insolvency and Bankruptcy Journal' is normally published in the first week of every month • Non- receipt of any issue should be notified within that month • Articles on subjects of interest to Insolvency Professionals are welcome • Views expressed by contributors are their own and ICSI IIP does not accept any responsibility • ICSI IIP is not in any way responsible for the result of any action taken on the basis of the advertisements published in the JOURNAL • All rights reserved • No part of the JOURNAL may be reproduced or copied in any form by any means without the written permission of ICSI IIP.

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

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

ANNUAL SUBSCRIPTION
(JANUARY - DECEMBER 2021) : ₹ 5, 500
Cheques to be drawn in favour of

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At a Glance

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Section 2, read with sections 1, 78, 79, 94 to 187, 239 and 249, of the Insolvency and Bankruptcy Code, 2016 - Application of Code - Petitioners were associated with different

corporate debtor companies as directors, promoters or in some instances, as chairman or managing directors - They furnished personal guarantees to banks and financial institutions - Notification No. S.O. 4126(E), dated 15-11-2019 was issued by Central Government which brought into force sections 2(e), 78, 79, 94 -187, 239(2)(g), 239(2)(h) & 239(2)(i), 239(2)(m) to 239(2)(zc), 239(2)(zn) to 239(2)(zs) and 249 in relation to such `personal guarantors to corporate debtors' - Whether there is no compulsion in Code that it should, at same time, be made applicable to all individuals, (including personal guarantors) and there is sufficient indication in Code by sections 2(e), 5(22), 60 and 179 indicating that personal guarantors, though forming part of larger grouping of individuals, are to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through same adjudicatory process and by same forum as such corporate debtors - Held, yes - Whether further, impugned notification, has merely made provisions of Code applicable in respect of `personal guarantors to corporate debtors', as another such category of persons to whom Code has been extended - Held, yes - Whether, thus, impugned notification is not an instance of legislative exercise, or amounting to impermissible and selective application of provisions of Code and it being issued within power granted by Parliament, is valid - Held, yes (Para 101)

Section 31, read with sections 1 and 2 of the Insolvency and Bankruptcy Code, 2016 and Sections 128, 133 and 140 of the Contract Act, 1872 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under contract of guarantee - Held, yes - Whether release or discharge of a principal borrower from debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding does not absolve surety/guarantor of his/her liability, which arises out of an independent contract - Held, yes - Whether approval of resolution plan relating to corporate debtor does not discharge liabilities of personal guarantors - Held, yes (Para 112)

- **Directorate of Economic Offences v. Binay Kumar Singhania**
  (2021) 127 taxmann.com 173 (NCLAT-New Delhi) • P-172

Section 14, read with section 33, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - Pursuant to an application under section 9, CIRP against corporate debtor was initiated and liquidator was appointed - However, Directorate of Economic Offences (DEO) had sealed registered office of corporate debtor and attached bank accounts for fraudulent transactions in terms of section 3 of West Bengal Protection of Interest of Depositories in Financial Establishment Act, 2013 - Liquidator filed an application under section 33(5) stating that documents kept in registered office were essential to conduct liquidation process - NCLT by impugned order directed DEO to de-attach all properties attached and to restore possession thereof to liquidator - Whether since properties of corporate debtor were seized and registered office was sealed much prior to initiation of CIRP and moratorium had been declared after properties were attached by DEO and produced before Designated Court of Economic Offences, section 14 of IBC had no overriding effect on section 3 of WBPIDFE Act - Held, yes - Whether Director of corporate debtor and property of corporate debtor could not get immunity from prosecution and, therefore, attached property, which was confiscated by Designated Court of Economic Offences, could not be de-attached - Held, yes - Whether attached property was not in possession and control of DEO and, therefore, DEO could not de-attach property which was already confiscated by Designated Court of Economic Offences - Held, yes - Whether impugned order was not sustainable in law and, therefore, same was to be set aside - Held, yes (Paras 44, 52, 53 and 55)

- **Sirpur Paper Mills Ltd. v. I.K. Merchants (P.) Ltd.**
  (2021) 127 taxmann.com 865 (Calcutta) • P-179

Section 31 of the Insolvency and Bankruptcy Code, 2016, read with section 34 of the Arbitration and Conciliation Act, 1996 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether pre-existing and undecided claims which have not featured in collation of claims and consequent consideration by Resolution Professional will be treated as extinguished upon approval of resolution plan under section 31 - Held, yes (Para 23)

- **Lakshmi Narayan Sharma v. Punjab National Bank**
  (2021) 127 taxmann.com 873 (NCLAT - Chennai) • P-189

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016, and section 18, read with section 19 of the Limitation Act, 1963 - Corporate insolvency resolution process - Limitation period - Appellant was promoter/suspended director of corporate debtor - Corporate debtor was a 'special purpose vehicle' incorporated to undertake a certain public-private partnership project with Government of Telangana - Corporate debtor availed of a loan facility from a 'consortium' which included respondent bank (financial creditor) - Having defaulted in repaying loan amount within time, bank filed an application under section 7 which was admitted by NCLT - Corporate debtor submitted that date of default for all facilities extended by bank was 30-3-2016, whereas section 7 application was filed by bank only on or after 18-7-2019, therefore, bank's application, having been filed beyond 3 years' period was barred by limitation - However, prima facie fact was that 'guarantors' of corporate debtor had executed a Balance and Security Confirmation Letter confirming correctness of debit balance and there was a certain part payment made by corporate debtor on 15-10-2018 towards its liability to financial creditor bank - Whether therefore, it was to be held that there was an acknowledgement of debt as per sections 18 and 19 of Limitation Act in respect of loan account of corporate debtor and, NCLT had rightly admitted section 7 application filed by financial creditor - Held, yes (Para 34)

- **Dreams Infra India (P.) Ltd. v. Competent Authority Dreamz Infra India (P.) Ltd.**
  (2021) 127 taxmann.com 864 (Karnataka) • P-207

Section 238, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 3 of Karnataka Protection of Interest of Depositors in Financial Establishment Act, 2004 - Corporate insolvency resolution process - Overriding effect of Code - Petitioner/corporate debtor, a real estate company, had floated multiple projects - Petitioner had executed an Agreement of sale and Memorandum of Understanding with thousands of home buyers for sale of apartments in these under construction projects - As per agreement, home buyers were asked to pay certain amount as advance money or earnest in lieu of booking their apartments in said projects - Apartments were not handed over after collecting advance money from home buyers and thus, home buyers asked petitioner to refund amount paid as advance - Since petitioner failed to pay same an application was filed under section 7 - Adjudicating Authority admitted said application and moratorium was declared - Meanwhile, owing to various complaints lodged against promoters and directors of petitioner, respondent-Authority appointed by Government of Karnataka initiated proceedings under Karnataka Protection of Interest of Depositors in Financial Establishment Act, 2004 and attached all properties of petitioner - Whether section 238 had an overriding effect over any other law; therefore, proceedings initiated against petitioner under Karnataka Protection of Interest of Depositors in Financial Establishment Act, 2004 were to be quashed - Held, yes (Para 22)

- **Regional Provident Commissioner Employees Provident Fund Organisation v. Vandana Garg**
  (2021) 127 taxmann.com 341 (NCLAT - Chennai) • P-208

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution plan - Resolution plan - Approval of - Whether after approval of Resolution Plan under section 31, claims as provided in Resolution Plan shall stand frozen and will be binding on corporate debtor and its employees, members, creditors including Central Government, any State Government or any Local Authority, Guarantors and other Stakeholders - Held, yes - Whether on approval of Resolution Plan by Adjudicating Authority, all such claims that are not a part of Resolution Plan shall stand extinguished - Held, yes - Whether no person will be entitled to initiate/continue any proceedings regarding a claim that is not part of Resolution Plan - Held, yes (Para 34)

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

From Chairman's Desk

Those who want to leave footprint behind will never fly

Dear Professional Members,

I hope you all are keeping well!

Amidst this unprecedented and a very difficult period that we all are witnessing, there is a definite need to remain united in our determination and evolve victorious by overcoming the challenges posed by the pandemic.

After coping with the first wave of Covid-19 pandemic, the Indian economy had finally shown some signs of recovery from Q3 of the Financial Year 2020-21. The initial months of the first wave did adversely impact the organised as well as the unorganised sectors of the economy. However, in subsequent months, the organised sector did adapt to the new normal, and the unorganised sector also started limping back to life. However, the challenges were far from over and the second wave of the pandemic has dealt another blow. Infact, the second wave hashit the nation very hard, pushing many Indian states to go in for a lockdown.The second wave which struck the nation between the end of February and beginning of March is continuing unabated. Infact, the alarming rate at which it has spiralledis leaving us bewildered. There is a surge

in daily cases and the situation is no less than a war which we all need to fight together to save world's largest democracy. Although there are views expressed by some economists that the impact of the second wave on Indian economy shall not be as hard as that of the first wave witnessed last year, there are several risks that can derail the economy. Some of them are rising income inequality, unemployment, sectoral impact, consumer confidence and inflation. The second wave has not impacted the livelihood of salaried employees to the extent it has affected the poorer households. The problems faced by thousands of migrant labourers and daily wage labourers who have returned home due to the announcement of lockdowns in several cities is very difficult to fathom. The challenges before the economy are being addressed in the best possible manner by the Government (and the concerned agencies), we all do need to be conscious of our individual responsibility(ies) which is to comply with all safety measures to prevent the spread of the pandemic.

From the legal stand-point, the month of may witnessed a very important landmark judgment being delivered by Hon'ble Apex Court (judgment dt. 21st May 2021) in the matter of *Lalit Kumar Jain* v. *Union of India* (2021) 127 taxmann.com 368 wherein it has upheld the constitutional validity of the notification dated 15th November 2019 issued by the Central Government whereby the provisions pertaining to *insolvency proceedings against personal guarantors to corporate debtors* (under the IBC) were notified and brought into force (w.e.f. 1st December, 2019). The legal validity of the *Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019* and *Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019* (notified on 20th November 2019) has also been upheld. Accordingly, the constitutional challenge made against the proceedings initiated against *Personal Guarantors of Corporate Debtors* (PG to CD) in terms of Part III of IBC, which dealt with Insolvency Resolution and Bankruptcy for individuals and partnership firms have been turned down. The judgment has made it clear that approval of a resolution plan relating to a CD shall not operate so as to discharge the liabilities of PGs to CDs. This aspect of the judgment is very significant since

there have been some differing opinions expressed on this issue in the past.

The other very important landmark judgment that I had the occasion to go through has come from Hon'ble NCLT, Kolkata Bench delivered in the matter of *Gujarat NRE Coke Ltd. In re* (2018) 90 taxmann.com 44/146 SCL 63, wherein, while dismissing an interim application filed by the workers of the CD *inter alia* seeking restraint orders against the liquidator (appointed in the case) injuncting him from taking any coercive steps for closing CD's operation at its Dharwad plant, and to further appoint an independent competent agency to investigate the manner in which the Liquidator conducted his affairs as such Liquidator, and a report be called for from such agency. While dealing with the peculiar facts of the case, the AA made it clear that in the absence of any allegation of fraud or bias in the decisions of the liquidator, the AA cannot order a roving inquiry just on the basis of perceived loss of employment of the workers on account of a business decision taken by the liquidator. The AA further held that actions taken in good faith by a public servant (liquidator) always enjoy protection under the law, and the IBC is no different, provides for the same under s. 233 of the Code.

The judgments coming from the Constitutional Courts of the country as well as the Authorities established under the Code are indeed a *shot in the arm* as they not only uphold the rule of law, but also help in settling the law.

I look forward to better days ahead for all of us. Till then, please take care of you and yours!

DR. BINOY J. KATTADIYIL

MANAGING DIRECTOR
ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

Managing Director's Message

Dear Professional Member(*s*),

It is a privilege for me to be communicating with all the members through this medium of our monthly journal. Despite the present unprecedented situation and circumstances, it is only with your unstinted support and guidance that we have succeeded in continuously organizing different workshops and webinars (as a part of our mandate) on subjects related to IBC. While our endeavour is to serve our members with the best of our services, I am sure that there shall be areas wherein a constructive suggestion from our members can help us in analyzing the things better thereby leading us to a better future. With that intent in mind, I request all the members to keep helping us with their valuable suggestions.

In the last financial year 2020-21, as with other progressive economic legislations in the country, an element of flexibility was injected into the IBC. The flexibility was introduced so as to allow certain adjustments to be made in the application of the Code which were necessitated due to the difficulties being faced by different sectors of the economy. The spirit of the legislation was however kept intact since the measures

(suspension of certain IBC provisions) were necessitated by the financial disruption due to the pandemic. I recount that in the month of *march* last year the Government of India suspended certain IBC provisions in order to prevent firms from being forced into bankruptcy proceedings due to the economic shock caused by the pandemic (the provisions suspended were ss. 7, 9 and 10). In addition, it was made clear that the debt liabilities that arose during lockdown period could never be treated as "*default*" under the IBC which essentially meant that no IBC proceedings could be initiated against a business entity for a default committed during this period. Realising the necessity, the suspension provision was extended bringing the total period of suspension to twelve months. The RBI also carried out simultaneous measures in the form of imposing moratorium on debt collection, infusion of liquidity into the market, relaxation in asset classification norms, etc. which not only dealt with the economic challenges, but also prevented opening of floodgates to pro-debtor judgments from the Courts which would have hurt debt recovery incentives and institutional mechanism in the long run by being cited as a judicial precedent. While the measures implemented did enable the businesses to withstand pain of the pandemic induced lockdown, the incessant pains caused due to the unrelenting pandemic continue to be a big cause of worry. One of the most important challenges that the Government is faced with is to ensure a sustained economic recovery which can be done by ensuring growth of firms that are competitive and reallocation of capital from failing firms to healthy and competitive ones and IBC undoubtedly has a very crucial role to play in this process.

This financial year (so-far) continues to see a huge impact caused by the second wave of Covid 19 pandemic which has taken a heavy toll on our nation's economy and its population. The wave appears to be unrelenting and unwavering, and one of the major concerns is that this second wave is spreading its wings into the India's hinterland thereby impacting the people in villages, towns and small cities. The first wave of the pandemic was largely seen as having its impact on the urban population, however, with cases now also coming from rural districts as well the concern is even more since the health infrastructure in these are as is relatively sub-optimal, and thus the impact of the pandemic could be frightening. According to an estimate by the Niti Aayog, nearly 70 per cent of India's workforce lives

in rural areas. Moreover, the rural economy accounts for 46 per cent of the country's national income. In 2020, the rural economy gave the nation a ray of hope in the face of broad-based economic chaos. However, in the present situation, *saving lives* has to be our paramount objective. The economic matters can take a back seat, and measures like vaccination and lockdowns have to come to the forefront.

With uncertainty gripping us so tight, the only way we can now keep up our spirit is through sheer determination to keep working in the direction of building a better future for the nation. I appeal to the sense of optimism that resides within all of us by simply saying that "there is always a sunshine after the rain; there is always happiness that follows the pain; there's always courage that comes after fear; there is always a smile after the tears; and there's always a laughter after the cries.

I look forward to see all of you very soon. Till then please do take a very good care of yourself and your loved ones!

INTERVIEW

SATWINDER SINGH

Insolvency Professionals

1. At the outtset, let me start by asking your views about t overall experience as an Insolvency professional?

Insolvency Professional plays a vital role in the Insolvency and Bankruptcy process, forming a pillar upon which rests the effective, timely functioning as well as credibility of the entire insolvency and bankruptcy resolution process. Further, in IBC, an IP has to wear several hats at different points of time, he/she has to conduct the whole CIRP process, collect and verify claims of the creditors, manage the operations of the corporate debtor, conduct liquidation process, distribute the realised amounts in fair and equitable manner, take decisions as to raising finances etc. With the kind of roles and responsibilities assigned to an IP under the statute, it can only be a primary profession for an IP and not a secondary one. If one is acting as IRP or RP or Liquidator, it requires him to be very focused, dedicated and sincere while developing a commercial acumen alongside.

Though I got the qualification as an Insolvency Professional much earlier, but, so far, I have chosen to not take the role of an IRP or RP or Liquidator (except in case of voluntary liquidation) and rather focused myself towards providing representational and advisory services to various stakeholders, be it resolution

applicants, corporate debtors, resolution professionals or liquidators. This has worked out very well with my core profession as a corporate lawyer and particularly, my experience of over 20 years in the field of corporate restructuring, banking, securities laws and other corporate laws. This has helped me in advising on various big ticket acquisitions and in dealing with different stakeholders, which has led to a better understanding of the roles and responsibilities of IP and more so, on the thought process of different stakeholders and then working around that thought process, negotiating with various stakeholders and completing the transactions in a time bound manner.

2. How different is Insolvency Professional from other professions? And what is the scope of work available for Insolvency professionals apart from being the Resolution professional of the corporate debtor?

As far as an Insolvency Professional's job is concerned, it is very versatile and it requires legal knowledge, negotiation skills, commercial acumen, stakeholder management and integrity, among others. Apart from it, if you also acquire reasonably good knowledge in other relevant laws that govern various aspects of a company, including but not limited to labour and employment laws, taxation - both direct and indirect, securities laws, company law, law of limitation, it will surely help any insolvency professional to act as a matured professional.

As I said earlier, the profession of IP has various facets and if you choose to take up the core assignments of IRP or RP or Liquidator, then you have to be very focused, dedicated, sincere and take this profession as an independent primary profession and not as a secondary profession. However, there are other roles, which are in tune with the skill sets of an Insolvency Professional, such as practising company secretary or chartered accountant or a lawyer performs in his day to day working. One can consider developing this as a profession in respect of taking representational services and advisory services, which are equally important for an efficient justice delivery system. My qualification as an insolvency professional has indeed helped me to delve deeply into relevant areas of law and to understand the process more accurately. I would like to encourage the practising company secretaries, chartered accountants and lawyers that they should study the insolvency law, and rather it should be part of the main course curriculum for students of these professions, so that they develop a broad understanding of the subject which would surely help them while representing clients before judicial authorities.

3. Since resolution applicants play vital role in the revival of the Corporate Debtor, can you throw some light on their importance and demand in current scenario?

The role of Resolution Applicants (RA) has been very critical, as they have been tasked with the function of revival of the corporate debtor which is undergoing CIRP. One should be mindful of the fact that law envisaged under IBC is not a recovery law or it is not merely a sale of assets or business but it acts as a catalyst

in the restructuring and revival process of the Corporate Debtor. That is why the evaluation criteria provides for both quantitative as well as qualitative criteria. I personally feel that qualitative criteria should be given equal importance and perhaps, the Committee of Creditors should look for it with a long-term perspective and participate in the future growth and not merely from the point of recovery of their dues. The results show that where the companies have been taken by the resolution applicants, with similar line of business or experience in reviving the distressed units, such distressed companies have given extremely good results. It gives them the inbuilt synergies which help in increasing the scope of revival of the distressed companies. Therefore, experienced Resolution Applicants with trusted projections are well suited for the revival of a corporate debtor.

The most important aspect is that the Plan proposed by the Resolution Applicant should pass the test of 'feasibility' and 'viability' while offering a reasonable prospect of revival of Corporate Debtor.

4. What are your views on frame-work of Pre-packaged Insolvency Resolution Process & individual insolvency? How will it impact the current insolvency scenario?

The introduction of the concept of Pre-Packaged Insolvency Process is a great commercially oriented as well as legally sound decision which aims to provide a cost-effective, swift and value-maximising mechanism for resolving insolvency of MSMEs. The process provides a hybrid mechanism, allowing the benefit of both informal and formal insolvency proceedings. It provides MSMEs with an opportunity to start afresh while safeguarding the rights of the stakeholders; and at the same time, it provides enough protection to prevent any potential misuse by the companies of this process. Further, to legitimize the process, the pre-pack also carries the blessing of court like in most jurisdictions, though the nuances differ across jurisdictions.

However, one major issue which might be faced by many MSMEs is that in India, the number of unregistered MSMEs exceeds the number of registered MSMEs and thus, they cannot take recourse under the pre-packaged regime for insolvency resolution as the law provides for obtaining Udyam Registration Certificate as pre-requisite for the same. In a way, it will encourage unregistered MSMEs to apply for registration. Further, the existing awareness campaigns of the government should also highlight this aspect of the MSME registration as well.

Another issue in relation to CIRP of MSMEs is whether the provisions of section 32A of IBC will apply in pre-pack plans as one of the conditions for availing section 32A is that it is applicable only where there is a change in management or control of the corporate debtor. In my opinion, the clean slate theory's applicability should be cautiously used so that it doesn't give unjust benefit to the promoters of the MSMEs, especially if they are responsible for malfeasance in their capacity as managing the affairs of the corporate debtor which led to the distressed situation in the first place.

5. What are your views on the concept "Liquidation as a going concern"? How is it different from resolution and do you think

this concept can be a game changer for the existence of Indian companies?

The sale of assets of the company as a going concern under liquidation is one last chance to preserve the value of the corporate debtor. It helps to preserve the value of the assets of a company under liquidation, as value realized for assets sold, under liquidation as a going concern, may be closer to value realized in a resolution plan as the procedure involved is different than a usual liquidation process.

IBBI Liquidation Regulations provide two modes for conducting sale of corporate debtor as a going concern - (*a*) the Corporate Debtor itself may be sold as whole along with its undertakings, and (*b*) the business of the corporate debtor may be sold. The first mode does not involve dissolution of corporate debtor and it is transferred along with the business, assets and liabilities. Second mode involves transfer of only the business, assets and liabilities of the corporate debtor and resultantly, corporate debtor is dissolved.

While, in a usual liquidation process, the assets of a corporate debtor are sold separately. So, the process remains the same in both cases as it is followed by distribution of realised sum by way of sale under section 53 of IBC. Thus, in case of usual process for sale, *i.e.* piecemeal sale, due to its very nature the value realised from the assets is minimal as compared to sale as a going concern. Sale as a going concern is picking up pace with the stakeholders for the precise reason that the prospective buyer will be getting the whole company or business, along with all the employees, their technical or business knowhow, and tangible and intangible assets etc. which makes it easier for any prospective buyer to freshly start the business of the corporate debtor with its own new strategies. Here, the corporate debtor continues to exist and there is no dissolution of the corporate debtor as such.

The biggest benefit of selling the corporate debtor, as a going concern in liquidation, is that it provides another opportunity to maximise value of the assets of the corporate debtor as any prospective bidder would see that it saves him from paying transaction duties such as stamp duty. One can structure the sale to take benefit of carry forward of losses, as now in certain orders, the NCLTs have also mentioned that sale as a going concern is akin to a resolution plan. There is no need for transfer of licenses granted under various laws to the corporate debtor as licenses still remain in the name of the corporate debtor. It can save the employees of the corporate debtor from uncertainties as well, while maximising the value of returns for stakeholders. Therefore, liquidation as a going concern is a definitely a game changer for the stressed companies.

6. 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?

Judiciary, since the enactment of IBC, has been the guiding force behind it and has played a pivotal role, by providing clarifications on several issues and has paved the way towards evolution of IBC jurisprudence, such as:

(*a*) Clarification regarding the past liabilities of a corporate debtor by evolving the doctrine of 'Clean Slate';

(*b*) Extinguishment of claims which do not form part of the resolution plan, as the same had not been submitted by a creditor during CIR Process;

(*c*) Special treatment extended to resolution applicants in case of insolvency resolution of an MSME;

(*d*) Status of statutory dues during and post CIR Process and liquidation;

(*e*) Commercial wisdom of COC being paramount as to any decision regarding viability of a resolution plan;

(*f*) Issues related to applicability of Limitation Act, 1963 to the IBC proceedings;

(*g*) Minimum judicial interference during the CIR Process etc.

Regulators on the other hand, are also keeping up with the changes. However, more clarity is needed in the process of sale of corporate debtor as a going concern, as there is considerable time gap between the payment made to the liquidator and getting the final order from the NCLT after filing of final closure letter in relation to liquidation process. The Registrar of Companies should dissolve the corporate debtor, after completion of liquidation process, on the basis of the letter of the liquidator confirming the completion of the liquidation process, without necessitating the order of the NCLT to that effect. So, there's scope for improvement by way of regulations by IBBI.

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

Although, the country is currently facing a Pandemic and as a result, there has been a significant rise in NPAs, particularly in the corporate lending sector, however, the IBC mechanism is ever evolving and I am proud to say that I have been practicing under a law that took only 13 months to be prepared and implemented, which is itself a humongous task, as this new law provided for new judicial tribunals through which the insolvency process was to be monitored from start to end, creation of institutions such as information utilities and last but not the least, creation of a whole new array of insolvency professionals - which turned out to be pretty successful legislative experiment.

I am affirmatively foreseeing substantial improvement in the ranking of India in the World Bank's Resolving Insolvency Rank in the coming years. As you must be aware, India has already moved up by 14 places from its last ranking in the latest report. Definitely, with the settling of jurisprudence on many issues in the recent past along with the positive judicial interference and active involvement of the regulators, further improvement in the rank is inevitable, as India is reaching towards a more mature insolvency regime. Ease of doing business is not only for setting up the company or running the company, it also applies to timely exit or timely resolution. I foresee that the sound policy in place currently will be beneficial in bringing more FDI.

Notably, despite pandemic, capital market is going strong, it shows confidence of international investors in our system and the same will be reflected the next time the rankings are made.

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

My advice to prospective aspirants and fresh IPs is to keep abreast of the changes and new developments in the ever-evolving insolvency regime. This can only be done by regularly reading important judgments of NCLT, NCLAT and Supreme Court. Apart from the judgments, one may also go through various discussion papers, issued from time to time by IBBI, as these pertain to the prospective changes and scope for improvement in the existing law which I have found to be highly knowledgeable.

As it goes with any profession, an individual's etiquette towards his work defines her/him in professional life, therefore, the prospective candidates must cultivate the requisite skills, such as a keen sense of business acumen, negotiating skills, and most importantly, integrity - which is sacrosanct for an Insolvency Professional. Lastly, I would like to highlight that there is no substitute for hard work in any profession and the same applies to Insolvency Professionals.

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

Ever since its formation, ICSI IIP has been involved in a number of activities aimed at educating and developing the Insolvency Professionals. These activities *inter alia* include issuance of different publications, such as Practical Aspects of Insolvency Law; Interim Resolution Professionals: A Handbook; Monthly Journal; Weekly Journal (Knowledge Reponere) and Daily Learning Curve. Apart from the books, magazines, pamphlets and knowledge supplements, the other significant area served by ICSI IIP is organizing Intensive Educational Training Programmes, Interactive Sessions with Regulators and Insolvency Professionals, conducting Webinar Sessions especially focusing on practical aspects and challenges faced by Insolvency Professionals etc. These programs and ventures, which are unique to ICSI IIP, create a conducive environment for the development of a prospective Insolvency Professional and prepare him/her for the actual tasks ahead.

ICSI IIP has been vested with the power and authority *inter alia* to enrol, educate, train and also monitor the performance of its registered members as an Insolvency Professional. Its mandate also includes laying down standards of professional conduct and take steps in the direction of disciplining its members, whenever required. Therefore, I am proud to say that ICSI IIP has been consistently working towards the development of a very young profession. Its contribution to the profession of Insolvency Professionals is above par and I hope to see it continue as a driving force of change, and create more avenues of knowledge and learning.

Insight!

Insolvency Resolution Process initiated by Personal Guarantors to Corporate Debtors - An Insight

AKHIL CHADHA
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1. Introduction

Chapter III, Part III of the Insolvency and Bankruptcy Code 2016 deals with Insolvency Resolution Process for Individuals and Partnership Firms. Chapter III of IBC 2016 has been made effective from December 1, 2019 *vide* MCA notification dated November 15, 2019 to the extent of their applicability to personal guarantors to corporate debtors. The MCA has also notified The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 and The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 which were made effective from December 1, 2019. In this article we will discuss the insolvency resolution process of corporate guarantors initiated by the corporate guarantor himself/herself wherein the corporate guarantee provided by them has been invoked by the creditors and the guarantee is unpaid. In the present article we will discuss the process in brief and relevant issues

which may be of concern in Insolvency Resolution Process initiated by the personal guarantors themselves.

2. Legal Provisions

(1) Insolvency and Bankruptcy Code 2016. ("hereinafter referred to as "IBC 2016").

(2) The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. ("hereinafter referred to as "Rules")

(3) The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. ("hereinafter referred to as "Regulations")

3. Brief *Explanation* of the process

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

According to Section 3(e) of The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 "guarantor" means a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part.

Section 94 of IBC 2016 governs the provisions for application to the Adjudicating Authority by the personal guarantor of a corporate debtor (hereinafter referred to as "Debtor"), who has made a default, for initiation of insolvency resolution process. The application under the aforesaid provisions can only be made by an individual who is personal guarantor to a corporate debtor. According to Rule 6 of the Rules aforesaid, the application can be made by the Debtor to the Adjudicating Authority in Form A along with a fee of Rs. Two thousand only. Form A should mention all debts of the Debtor in respect of which he/she is in default and in respect of which a discharge order is sought by the Debtor. Section 96 of the IBC 2016 provides for an interim moratorium which shall commence on the date of application and shall have cease to effect on the date of admission of such application. During the interim moratorium period any pending legal action or proceeding against the Debtor in respect of any debt shall be deemed to have been stayed. Further the creditors of the Debtor shall not initiate any legal action or proceedings in respect of any debt during the period of interim moratorium. The insolvency resolution process of a Debtor under these provisions shall be carried by a resolution professional. Section 97 of IBC 2016 provides that the Debtor may file the application to the Adjudicating Authority through a resolution professional. If the application is not submitted through a resolution professional, the Adjudicating Authority shall appoint a resolution professional on recommendation of the Insolvency and Bankruptcy Board of India ("IBBI").

The obligation of preliminary assessment on the validity of the application filed by the Debtor u/s 94 shall be of the Resolution Professional who shall submit his report with the Adjudicating Authority recommending the approval or rejection of the application. In case of Adjudicating Authority's acceptance of the application, the adjudication Authority may issue instructions for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan. When the Adjudicating Authority admits an application u/s 100 of IBC 2016, a moratorium shall commence in relation to all the debts of the Debtor and shall cease to have effect at the end of the period of 180 days starting from the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.

The Resolution Professional then invites the claims of the creditors, verifies the claims and makes a list of creditors, prepares a statement of affairs of the Debtor, conducts meetings of the creditors and prepares a repayment plan in consultation with the Debtor. The repayment plan as prepared by Debtor in consultation with the Resolution Professional shall be approved by majority of more than 3/4th of the creditors present in person or proxy and voting on the resolution approving the repayment plan. The Resolution Professional shall make applications with the Adjudicating Authority for approval of the repayment plan and for obtaining discharge order in respect of debts mentioned in the application.

4. Analysis

IBC 2016 *vide* Chapter III as mentioned above, gives rights to personal guarantors to corporate debtors to initiate insolvency resolution process for themselves when they have committed a default. The Debtor has to make an application to the Adjudicating Authority in the prescribed format as stated above along with the prescribed fee. The Debtor has an opportunity to include all his/her debts in the application in respect of which he/she is in default. The peculiar feature of the process initiated by the Debtor is that the Resolution Professional shall recommend the acceptance or rejection of the application to the Adjudicating Authority.

These provisions provide an opportunity to the genuine Debtors to negotiate with the creditors and arrive at a repayment plan which can provide him/her a discharge from the liabilities towards these creditors. It is not necessary that the repayment plan should be feasible or viable and

equitable and just to all the creditors. If the committee of creditors recommends or suggests modifications/amendments to the repayment plan, these modifications/ amendments are not binding on the Debtor. The consent of the Debtor shall be needed to these modifications/amendments. If the repayment plan is approved by the Adjudicating Authority a genuine Debtor gets a discharge order for his liabilities included in the repayment plan.

The Resolution Professional's role is of utmost importance here as he has to make a preliminary assessment on the validity of the application. The Adjudication Authority shall accept or reject the application of the Debtor on the recommendation of the Adjudicating Authority. Sub-section (4) of Section 99 of IBC 2016 provides a right to the Resolution Professional to seek further explanations/information in connection with the application from the Debtor oy any other person. The Resolution Professional before certifying the application should evaluate in detail all aspects of the application and should form an opinion that the application made by the Debtor is not made with an intent to defraud the creditors. In some cases, applications under these provisions may be initiated by Debtors with an intent to defraud the creditors or to take an advantage of the interim moratorium and moratorium provisions to delay the proceedings pending against them like execution proceedings initiated by banks or financial institution under SARFAESI Act 2002, proceedings under PMLA etc. In my opinion, the IBC 2016, Regulations or Rules should have some specific provisions to enable Resolution Professional to arrive at a conclusion that the application u/s 94 is not made with an intent to defraud the creditors or to frustrate other legal proceedings which have been initiated/ pending against the Debtor.

5. Conclusion

The IBC 2016 along with Regulations and Rules mentioned above envisage reorganization and insolvency resolution of personal guarantors to corporate persons in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all stakeholders. These provisions should not be allowed to operate to the prejudice of some stakeholders and providing undue benefit to others. Some wilful defaulters look upon the IBC 2016 to get some undue reliefs from the Adjudicating Authority in their pending legal proceedings. The Insolvency Professionals, who are the eye and ears of the regulator IBBI, should exercise due caution in handling such applications and proceedings to maximize the objects of IBC 2016 and should not let any stakeholder to take undue benefits.

●●●

Treatment of Bank Guarantees in CIRP of a company under IBC, 2016

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1. Introduction

The law relating to guarantees have been enshrined under the Indian Contract Act 1872, with Section 126[1] defining Guarantee as: "a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'".

When we talk about bank guarantees, these can be understood as a promise by the bank to pay certain sum to a third party upon failure of performance by the customer of the bank. The RBI regulates the Bank Guarantees through its master circular on guarantees & co-acceptances[2]. In common parlance the bankers providing bank guarantees are referred as "non-fund-based credit providers".

In the context of IBC, it has been frequently observed that the corporate debtor undergoing CIRP has few unexpired bank guarantees at the time of commencement of CIRP. The law[3] being silent to some extent on treatment of such bank guarantees in CIRP, various issues have arose, which requires to be addressed. In this Article we will highlight some of these issues and discuss few judicial pronouncements to gain some clarity upon the treatment of bank guarantees under IBC.

2. Basics of Guarantee

A contract of Guarantee has three parties; the entity that has borrowed the money (the principal debtor), the entity that has provided the funds (the creditor) and the Guarantor.

The contract of guarantees will have the following features (unless specifically modified):

- Once entered into, the guarantor cannot walk away from his obligations until the expiry date of the guarantee, unless there is anything contrary to that effect in the guarantee document.
- The liability of the guarantor and the borrower is independent and co-extensive.
- The creditor can independently proceed against the principal borrower and the guarantor
- Any modification to the guarantee instrument without the consent of the guarantor can release the guarantor of his obligations.
- The guarantor will have a right of subrogation *i.e.*, once the guarantor has fulfilled his guarantee obligations, he will have a right to claim the amount from the Principal Debtor.

3. Issues with respect to treatment of bank guarantees in CIRP

Some of the issues surrounding the bank guarantees are:

1. Whether the non-fund based credit providers (Bank Guarantee providers) can file a claim during CIRP at the time when the bank guarantee has not been invoked?
2. Whether the Bank Guarantee can be invoked during the moratorium of Corporate Debtor?
3. Whether the non-fund based credit providers will be a part of the Committee of Creditors and/or have voting rights?
4. What actions shall the RP take in case a bank guarantee gets invoked during CIRP?
5. What actions the RP shall take in case a bank guarantee expires during CIRP?
6. In what manner the margin money kept by Corporate Debtor with the non-fund based credit providers is treated in case of (1) invocation; and (2) expiry of Bank guarantee?
7. Can the bank guarantee be invoked during CIRP, when the matter forming basis of invocation[4] is itself under adjudication before any court of law?
8. Once the bank guarantee is invoked and the bank files a fresh claim for the invoked amount, whether the same will be subjected to the 90 days claim filing timeline under Regulation 12(2) of the CIRP Regulations[5]?
9. Whether any payment is required to be made by the Resolution Applicant to the Non-fund based claimants even if the bank guarantee remains uninvoked?

4. BG is a Claim not Debt

The IBC defines Debts as Financial Debt and Operational Debt. Operational Debt is the amount due to a supplier for provision of goods and services and includes workers

and employees' dues, dues owned to the government and others, while the financial debt is an amount disbursed against the consideration for the time value of money.

The Section 3(6) of the code defines "claim" to mean-

> "(*a*) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;
>
> (*b*) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"

The Section 3(11) of the Code defines "debt" to mean-

> "a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

The Section 5(8) of the Code defines "Financial Debt" to mean-

> "a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-
>
> ...(*h*) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
>
> (*i*) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;"

The Section 5(7) of the Code defines "Financial Creditor" to mean-

> "any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

Having seen the broad nature of definition of Financial Debt, we can say that all those entities or individuals whose transaction with the Corporate Debtor is of a nature that qualifies to be a financial debt, they are necessarily financial creditor and they will be a part of CoC.

The widely popular position is that unless a guarantee has been invoked, it does not become a Debt. One of the major reason being, that the disbursement of an amount against the consideration for time value of money is an essential requirement in the definition of financial debt u/s. 5(8) of the Code. Whereas in case of Bank Guarantees there isn't any disbursement of fund done, and only upon invocation there will be an amount disbursed which is itself a contingent event.

Therefore, before invocation, the non-fund based facility is a claim and may become a debt only upon its invocation. However, the obligation of the Bank issuing the guarantee is absolute under law, the Bank therefore desires to have a stake in the process and if anytime the guarantee gets invoked then there is no difference between

the Banks who have extended loans and a bank that has issued a guarantee on behalf of a Corporate Debtor.

This matter came to be heard by the Hon'ble NCLAT in the case of *Export Import Bank of India* v. *Resolution professional JEKPL (P.) Ltd.*[6]. The relevant portion is reproduced hereunder: -

> "56. Therefore, we hold that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim pursuant to public announcement made under section 13(1)(*b*) r/w Section 15(1)(*c*) or for collating the claim under section 18(1)(*b*) or for updating claim under section 25(2)(*e*). For the purpose of collating information relating to assets, finances and operations of Corporate Debtor or financial position of the Corporate Debtor, including the liabilities as on the date of initiation of the Resolution Process as per Section 18(1), it is the duty of the Resolution Professional to collate all the claims and to verify the same from the records of assets and liabilities maintained by the Corporate Debtor."

In *Resolution Professional JEKPL (P.) Ltd*[7] Prior to the filing of the appeal in NCLAT, the Hon'ble Principal Bench of NCLT at New Delhi rejected the claim of Bank stating that as of the date of admission under CIRP, the claim was contingent as the guarantee had not been invoked. It also concurred with the views of the RP in the case that the moratorium under section 14 does not permit invocation of a guarantee once the Corporate Debtor has been admitted under CIRP. The CoC in this case also believed that the claim for unmatured debt under a guarantee cannot be accepted as the debt has not become due and payable. The Hon'ble NCLAT differentiated between claim and default. The Appellate Tribunal held that when the Insolvency has been triggered then everyone who has a right to payment can file a claim with the IRP/RP and that the claim has not matured cannot be a ground for rejection of the claim.

W.r.t. the admission of claim for un-invoked BG, often another kind of argument has also been seen that: As the whole amount of debt under the claim, is contingent upon invocation of bank guarantee so keeping in mind the Regulation 14(1) of the CIRP Regulations[8] and the findings of the Hon'ble Supreme Court in *Committee of Creditors of Essar Steel India Ltd* v. *Satish Kumar Gupta (2019) 111 taxmann.com 234*,

all the bank guarantees be admitted at INR 1. And in case that get invoked during the CIRP period, a fresh claim equivalent to the amount of BG honoured by bank will filed by the bankers and the whole amount shall be admitted.

Now coming to the admissibility of fresh/ amended claim upon invocation. We understand that on admission of an insolvency application by the adjudicating authority and upon appointment of the Interim Resolution professional ("IRP"), the IRP/RP is under obligation under section 18 (1)(*b*) R/w. sections 23(2) & 25(2)(*e*) of the Code & R/w. Chapter IV of the IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016, to receive, verify and collate all claims submitted by creditors to him pursuant to public announcement, until the end of CIRP. Further, as per Section 21(1) & (2) of the Code the IRP shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor constitute a committee of creditors, which shall comprise of all the financial creditors.

Hence, in light of the above discussion, the RP shall ask the Non-Fund based facility providers to amend or update their claims as and when required, and RP should provide the Resolution Applicants the updated list of claims. Also, as per Regulation 12A of the Regulations a duty is casted on the creditors to update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date. Further under Regulation 14(2) the IRP can revise the amounts of claims admitted as soon as may be practicable when he comes across additional information warranting such revision. Hence, it can be said that, upon invocation of Bank Guarantee or it's expiry, the RP shall request for fresh claims to be filed by the respective creditors and upon non-receipt of claims within reasonable time, IRP can amend the claims on its own and update the list of creditors.

5. Whether non-fund based creditors have Voting Powers

The expression 'voting share' has been precisely defined in clause (28) of Section 5 of IBC, 2016 to mean the voting rights of a single financial creditor in the Committee of Creditors, which is based on the proportion of the financial debt owed to such a financial creditor *vis-à-vis* the financial debt owed by the corporate debtor, the same is reproduced hereunder: -

> "(28) "voting share" means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor."

Further regulation 16 sub-regulation (3) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that a member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt. In this regard it's clear that the proportion of voting shares corresponds to

the proportional financial debt, whereas the amount of bank guarantee cannot be considered a debt as it is merely a claim.

6. Whether BG Can be invoked during CIRP

This issue has been quite contentious since the coming of IBC. The jurisprudence on this subject has been scattered as there have been several judgments where the NCLAT/NCLT have allowed invocation whereas in some situations the same has not been allowed. Few of the decisions have been discussed below.

The NCLAT in *Bharat Aluminium Co. Ltd.* v. *J.P. Engineers (P.) Ltd.* (Company Appeal (AT)(Insolvency) No. 759 of 2020) held that:

> "Bank guarantee can be invoked even during moratorium period issued under section 14 of the IBC in view of the amended provision under section 14(3)(*b*) of the IBC."

The NCLT New Delhi in *Phoenix ARC (P.) Ltd.* v. *Anush Finleash & Construction (P.) Ltd.* ((IB)-1705(PB)/2018) held that:

> "34. The beneficiary is not a party to the resolution plan and it has not made any claim. It need not claim also because the beneficiaries are always at liberty to directly realize its dues from the bank guarantee instead of initiating proceeding or making claim against the Corporate Debtor. When a procedure is set out for easy realization by encashing bank guarantee, nobody would file a claim with the Corporate Debtor."

An interesting relevant finding in this relation is of Hon'ble Supreme Court in *Ansal Engg. Projects Ltd.* v. *Tehri Hydro Development Corpn. Ltd.* (1996) 5 SCC 450, that:

> "4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary..."
>
> "5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/ letters of credit except only in cases where fraud or special equity is *prima facie* made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties...".

7. What happens if BG expires during CIRP?

In situations where the BG expires during the period of CIRP. There can be two situations:

i. The BG expires before ICD or before filing of claim: the right to file claim expires, therefore no claim can be filed.

ii. The BG expires after filing of claim: this has been discussed in foregoing paragraphs.

To discuss the treatment of bank guarantee which expires after filing of claim, let's first understand the nature of BG contracts. We understand that Bank Guarantees ("BG/BGs") are independent contracts that vest the beneficiary therein with a right to make a claim against the bank to pay for the loss suffered due to the default committed/non-performance of the borrower. This arrangement is put into motion when a borrower's default under his contract with the beneficiary occurs within the lifetime of the BG *i.e.,* the Validity Period and the beneficiary makes a written demand invoking the BG either within the Validity Period, or in cases where a BG clause provides for a grace period to make such written demand *i.e.,* the Claim Period. Therefore, as per the bank guarantee agreement, the bank issuing the BG is discharged from its liability if no claim is received by it on or before validity period mentioned in the guarantee. This view was affirmed by Hon'ble Supreme Court in its Judgment of *Food Corporation of India* v. *New India Assurance Co. Ltd.* (1994) 3 SCC 324 and the same view was further reaffirmed by the Hon'ble Supreme Court in *Union of India v. Indus Ind Bank Ltd* (2016) 74 taxmann.com 26/138 SCL 81.

As far as the issue of physically returning guarantee on expiration is concerned, it is merely the procedure provided for cancellation of expired guarantee and it doesn't deal with liability of bank issuing such guarantee. The procedure provides that when an original Guarantee issued by the bank, is not returned to the bank for cancellation after the expiry of guarantee, a registered notice is sent to the beneficiary of the guarantee to return the original guarantee immediately. If no reply is received or original guarantee is not surrendered for cancellation, the guarantee can be cancelled by the bank after waiting for a reasonable time.

As can be seen from the abovementioned observation, in situations where bank cannot be made liable beyond expiration of the validity period as well as claim period of bank guarantee, the inclusion of amount/claim of such expired bank guarantees by bank/CoC during the CIRP is not in consonance with the law. As post expiration, the Non-Fund based facility which was extended by the Bank is no more a contingent liability for the Corporate Debtor.

In this regard Section 25(1) clause (*e*) of the IBC, 2016 provides that it is the duty of resolution professional to maintain an updated list of claims. Further, Regulation 10 of the IBBI (CIRP) Regulations, 2016 empower the IRP/RP to call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim. Additionally, Regulation 14(2) empowers the IRP/RP to revise the amounts of claims admitted as soon as may be practicable or when he comes across additional information warranting such revision. Also, as per Regulation 12A, a duty is casted on the creditors

to update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date. The relevant portion is reproduced hereunder: -

> "12A. Updation of claim. A creditor shall update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date."

Hence, keeping in mind the above referred provisions it is clear that the IRP/RP is empowered to get the claims w.r.t. expired bank guarantees adjusted.

8. What happens to the margin money?

The Bank guarantees are secured to some extent by way of margin money or secured deposits, which the bank adjusts with the amount of BG invocation and demands the remaining from the corporate debtor.

The financial creditor who has issued bank guarantee being a holder of a contingent debt of Corporate Debtor, can file its claim in the CIRP of the Corporate Debtor as was rightly allowed by the Hon'ble NCLAT[9].

In case of invocation, the amount paid by the bank can be adjusted only up-to the margin money or security deposits given by the Corporate Debtor, and with no other amount, this has been made amply clear by the Hon'ble NCLAT[10]. After invocation, the amount paid by bank in honouring BG, becomes a financial debt owed by the corporate debtor towards the bank, and the claim form in respect of the same needs to be additionally filed or updated.

But, in case the margin money or security deposits is kept with the bank in respect of the expired bank guarantees. The Hon'ble NCLAT has comprehensively answered this question in Indian Overseas Bank's case (*supra*):

> "13. The 'margin money' is the contribution on the part of the borrower who seeks 'Bank Guarantee'. The said margin money remains with the Bank, as long as the Bank Guarantee is alive. If the Bank Guarantee expires without being invoked, then the margin money reverse back to the borrower."

9. Treatment of Non-Fund Based Creditors under the Resolution Plan

There are certain practical issues that need to be addressed at the time of distribution under an approved resolution plan when the Guarantees have not been invoked. In principle, if the guarantee has not been invoked at the time of distribution under an approved resolution plan, then the creditor cannot get the benefit of the payment against uninvoked Guarantees. Thus, the right thing would be that the existing BG contracts get extinguished with an option to the RA and bankers to re-enter into fresh bank guarantee arrangements w.e.f. the NCLT Approval date. Another alternative can be continuing the BG, and allocation of certain sum to a contingency fund to be kept with the BG provider, which will be utilised in case of invocation and to be refunded upon expiry. This was observed in *IIFCL Mutual Fund v. Committee of Creditors of GVR Infra (2021) 123 taxmann.*

com 90/163 SCL 481. Wherein the NCLAT upheld the commercial wisdom of CoC in taking a business decision of keeping the amount equivalent to the BG with the BG provider bank as contingency fund.

10. Conclusion

Thus, it is clear from the provisions of the Code and various judgments that there is no bar on filing claim of an uninvoked guarantee, but it would become debt only post invocation of guarantee, hence any non-fund based provider of credit can be part of the CoC post invocation and as has been stated in various judicial pronouncements that Section 14 moratorium is no bar on invocation of guarantee. Apart from this, it is also to be noted that in the event that a BG expires post filing of claim, as the BG has not been invoked there is no question of any recovery for such claim. One aspect that remains unanswered is the acceptance of BG claim post 90 days, keeping in mind the amendment in CIRP regulations, as there is no specific judgment dealing with this matter, this question shall be addressed in due course of time by the courts, giving due regard to the nature of debt and complexities associated with a bank guarantee.

●●●

1. Section 126, Indian Contract Act 1872.
2. DBOD.No.Dir.BC.18/13.03.00/2008-09 dated July 1, 2008
3. The Insolvency and Bankruptcy Code, 2016
4. May be an alleged default or failure of performance by the corporate debtor, and the dispute between the corporate debtor and the beneficiary of Bank Guarantee is pending adjudication.
5. Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016
6. *Export Import Bank of India* v. *Resolution professional JEKPL (P.) Ltd. (2018) 97 taxmann.com 194*
7. Ibid.
8. Regulation 14(1) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides as under:
   "Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him."
9. *Export Import Bank of India* v. *Resolution professional JEKPL Pvt. Ltd.* (Company Appeal (AT) (Insolvency) No. 304 of 2017)
10. *Indian Overseas Bank* v. *Arvind Bank* (Company Appeal (AT)(Insolvency) No. 558 of 2020).

(2021) 127 taxmann.com 368(SC)

SUPREME COURT OF INDIA

Lalit Kumar Jain *v.* **Union Of India**

L. NAGESWARA RAO AND S. RAVINDRA BHAT, JJ.

TRANSFERRED CASE (CIVIL) NO. 245 OF 2020

WP(C) NO. 117 OF 2021 AND OTHERS

MAY 21, 2021

Section 2, read with sections 1, 78, 79, 94 to 187, 239 and 249, of the Insolvency and Bankruptcy Code, 2016 - Application of Code - Petitioners were associated with different corporate debtor companies as directors, promoters or in some instances, as chairman or managing directors - They furnished personal guarantees to banks and financial institutions - Notification No. S.O. 4126(E), dated 15-11-2019 was issued by Central Government which brought into force sections 2(e), 78, 79, 94 -187, 239(2)(g), 239(2)(h) & 239(2)(i), 239(2)(m) to 239(2)(zc), 239(2)(zn) to 239(2)(zs) and 249 in relation to such 'personal guarantors to corporate debtors' - Whether there is no compulsion in Code that it should, at same time, be made applicable to all individuals, (including personal guarantors) and there is sufficient indication in Code by sections 2(e), 5(22), 60 and 179 indicating that personal guarantors, though forming part of larger grouping of individuals, are to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through same adjudicatory process and by same forum as such corporate debtors - Held, yes - Whether further, impugned notification, has merely made provisions of Code applicable in respect of 'personal guarantors to corporate debtors' as another such category of persons to whom Code has been extended - Held, yes - Whether, thus, impugned notification is not an instance

of legislative exercise, or amounting to impermissible and selective application of provisions of Code and it being issued within power granted by Parliament, is valid - Held, yes (Para 101)-

Section 31, read with sections 1 and 2 of the Insolvency and Bankruptcy Code, 2016, and Sections 128, 133 and 140 of the Contract Act, 1872 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under contract of guarantee - Held, yes - Whether release or discharge of a principal borrower from debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve surety/guarantor of his/her liability, which arises out of an independent contract - Held, yes - Whether approval of resolution plan relating to corporate debtor does not discharge liabilities of personal guarantors - Held, yes (Para 112)

CASE REVIEW

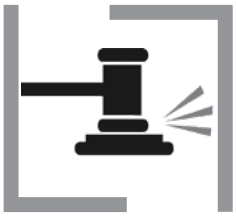
Koteswar Vittal Kamath v. K. Rangappa Baliga & Co. (1969) 1 SCC 255 (Para 88); *Vijay Kumar Jain v. Standard Chartered Bank* (2019) 102 taxmann.com 14/152 SCL 56 (SC) (Para 108); *Committee of Creditors of Essar Steel (I) Ltd. v. Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (Para 108); *Industrial Finance Corpn. Of India Ltd. v. Cannore SPG & Wvg Mills Ltd.* (2002) 5 SCC 54 (para 111), followed.

CASES REFERRED TO

State Bank of India v. V. Ramakrishnan (2018) 96 taxmann.com 271/149 SCL 107 (SC)(Para 8), *Swiss Ribbons (P.) Ltd. v. Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC)(Para 12), *Delhi Laws Act, 1912, In re* (1951) SCR 747 (Para 16), *State of Tamil Nadu v. K. Sabanayagam* (1998) 1 SCC 318 (Para 16), *Vasu Dev Singh v. Union of India* (2006) 12 SCC 753 (Para 16), *R v. Burah* (1878) 3 App. Cases 889 (Para 18), *State of Bombay v. Narothamdas Jethabai* (1951) 2 SCR 51 (Para 20), *Sardar Inder Singh v. State of Rajasthan* AIR 1957 SC 510 (Para 20), *Hamdard Dawakhana (Wakf) Lal v. Union of India* AIR 1960 SC 554 (Para 20), *Babulal Vardharaji Gurjar v. Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 118 taxmann.com 323 (SC)(Para 23), *Jatindra Nath Gupta v. Proince of Bihar* (1949-50) 11 FCR 595 (Para 26), *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (Para 28), *Kundanlal Dabriwala v. Haryana Financial Corporation* (2012) 22 taxmann.com 274/114 SCL 609 (Punj. & Har.)(Para 29), *Dr. Vishnu Kumar Agrawal v. Piramal Enterprises Ltd.* (2019) 101 taxmann.com 464/151 SCL 555 (NCL - AT)(Para 30), *Chettian Vettil Ammad v. Taluk Land Board* (1980) 1 SCC 499 (Para 34), *Basant Kumar Sarkar v. Eagle Rolling Mills Ltd.* (1964) 6 SCR 913 (Para 36), *Biswambhar Singh v. State of Orissa* AIR 1954 SC 139 (Para 36), *Embassy Property Developments (P.) Ltd. v. State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC)(Para 39), *J. Mitra & Co. (P.) Ltd. v. Assistant Controller*

of Patents & Designs (2008) 10 SCC 368 (Para 42), *Lalit Narayan Mishra Institute of Economic Development & Social Change v. State of Bihar* (1988) 2 SCC 433 (Para 42), *Javed v. State of Haryana* (2003) 8 SCC 369 (Para 42); *Gopilal J. Nichani v. Trac Industries & Components Ltd.* AIR 1978 Mad 134 (Para 43), *Bank of Bihar Ltd. v. Dr. Damodar Prasad* (1969) 1 SCR 620 (Para 43), *State Bank of India v. Index Port Registered* AIR 1992 SC 1740 (Para 43); *Industrial Investment Bank of India v. Biswanath Jhunjhunwala* (2009) 9 SCC 478 (Para 43); *Maharashtra State Electricity Board Bombay v. Official Liquidator, High Court, Ernakulum* (1982) 3 SCC 388 (Para 44); *Punjab National Bank v. State of UP* (2002) 5 SCC 80 (Para 44), *Gouri Shankar Jain v. Punjab National Bank* (2020) 117 taxmann.com 613 (Cal.)(Para 45); *PAFCO 2916 Inc. v. Kingfisher Airlines Ltd.* 2016 SCC Online Kar 5991 (Para 45), *Kaupthing Singh & Friedlander Ltd. (In Administration), In re* (Co. 2012 (1) All ER 883) (Para 45), *Lachmi Narain v. Union of India* (1976) 2 SCC 953 (Para 47), *Raghubar Swarup v. State of UP* AIR 1951 SC 909 (Para 48); *Tulsipur Sugar Co. Ltd. v. Notified Area Committee* (1980) 2 SCC 295 (Para 48), *Bangalore Woollen Cotton & Silk Mills Co. Ltd. v. Corporation of the City of Bangalore* (1961) 3 SCR 698 (Para 48), *ITC Bhadrachalam Paperboards v. Mandal Revenue Officer* (1996) 6 SCC 634 (Para 48), *Edward Mills Co. Ltd. v. State of Ajmer* (1955) 1 SCR 735 (Para 49), *State of West Bengal v. Union of India* (1964) 1 SCR 371 (Para 50), Chairman *Board of Mining Examination v. Ramjee* AIR 1977 SC 965 (Para 51), *Directorate of Enforcement v. Deepak Mahajan* (1994) 3 SCC 440 (Para 51), *Arcelormittal India (P.) Ltd. v. Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL 354 (SC)(Para 51), *Western Coalfield Ltd. v. Special Area Development Authority* (1982) 1 SCC 125 (Para 53), *Baleshwar Dayal Jaiswal v. Bank of India* (2015) 61 taxmann.com 104/132 SCL 129 (SC)(Para 53), *Nagpur Improvement Trust v. Vasantrao* (2002) 7 SCC 657 (Para 53), *Brij Sunder Kapoor v. First Additional Judge* (1989) 1 SCC 561 (Para 55), *Raghubar Sarup Nawab Jamshed Ali Khan v. State of U.P.* AIR 1959 SC 909 (para 56), *Khargram Panchayat Samiti v. State of West Bengal* (1987) 3 SCC 82 (Para 56), *Koteswar Vittal Kamath v. K. Rangappa Baliga & Co.* (1969) 1 SCC 255 (Para 87), *Rajendra K. Bhutta v. Maharashtra Housing & Area Development Authority* (2020) 114 taxmann.com 655/160 SCL 95 (SC)(Para 88), *Pannalal Bansilal Pitti v. State of AP* (1996) 2 SCC 498 (Para 90), *Vijay Kumar Jain v. Standard Chartered Bank* (2019) 102 taxmann.com 14/152 SCL 56 (SC)(Para 105), *Industrial Finance Corpn. of India Ltd.v. Cannanore Spg. & Wvg. Mills Ltd.* (2002) 5 SCC 54 (Para 109) and *Punjab National Bank v. State of UP* (2002) 5 SCC 80 (Para 109).

For Full Text of the Judgment see
(2021) 127 taxmann.com 368(SC)



(2021) 127 taxmann.com 173 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Directorate of Economic Offences v. Binay Kumar Singhania

JARAT KUMAR JAIN, JUDICIAL MEMBER AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS) NO. 935 OF 2020

MAY 4, 2021

Section 14, read with section 33, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - Pursuant to an application under section 9, CIRP against corporate debtor was initiated and liquidator was appointed - However, Directorate of Economic Offences (DEO) had sealed registered office of corporate debtor and attached bank accounts for fraudulent transactions in terms of section 3 of West Bengal Protection of Interest of Depositories in Financial Establishment Act, 2013 - Liquidator filed an application under section 33(5) stating that documents kept in registered office were essential to conduct liquidation process - NCLT by impugned order directed DEO to de-attach all properties attached and to restore possession thereof to liquidator - Whether since properties of corporate debtor were seized and registered office was sealed much prior to initiation of CIRP and moratorium had been declared after properties were attached by DEO and produced before Designated Court of Economic Offences, section 14 of IBC had no overriding effect on section 3 of WBPIDFE Act - Held, yes - Whether Director of corporate debtor and property of corporate debtor could not get immunity from prosecution and, therefore, attached property, which was confiscated by Designated Court of Economic Offences, could not be de-attached - Held, yes - Whether attached property was not in possession and control of DEO and, therefore, DEO could not de-attach property which was already confiscated by Designated Court of Economic Offences - Held, yes - Whether impugned order was not sustainable in law and, therefore, same was to be set aside - Held, yes (Paras 44, 52, 53 and 55)

FACTS

- Operational creditor had filed an application under section 9 against corporate debtor. The application was admitted and Interim Resolution Professional (IRP) was appointed. Subsequently, 'B' was appointed as Resolution Professional (RP) and later he was appointed as Liquidator.
- There were many complaints against the group companies of corporate debtor, alleging fraudulent transactions by receiving deposits from the public at large. Therefore, First Information Report (FIR) was registered against the Directors and other officials of the Group

of Companies of corporate debtor under sections 406 and 420 of IPC and section 3 of the West Bengal Protection of Interest of Depositories in Financial Establishment Act, 2013 (WBPIDFE Act).

- In connection with that offence, DEO, sealed the registered office of the corporate debtor and attached the Bank Accounts, movable and immovable properties of the corporate debtor.
- After investigation, DEO, WB filed Charge Sheet under sections 406, 409, 420 and 120B of the IPC and under section 3(1)(*e*) of the WBPIDFE Act against accused persons. The Government of West Bengal has in order to protect the rights of depositors enacted the WBPIDFE Act, 2013. The case was registered and tried by Designated Court of Economic Offence. The said Court, convicted the mastermind accused 'M' and others for the offence under sections 406, 409, 420 and 120B of the IPC and section 3 of WBPIDFE Act, 2013 and passed sentences accordingly and also directed that all the seized articles, documents, materials, instruments, furniture and other properties, cash Bank Accounts, movable and immovable properties, premises, factories landed properties would be in the custody of the Court as attached property, for realization of the dues of the depositors of the accused under sections 15 to 18 WBPIDFE Act subject to the decision of the Appellate Court.
- Liquidator filed an application under sections 33(5), 60(5)(*c*) and 238 of the IBC stating that the registered office of the corporate debtor was attached and sealed by DEO, WB under section 3 of WBPIDFE Act. The documents kept in the registered office were essential to conduct the liquidation process. Hence, the interest of the creditors to recover their dues from the corporate debtor was jeopardized. Therefore, Liquidator requested to pass an order directing the DEO, WB to de-attach all the properties attached and to handover the possession of properties to the Liquidator for the purpose of liquidation process.
- NCLT observed that earlier the DEO has filed an application challenging the initiation of CIRP as against the corporate debtor that corporate debtor company being a Financial Service provider and a chit fund company fraudulently accepting the deposits therefore, proceedings initiated against the corporate debtor is illegal and liable to be dismissed. The Adjudicating Authority dismissed the application stating that there is no material to prove that corporate debtor was a financial establishment as defined under section 2(*e*) of WBPIDFE Act and the company failed or fraudulently defaulted in payment of deposit after specified period.
- NCLT while passing the impugned order, reiterated the aforesaid grounds and also held that provision under section 3 of WBPIDFE Act, 2013 was inconsistent with section 14 of the IBC and therefore, section 14 as well as sub-section

(5) of section 33 of the IBC would prevail over section 3 of WBPIDFE Act and accordingly allowed the application filed by the Liquidator and directed the DEO to de-attach all the properties attached and to restore the possession thereof to the liquidator.

- The appellant 'Directorate of Economic Offences, Government of West Bengal' (DEO, WB) filed appeal against the impugned order passed by NCLT whereby Liquidator's application under sections 33(5), 60(5)(*c*) and 238 of Insolvency and Bankruptcy Code, 2016 (IBC) was allowed directing the appellant to de-attach all the properties attached and to restore possession thereof to the Respondent (Liquidator).

HELD

- Earlier NCLT disposed of the application of RP (now liquidator) showing inability to pass an order for de-attachment of the property of the corporate debtor with the liberty to take appropriate legal courses. Thereafter, the liquidator has filed the application with the same prayer for de-attaching the property of the corporate debtor. surprisingly, NCLT by the impugned order allowed the application of Liquidator and directed to de-attach all the properties attached by the DEO, WB and to restore possession thereof to the liquidator (Respondent). (Para 22)

- The properties of corporate debtor were attached in connection with the case under sections 406 and 420 of IPC and section 3 of the WBPIDFE Act in different dates between 10-11-2017 to 17-11-2017. The particulars of attached property are shown in the final report (Charge Sheet) submitted before Designated Court. Thereafter, the registered office of the corporate debtor was sealed and on 26-4-2018 from the registered office of the corporate debtor, 29 articles were seized and on 25-2-2019, the Government of West Bengal published an order in the official gazette under section 5 of the WBPIDFE Act and attached the movable and immovable properties of corporate debtor and other group Companies, specified in the schedule. (Para 24)

- NCLT by the impugned order has only directed to de-attach the property attached *vide* notice dated 16-4-2018. On 16-4-2018, the registered office of the corporate debtor was sealed. (Para 25)

- Section 5(1)(*d*) of the WBPIDFE Act provides that where the State Government is satisfied that any financial establishment committing a default in repayment of deposit fraudulently, has transferred any of the property otherwise then in good faith and for consideration, it may in order to protect the interest of the depositors of such financial establishment by an order to be published in official gazette and recording reasons in writing attach the money or other property acquired either in the name of such financial establishment or in the

name of any other person on behalf of such financial establishment. (Para 27)

- Sub-section (5) of section 5 of the WBPIDFE Act provides that the Competent Authority may make an application to Special Court or Designated Court for adjudicating any issue or subject matter pertaining to money or property or assets belonging to or ostensibly belonging to a financial establishment or any person mentioned in the order under sub-section (1) situated within the territorial jurisdiction of the Designated Court may be, for passing appropriate orders to give effect to the provisions. (Para 28)

- Section 14 of the WBPIDFE Act provides the powers of Designated Court regarding attachment. Section 14(1) provides that upon receipt of an application under sub-section (4) of section 5, the Designated Court shall issue to the Financial establishment or to the person, whose property has been attached and vested in the competent authority under section 5, a notice accompanied by a copy of the application and affidavit together with an extract of evidence calling upon such financial establishment and person to show cause as to why the order of attachment should not be made absolute and property so attached sold in public auction. Section 14(3) provides that any person claiming an interest in the property attached or any portion thereof, may notwithstanding that no notice has been served upon him under this sub-section, raise an objection as aforesaid before the designated court at any time before an order is passed under sub-section (5) or sub-section (6). (Para 29)

- With the aforesaid provisions, it is clear that under the WBPIDFE Act, the property acquired either in the name of a financial establishment or in the name of any other person on behalf of such financial establishment can also be attached. In the present case, the property of the corporate debtor is attached on the allegation that corporate debtor is one of the Companies of Group and the Group had fraudulently accepted the deposits and all the money went to corporate debtor and the corporate debtor had purchased the attached properties with the money of the depositors. In this regard, the appellant placed reliance on the findings of the designated court. (Para 30)

- Respondent Nos. 1 & 3 raised the objection that the findings of the designated court are not binding on the corporate debtor because the corporate debtor was not a party before the designated court. Admittedly, accused 'M' is a director of corporate debtor and designated court found him guilty for the offence under sections 406, 409, 420 and 120B of IPC and section 3 of the WBPIDFE Act. In this case, the properties of the corporate debtor attached and produced before the court and on conclusion of the trial, such properties have

been confiscated. It cannot be said that the corporate debtor was unaware of the proceedings before designated court. There is nothing on record that corporate debtor had raised any objection under section 14(3) of the WBPIDFE Act that the properties were wrongfully attached and produced before the court. In such circumstances, the argument of the respondent that the findings of the designated court are not binding on the corporate debtor cannot be accepted. (Para 31)

- A bare reading of order of Designated Court of Economic Offences makes it apparent that High Court while passing aforesaid order has not directed for de-attaching the Assets of the corporate debtor so also has not directed that such Assets should be kept outside the purview of such sale. Therefore, High Court's order has wrongly been quoted, as if, High Court has directed to de-attach the Assets of the corporate debtor. (Para 36)

- It cannot be said that the High Court directed that the assets of the corporate debtor be kept outside the purview of sale. (Para 38)

- The WBPIDFE Act, 2013 relates to fraudulent deposits accepted by the Company and fails to make repayment of deposit along with interest, bonus, profit or in any other form after the specified period *i.e.* on maturity or otherwise. As per section 3(2) of the WBPIDFE Act, as a person including the promoter, partner, director, manager, member, employee or any other person responsible for the management or for conducting the business or affairs, of a financial establishment who committed a default in repayment of deposit fraudulently within the meaning of section 3(1) of the WBPIDFE Act shall on conviction be punished with imprisonment for life, however, after recording special and adequate reasons not less than three years and has nothing to do with the corporate debtor. It will be applicable to individual which may include the promoter, partner, director, manager, member, employee or any other person responsible for the management of the corporate debtor and they cannot be given protection from the WBPIDFE Act, and such individual cannot take any advantage of section 14 of the IBC. Section 14 of the IBC is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceedings or any Act having essence of crime or crime proceeds. The WBPIDFE Act and the IBC are legislated on two different fields with two different aims. The WBPIDFE Act has been enacted to protect the interest of depositors and it provides penal action. (Para 43)

- In instant case, the properties of the corporate debtor were attached during 10-11-2017 to 17-11-2017 and after investigation DEO, WB filed charge sheet on 31-1-2018 under sections 406, 409, 420 and 120B of IPC and under section 3(1)(*e*) of the

WBPIDFE Act against 41 accused persons, including 'M' Director of the corporate debtor. On 16-4-2018, the registered office of corporate debtor was sealed. Thereafter, on 26-4-2018 and 25-2-2019, various properties of corporate debtor were attached by the DEO, WB. Meanwhile, on 19-7-2018 initiated CIRP against corporate debtor. Thus, admittedly, the properties of corporate debtor were seized and the registered office was sealed much prior to the initiation of CIRP. The moratorium has been declared after the properties were attached by the DEO, WB and produced before the Designated Court of Economic Offences. Thus, section 14 of the IBC has no overriding effect on section 3 of the WBPIDFE Act. (Para 44)

- Admittedly, in instant case, pursuant to the advertisement published inviting the Expression of Interest (EoI), however, not even a single EoI was received. The statutory period of 180 days for completion of CIRP was extended and even after the expiry of 270 days of CIRP, no EoI or resolution plan was received. Thereafter, in the 7th meeting of CoC held on 5-4-2019, the CoC, by majority voting share of the committee members, has decided not to proceed with CIRP and recommended liquidation. However, the liquidation process is not commenced because the registered office of the corporate debtor was sealed by the DEO, WB on 16-4-2018 and the record kept in the registered office was ultimately seized by the DEO, WB on 26-4-2018. As, in instant case, no resolution plan was received, therefore, there is no question of approval of resolution plan. (Para 49)

- No resolution plan was approved which resulted in the change in control of the corporate debtor, therefore, there is no bar to take action against the property of the corporate debtor in connection with the offence. The *Explanation* to sub-section (2) of section 32A has clarified that the words and actions against the corporate debtor in relation to an offence would include the attachment, seizure, retention or confiscation of such property under the law applicable to the corporate debtor. Since the word 'include' is used under sub-clause 1 of the *Explanation* to section 32A(2), the word 'action' against the property of the corporate debtor is intended to have the widest possible amplitude. There is a clear nexus with the object of the IBC. The other part of the clarification under the *Explanation* is found in the second sub-clause of the *Explanation*. (Para 50)

- Reading sub-sections (1) and (2) of section 32A together, two results emerge :- (*i*) subject to the requirements embedded in sub-section (1), the liability of the corporate debtor for the offence committed under CIRP will cease; and (*ii*) the property of the corporate debtor is protected from any legal action subject to

the safeguards which indicated. The bar against action against the property is available, not only to the corporate debtor but also to any person who acquires property of the corporate debtor under the CIRP or liquidation process. The bar against action against the property of the corporate debtor is also available in the case of a person subject to the same limitation as prescribed in sub-section (1) and also in sub-section (2) if he has purchased the property of the corporate debtor in the proceedings for the liquidation of the corporate debtor. (Para 51)

- In such a situation the Director of the corporate debtor and the property of the corporate debtor cannot get immunity from the prosecution. Thus, the attached property, which is confiscated by the Designated Court of Economic Offences, cannot be de-attached. (Para 52)
- Now the attached property is not in possession and control of the DEO, WB. Therefore, as per the impugned order DEO, WB cannot de-attach the property which is already confiscated by the Designated Court of Economic Offences. (Para 53)
- In the earlier order dated 30-9-2019, Adjudicating Authority rightly held that WBPIDFE Act is a self-contained Act wherein section 19 enables the liquidators to prefer an Appeal against the order of the Authorities before the High Court of Calcutta. Admittedly, when the corporate debtor's property was attached and produced before designated court, the Corporate Debtor has not taken any appropriate legal courses open under the WBPIDFE Act. (Para 54)
- With the aforesaid, it is opined that the impugned order is not sustainable in law therefore, the order is set aside. However, the liquidator is at liberty to take legal action available. Accordingly, the Appeal is allowed. (Para 55)

CASE REVIEW

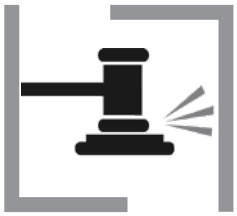
Bengal Polypet, In re (2021) 126 taxmann.com 219 (NCLT - Kolkata) (para 55) *set aside* (***See Annex***).

CASES REFERRED TO

Manish Kr. v. *Union of India* (2021) 123 taxmann.com 343 (SC) (para 13).

Ms. Nandini Sen, Adv. *for the Appellant.* **Gaurav Mitra**, **Kanishk Khetan** and **Nipun Gautam**, Advs. *for the Respondent.*

For Full Text of the Judgment see
(2021) 127 taxmann.com 173 (NCLAT- New Delhi)



(2021) 127 taxmann.com 865 (Calcutta)

HIGH COURT OF CALCUTTA

Sirpur Paper Mills Ltd. v. I.K. Merchants (P.) Ltd.

MOUSHUMI BHATTACHARYA, J.

A.P. 550 OF 2008

MAY 7, 2021

Section 31 of the Insolvency and Bankruptcy Code, 2016, read with section 34 of the Arbitration and Conciliation Act, 1996 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether pre-existing and undecided claims which have not featured in collation of claims and consequent consideration by Resolution Professional will be treated as extinguished upon approval of resolution plan under section 31 - Held, yes (Para 23)

CASE REVIEW

Committee of Creditors of Essar Steel India Ltd. v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) *followed*.

CASES REFERRED TO

Committee of Creditors of Essar Steel India Ltd. v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 3), *Gaurav Dalmia* v. *Reserve Bank of India* 2020 SCC Online Cal 668 (para 3), *Axis Bank Ltd.* v. *Gaurav Dalmia* MANU/WB/0739/2020 (para 3), *Sumitra Devi Shah* v. *Tata Steel BSL Ltd.* (2021) 123 taxmann.com 383/164 SCL 406 (Cal.) (para 3), *Board of Central for Cricket in India* v. *Kochi Cricket (P.) Ltd.* (2018) 6 SCC 287 (para 4), *Shipping Corpn. of India Ltd.* v. *Machado Bros.* (2004) 11 SCC 168 (para 4), *Soumik Sil* v. *Subhas Chandra Sil* (2015) 5 SCC 732 (para 4), *Satyadhyan Ghosal* v. *Smt. Deorajin Debi* AIR 1960 SC 941 (para 5), *Arjun Singh* v. *Mohindra Kumar* (1964) 5 SCR 946 (para 5), *Government of India* v. *Vedanta Ltd.* (*Formerly Cairn India Ltd.*) (2020) 10 SCC 1 (para 5), *Mobilox Innovations (P.) Ltd.* v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/144 SCL 37 (SC) (para 5), *K. Kishan* v. *Vijay Nirman Co. Ltd.* (2018) 97 taxmann.com 495/150 SCL 110 (SC) (para 5) and *Ghanshyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132 (SC) (para 11).

Jishnu Saha, Sr. Adv., **Sakabda Roy** and **Ms. Trisha Mukherjee**, Advs. *for the Petitioner.*

Sudip Deb, **Deepak Jain** and **R. Ghosh**, Advs. *for the Respondent.*

ORDER

1. This is an application for setting aside of an Award dated 7th July, 2008 passed by a learned Sole Arbitrator in arbitration proceedings between the respondent (claimant in the arbitration) and the petitioner herein. The petitioner before this court is the Award-debtor and the respondent before the learned Arbitrator.

2. According to the petitioner, the present proceeding under section 34 of the

Arbitration and Conciliation Act, 1996, has become infructuous by reason of the management of the petitioner company (the Award-debtor) being taken over by a new entity following the approval of a Resolution Plan of the petitioner company by the National Company Law Tribunal (NCLT) under the Insolvency and Bankruptcy Code, 2016 (IBC). The petitioner's case is that by reason of the subsequent developments after the impugned Award, the application for setting aside of the Award is not maintainable any more.

3. Mr. Jishnu Saha, Senior Counsel appearing for the petitioner relies on the provisions of the IBC, particularly section 31 thereof, which provides that an approved Resolution Plan is binding on the corporate debtor and its employees, members and other stakeholders and relies on a decision of the Supreme Court in *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234. Counsel contends that a successful Resolution applicant cannot be faced with undecided claims after the Resolution Plan has been accepted. Counsel places strong reliance on Essar to urge that the debts of the corporate debtor (the petitioner before this court) hence stands extinguished save to the extent of the debts which have been taken over by the resolution applicant under the approved Resolution Plan. Counsel cites *Gaurav Dalmia* v. *Reserve Bank of India* 2020 SCC Online Cal 668, *Axis Bank Ltd.* v. *Gaurav Dalmia* MANU/WB/0739/2020; *Sumitra Devi Shah* v. *Tata Steel BSL Ltd.* (2021) 123 taxmann.com 383/164 SCL 406 (Cal.) in support of the aforesaid contention. Counsel further relies on section 3(11) of the IBC "Debt"- which includes a financial debt and an operational debt and on section 3(6)(*a*) of the IBC to contend that the word "claim" - which has been defined as a right to payment, whether or not such right is reduced to judgment leaves no room for doubt that a claim would also include a disputed claim and a right to payment whether such right is reduced to judgment. Counsel places the scheme of the IBC and submits that Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 ("CIRP Regulations") provides that a Resolution Plan must mandatorily contain the amount payable under it including the amount payable to the operational and financial creditors. Counsel submits that in the event a creditor fails to submit his claims before the RP, it forfeits its rights to the claim.

4. Counsel relies on *Board of Control for Cricket in India* v. *Kochi Cricket (P.) Ltd.* (2018) 6 SCC 287 to urge that section 36 of the 1996 Act, as amended, would apply to pending section 34 applications on the date of commencement of the Amendment Act of 2016. Counsel argues that the Arbitral Award does not survive and no purpose will be served by pursuing the application for setting aside the Award and relies on *Shipping Corpn. of India Ltd.* v. *Machado Bros.* (2004) 11 SCC 168 and *Soumik Sil* v. *Subhas Chandra Sil* (2015) 5 SCC 732 for the aforesaid submission. Counsel submits that the question of maintainability of the section 34 application has not been finally decided by the judgment dated 10th January, 2020.

5. Mr. Sudip Deb, counsel appearing for the respondent/Award-holder submits at the very outset that the submissions of the

petitioner Award-debtor have been raised and argued on two earlier occasions. Counsel submits that, the issue was finally decided in the orders passed and that such orders have not been challenged by the petitioner. Counsel relies on *Satyadhyan Ghosal* v. *Smt. Deorajin Debi* AIR 1960 SC 941 and *Arjun Singh* v. *Mohindra Kumar* (1964) 5 SCR 946 for the proposition that *res judicata* can apply to different stages of the same proceeding. Counsel submits that upon filing of the application under section 34 of 1996 Act in October 2008, the Award was automatically stayed and the respondent could not approach the NCLT for lodging its claim. Counsel relies on *Board of Control for Cricket in India* (*supra*) and *Government of India* v. *Vedanta Ltd.* (*Formerly Cairn India Ltd.*) (2020) 10 SCC 1 for the proposition that amendments will only have prospective application. Counsel submits that with the filing of an application under section 34 is filed, the dispute raised by the party amounts to a pre-existing dispute which takes the respondent/Award-holder outside the purview of the IBC; *Mobilox Innovations (P.) Ltd.* v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/144 SCL 37 (SC) and *K. Kishan* v. *Vijay Nirman Co. (P.) Ltd.* (2018) 97 taxmann.com 495/150 SCL 110 (SC). On the factual aspect, counsel submits that the petitioner continues to exist and is hence under an obligation to pay the dues of the respondent Award-holder. Counsel reiterates that the respondent Award-holder could not have lodged its claim before the NCLT by reason of the impugned Award being stayed upon filing of the Section 34 application. Counsel further submits that the petitioner has not addressed the section 34 application on merits.

6. Counsel relies on *Swiss Ribbons (P.) Ltd.* (*supra*) for the proposition that a default would occur only when a debt, arising from a claim becomes due and payable and is not paid by the debtor. Counsel submits that in the present case, the respondent being the operational creditor does not have any claim since nothing is due from the petitioner (corporate debtor) in view of the pendency of the section 34 application.

7. Upon hearing learned counsel appearing for the parties, the question which has to be answered in the present proceeding is whether the claim of an Award-holder can be frustrated on the approval of a Resolution Plan under section 31 of The Insolvency and Bankruptcy Code, 2016. The related issue is whether a court sitting in a section 34 (of the 1996 Act) jurisdiction can recognize and accept the futility of the section 34 proceedings on the claim of the Award-holder being extinguished upon approval of the Resolution Plan and a resolution applicant taking over the management of the Award-debtor.

8. This court must however travel the road to the adjudication of the above issues by first dealing with the roadblock of the two earlier orders by which the contentions of the Award-debtor on the relevance of the IBC were rejected.

The Orders:

9. By a judgment dated 10th January, 2020 on the question whether the present application under section 34 of the Act

should be kept in abeyance following invocation of the provisions of the IBC against the petitioner/Award-debtor, this Court held that corporate insolvency resolution proceedings (CIRP) cannot be used to defeat a dispute which existed prior to initiation of the insolvency proceedings. It was further held that the respondent Award-holder could not have filed a claim before the National Company Law Tribunal since there was no final or adjudicated claim on the date of initiation of the CIRP against the Award-debtor.

10. The Award-debtor applied for recalling of the judgment which was rejected by this court by an order dated 3rd February, 2020. In rejecting the application, it was clarified that the question on which the judgment was pronounced was whether the section 34 application can be proceeded with in view of the Award-holder not having filed a claim in the resolution proceedings before the NCLT. The court also held that the apprehension of the Award-debtor that it may risk the effect of the observations made by the Court at the time of enforcement of the Award was misplaced since the Court had not gone into the merits of the application.

11. This is the second round in the recourse against the Arbitral Award dated 7th July, 2008 where the petitioner/Award-debtor has urged that the application for setting aside of the Award cannot be proceeded with after approval of the Resolution Plan in relation to the petitioner (corporate debtor before the NCLT). The petitioner has relied upon Essar in respect of its renewed plea before the court. This court is of the view that the three-member Bench decision of the Supreme Court in Essar constitutes a significant - and subsequent development of the law in relation to the fate of existing claims during and after corporate insolvency resolution proceedings which, in turn, would constitute a sufficient reason for this court to re-visit the judgment dated 10th January, 2020. It should be stated that the order dated 3rd February, 2020 rejecting the application for recalling of the judgment made it clear that the court had refrained from expressing any views on the maintainability of the section 34 application since the matter under consideration was wholly on a different aspect. The reason for having a re-look at the judgment at this stage is the pronouncement of the law by the Supreme Court in *Committee of Creditors of Essar Steel India Ltd.* (*supra*) and more recently in a judgment delivered on 13th April, 2021 in *Ghanshyam Mishra and Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132, wherein it was held that once a Resolution Plan is approved, a creditor cannot initiate proceedings for recovery of claims which are not part of the Resolution Plan.

12. A decision-making process must be attuned to a dynamic legal landscape shaped by legislative intervention and judicial pronouncements. The most predictable aspect of law is its constant evolution. It would hence be judicial short-sightedness, even stubbornness, to hold on to a view when the law, in the meantime, has transformed into a different avatar.

13. The contentions of the respondent with regard to the principles of *res judicata* applying to different stages of the same proceedings must therefore be read down in fit cases where orders are capable of

being altered or varied on the emergence of new facts or situations. The principle essentially is to guard the court from abuse of process where the same matter in issue, which had been heard and finally decided by a court, is urged again between the same parties. This is unlike the present case as the question of maintainability of the application under section 34 of the 1996 Act can be considered at any point of time on the legal aspect and particularly on the pronouncement of a decision relevant to the matter.

14. Since this court is of the view that the earlier orders would not stand in the way in considering the maintainability of the present application, the decision of the Supreme Court in *Committee of Creditors of Essar Steel India Ltd.* (*supra*) needs to be dealt with in some detail.

15. In Essar, the Supreme Court held that a Resolution Plan, once approved under section 31 of the IBC, is binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders, as emphasized in paragraph 107 of the report which is reproduced below;

> "107. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the Resolution Professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of section 60(6) of the Code, also militates against the rationale of section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the Resolution Plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the Resolution Professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be *set aside* on this count."

16. In this decision, the Supreme Court considered questions relating to the role of resolution applicants, Resolution Professionals and the Committee of Creditors constituted under the IBC as well as the jurisdiction of NCLT and the NCLAT with regard to Resolution Plans that have been approved by the Committee of Creditors. In the facts of that case, NCLAT had allowed admission of certain additional and belated claims of operational creditors and had held that claims which have been decided by the Adjudicating Authority or the Appellate Tribunal on merits may be decided by an appropriate forum under section 60(6) of the IBC. In answer to the issue of undecided claims, the Supreme Court expressed its view in paragraph 107 of the Report which has been set out above. The view of the Court was that the successful resolution applicant who takes over the business of

the corporate debtor must start running the business of the corporate debtor on a "fresh slate". This view has been reiterated in the recent three-member decision of the Supreme Court in *Ghanshyam Mishra & Sons (P.) Ltd.* (*supra*). This decision considered section 31 of the IBC and held that once the Resolution Plan is approved by the Adjudicating Authority, it shall be binding on the corporate debtor and its employees, members etc. since revival of the corporate debtor is one of the dominant purposes of the IBC. The Court was of the view that any debt which does not form a part of the approved Resolution Plan shall stand extinguished. The conclusions of the Supreme Court in paragraph 95 of the Report reiterates that once the Resolution Plan is duly approved by the Adjudicating Authority, claims which form part of the Resolution Plan shall stand frozen and would be binding on the corporate debtor. More significantly, the Court opined that claims which are not part of the Resolution Plan shall stand extinguished and no person will be entitled to initiate or continue any proceeding in respect to a claim which is not a part of the Resolution Plan. The relevant paragraph reiterating the aforesaid is reproduced below:—

> "95.....
>
> (*i*) That once a Resolution Plan is duly approved by the Adjudicating Authority under sub-section (1) of Section 31, the claims as provided in the Resolution Plan shall stand frozen and will be binding on the Corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of Resolution Plan by the Adjudicating Authority, all such claims, which are not a part of Resolution Plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the Resolution Plan;
>
> (*ii*) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;
>
> (*iii*) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the Resolution Plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under section 31 could be continued."

The opinion of the Court culminates in:-

> "As held by this Court, the successful resolution applicant cannot be flung with surprise claims which are not part of the Resolution Plan."

17. The fate of undecided or pending claims such as the one of the respondent before this court can also be gleaned from sections 25, 29, 30 and 31 of the IBC. Section 25-"Duties of Resolution Professionals"- which contemplates maintenance of an updated list of claims by the Resolution Professional section (25(2)(*e*)). Section 29- "Preparation of information memorandum"-provides for the Resolution Professional preparing an Information Memorandum containing relevant information for formulating a Resolution Plan. "Relevant information" has been explained as the information which would be required by the resolution applicant to make the Resolution Plan for the corporate debtor and which shall include the financial position of the corporate debtor including all information related to disputes by or against the corporate debtor. Section 30-"Submission of Resolution Plan "-provides for the payment of the debts of operational creditors in the manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of liquidation of the corporate debtor. Section 31 comes at the stage of approval of the Resolution Plan and mandates that upon the Resolution Plan being approved by the Adjudicating Authority, it shall be binding on the corporate debtor and its employees, members and other stakeholders. The aforesaid provisions of the IBC read with *Committee of Creditors of Essar Steel India (P.) Ltd.* (*supra*) and *Edelweiss Asset Reconstruction Co. Ltd.* (*supra*) makes it evident that for a claim to be considered by the Resolution Professional and later by the Committee of Creditors for approval of the Resolution Plan, the said claim must feature in the Information Memorandum prepared by the Resolution Professional and provided to the resolution applicant which will ultimately take over the business of the corporate debtor.

18. On a specific question put to counsel for the petitioner, it has been submitted - one day before delivery of this judgment - that the Information Memorandum mentioned the amount demanded by the respondent as on 31st March, 2014 under the heading "SUPPLIERS & SERVICE CONTRACTS AS ON MARCH 31, 2015". This fact should be explored further including whether it would have any bearing on the petitioner's contention that the respondent's claim does not survive anymore.

19. The IBC contemplates of several stages where an operational creditor is given notice of the commencement of the CIRP against a corporate debtor. The provisions also take into account claims of parties who have not initiated proceedings against the corporate debtor as operational creditors. The arrangement of the sections are conducive not only to making all creditors aware of the CIRP but also to invite claims and include them as part of the list of claims which are collated by the Resolution Professional and approved in the Resolution Plan by the Committee of Creditors and finally by the Adjudicating Authority. The sequence of stages would be evident from :-

Section 8 - Insolvency resolution by operational creditor

Section 9 - Application for initiation of creditor insolvency resolution process by operational creditor

Section 15 - Public announcement of corporate insolvency resolution process

Section 21 - Committee of Creditors: collation of claims received by the Interim Resolution Professional

Section 25 - Maintaining an updates list of claims by the Resolution Professional

Section 29 - Preparation of Information Memorandum

Section 30 - Submission of resolution plan

Section 31 - Approval of resolution plan.

20. Regulation 7 under Chapter IV- "Proof of claims"- of the CIRP Regulations, 2016, provides that an operational creditor shall submit the claim with proof to the Interim Resolution Professional on or before the last date mentioned in the "Public Announcement" (Regulation 12). In the present case, the public announcement was made by the interim Resolution Professional on 25th September, 2017. Regulation 6 of the CIRP Regulations mandates that an Insolvency Professional shall make a public announcement immediately on his appointment as an Interim Resolution Professional. These facts would show that from the date of the admission of the application of initiation of the CIRP against the petitioner namely 18th September, 2017 until approval of the resolution plan on 16th May, 2018, the respondent, as an Award-holder had sufficient opportunity to approach the NCLT for appropriate relief. Second, the amount demanded by the respondent/Award-holder as on 31st March, 2014 featuring in the Information Memorandum does not really help the respondent since the IBC and the CIRP regulations provide for specific procedural provisions for submission of claims (Ref: Regulations 7 and 12 read with Form B of the Schedule to the CIRP Regulations, 2016). The Award-holder hence was under an obligation to take active steps under the IBC instead of waiting for the adjudication of the application under section 34 of the 1996 Act.

21. The next issue which would naturally fall for consideration is whether the respondent could have lodged and pursued its claim before the NCLT when the impugned Award was challenged by the Award-debtor/petitioner in this Court on 31st October, 2008. The respondent/Award-holder contends that there was no scope for the respondent to approach any other forum since the impugned Award was automatically stayed upon filing of the section 34 application. The respondent has relied on section 34 of the 1996 Act as it stood prior to amendment of 2016 which came into effect from 23rd October, 2015. The merit of the stand taken must be seen in the light of section 36 which has been modified and added by the 2016 amendment. The new section 36 and sub-section (2) thereunder requires the Court to grant an order of stay of the operation of the Arbitral Award in accordance with section 36(3) on a separate application for stay taken out by the Award-debtor. Section 36(2) marks a significant departure from the erstwhile provision in clarifying that filing of an application for setting aside of an Award under section 34 shall not by itself make the Award unenforceable unless the Award is stayed by an order of Court in an application made in the

manner provided under section 36(3) of the Act. In *Board of Control for Cricket in India* (*supra*) the Supreme Court held that section 36, prior to the amendment, can only be seen as a "clog" on the right of a decree-holder who is unable to execute the Award in his favour in the absence of the conditions set forth in section 36. The Supreme Court further clarified that the aforesaid does not translate to a corresponding right in the judgment debtor to stay the execution of the Award. The most significant clarification of the Supreme Court in Kochi Cricket was expressed in the following words :-

> "Since it is clear that execution of a decree pertains the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending section 34 applications on the date of commencement of the amendment Act."

The dictum hence is clear with regard to section 34 applications which were pending at the time of the judgment in Kochi Cricket, namely that such pending applications would also be governed by the new section 36, as amended. In other words, the petitioner/Award-debtor would not have the benefit of the Award being automatically stayed upon filing of the application and the Award-holder would be free to enforce the Award against the Award-debtor in the absence of an application for stay of the award under the amended section 36 of the Act. The opinion of the Supreme Court in Kochi Cricket would also militate against the argument that the Award-holder/Respondent before this Court was rendered immobile in the matter of pursuing its claim in respect of the Award under the 1996 Act or before a forum contemplated under the IBC or otherwise. The decisions cited on behalf of the respondent in *Swiss Ribbons (P.) Ltd.* (*supra*) has therefore to be seen in the context as discussed above.

22. Since this court had placed reliance on *K. Kishan* (*supra*) in the judgment dated 10th January, 2020, the said decision should be referred to at this stage. The thrust of the decision in *K. Kishan* (*supra*) was that the provisions of the IBC should not be used "in terrorem" (in the words of the Supreme Court) against a corporate debtor where there was a pre-existing ongoing dispute between the parties. The concern of the Supreme Court was against the use of the IBC by an operational creditor to extract its due despite an adjudication pending for setting aside of an Award under section 34 of the 1996 Act on the date of initiation of the corporate insolvency resolution process. The Supreme Court relied on paragraphs 38 and 51 of Mobilox Innovations to opine that one of the objects of the IBC is to ensure that the amount of an operational debt does not enable operational creditors to put the corporate debtor prematurely into the insolvency resolution process or initiate the same for extraneous considerations. The Supreme Court sought to create a protective barrier around corporate debtors in cases where the provisions of the IBC were invoked by an operational creditor by jettisoning an ongoing and pending dispute for setting aside of an Arbitral Award under the 1996 Act. The facts of the present case are quite the opposite

to that of *K. Kishan* (*supra*). The corporate debtor/Award-debtor before this court seeks to take recourse in the culmination of the CIRP and the approval of the Resolution Plan whereas the Award-holder/ operational creditor seeks to proceed with the application for setting aside of the Award. As stated above, the view of this court as to a "pre-existing dispute" in the judgment of 10th January, 2020 must be revisited - and revised - in the light of both *Committee of Creditors of Essar Steel India (P.) Ltd.* and *Edelweiss Asset Reconstruction (P.) Ltd.* (*supra*).

23. The view of the Supreme Court as crystallized in Essar and Edelweiss is that pre-existing and undecided claims which have not featured in the collation of claims and consequent consideration by the Resolution Professional shall be treated as extinguished upon approval of the Resolution Plan under section 31 of the IBC. This can be seen as a necessary and an inevitable fallout of the IBC in order to prevent, in the words of the Supreme Court, a "hydra head popping up" and rendering uncertain the running of the business of a corporate debtor by a successful resolution applicant. In essence, an operational creditor who fails to lodge a claim in the CIRP literally missed boarding the claims-bus for chasing the fruits of an Award even where a challenge to the Award is pending in a Civil Court.

24. Every litigant has a right to argue that an action commenced in a court of law or a statutory forum is not maintainable by reason of the law existing as on that date. A challenge to maintainability of an action must be considered by the court before the substance of the dispute is adjudicated on merits. A court must also decide whether the argument pertaining to maintainability is such that the entire proceeding is rendered infructuous. The present proceeding is precisely such a case where deciding on the merits of the application, *i.e.* whether the Award should be *set aside* or sustained, would be a complete waste not only of judicial time as well as of the parties since the claim of the Award-holder has been extinguished upon approval of the Resolution Plan under section 31 of the IBC. Further adjudication on the legality of the impugned Award cannot lead to its logical conclusion and would hence be irrelevant. The parties would only be compelled to travel the road to further proceedings (appeal, enforcement *etc.*) without an end-point in the resolution to the dispute or any consequent relief to either of the parties. This surely cannot be the objective of any proceedings before any court of law.

25. In view of the above discussion, A.P. 550 of 2008 is disposed of as being rendered infructuous. There shall be no order as to costs.

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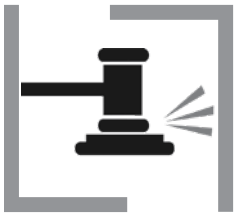

(2021) 127 taxmann.com 873 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Lakshmi Narayan Sharma v. Punjab National Bank

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

COMPANY APPEAL (AT) (CH) (INSOLVENCY) NO. 01 OF 2021†

MAY 12, 2021

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016, and section 18, read with section 19 of the Limitation Act, 1963 - Corporate insolvency resolution process - Limitation period - Appellant was promoter/suspended director of corporate debtor - Corporate debtor was a 'special purpose vehicle' incorporated to undertake a certain public-private partnership project with Government of Telangana - Corporate debtor availed of a loan facility from a 'consortium' which included respondent bank (financial creditor) - Having defaulted in repaying loan amount within time, bank filed an application under section 7 which was admitted by NCLT - Corporate debtor submitted that date of default for all facilities extended by bank was 30-3-2016, whereas section 7 application was filed by bank only on or after 18-7-2019, therefore, bank's application, having been filed beyond 3 years' period was barred by limitation - However, prima facie fact was that 'guarantors' of corporate debtor had executed a Balance and Security Confirmation Letter confirming correctness of debit balance and there was a certain part payment made by corporate debtor on 15-10-2018 towards its liability to financial creditor bank - Whether therefore, it was to be held that there was an acknowledgement of debt as per sections 18 and 19 of Limitation Act in respect of loan account of corporate debtor and, NCLT had rightly admitted section 7 application filed by financial creditor - Held, yes (Para 34)

CASE REVIEW

Punjab National Bank v. *Saptarishi Hotels (P.) Ltd.* (2021) 127 taxmann.com 872 (NCLT - Hyd.) (para 34) *affirmed* (***See Annex***).

CASES REFERRED TO

Babulal Vardharji Gurjar v. *Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 118 taxmann.com 323 (SC) (para 14), *Yogesh Kumar Jashwantlal Thakur* v. *Indian Overseas Bank* (Company Appeal (AT) Insolvency No. 236 of 2020, dated 14-9-2020) (para 17), *Bishal Jaiswal* v. *Asset Reconstruction Co. (India) Ltd.* (2021) 123 taxmann.com 390/164 SCL 429 (NCL - AT) (para 18), *V. Padmakumar* v. *Stressed Assets Stabilisation Fund (SASF)* (2021) 123 taxmann.com 331 (NCL - AT) (para 18) and *Asset Reconstruction Co. (India) Ltd.* v. *Bishal Jaiswal* (2021) 126 taxmann.com 200 (SC) (para 29).

Rajashekar Rao, Sr. Adv., **Suraj Prakash** and **Mrinal Lotoria**, Advs. *for the Appellant.* **T. Ravichandran**, Adv. and **T.S.N. Raja**, PCA *for the Respondent.*

JUDGMENT

Preface:

1. The Appellant has preferred the present Appeal as an `Aggrieved Person', against the `Impugned Order' dated 18-1-2021 passed by the `Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, Hyderabad) in C.P.(IB) No. 599/7/HDB/2019.

2. The `Adjudicating Authority' National Company Law Tribunal, Hyderabad Bench, Hyderabad while passing the `Impugned Order' dated 18-2-2021 in C.P.(IB).No.599/7/HDB/2019 (filed by the 1st Respondent/Bank/Petitioner/Financial Creditor under section 7 of the I & B Code) at Paragraph 10 had among other things observed that the `Financial Creditor' had established the `debt and default' through various documents filed along with the Applications and ultimately, admitted the `Application' by declaring the `Moratorium' and issued necessary directions thereto.

Appellant's Contentions:

3. According to the Learned Counsel for the Appellant, the Appellant is the `Promoter/Suspended Director' of `Corporate Debtor', controlling the majority of shareholding 100% of the paid-up capital of Saptarishi Hotels Private Limited (`Corporate Debtor') through its holding Company, Maha Hotels Projects Private Ltd.

4. The Learned Counsel for the `Appellant' submits that the `Corporate Debtor'/M/s. Saptarishi Hotels Private Limited is a `Special Purpose Vehicle' incorporated to undertake a Public Private Partnership (PPP) project to develop and operate a Four Star Hotel on `Build Operate Transfer' (BOT) Basis under Andhra Pradesh Infrastructure Development Enabling Act, 2001 with National Institute of Tourism and Hospitality Management (NITHM), `an undertaking of Telangana "Tourism Development Corporation Limited" (which is fully owned company of the Government of Telangana). As a matter of fact, the `Corporate Debtor' along with Maha Hotels Projects Private Limited who is the lead developer was to develop the project on its own cost and operate on revenue sharing with National Institute of Tourism and Hospitality Management and transfer back the project to National Institute of Tourism and Hospitality Management at the end of 33 years.

5. The Learned Counsel for the Appellant points out that the `Corporate Debtor' was sanctioned `Consortium Loan' by the 1st Respondent/Punjab National Bank and Punjab Sind Bank as per `Consortium Loan Agreement' and `Sanction Letters'. It is represented on behalf of the Appellant that the 1st Respondent/Punjab National Bank had sanctioned credit facilities amounting to INR 90 Crores and Punjab Sind Bank had sanctioned facilities totalling INR 80 Crores on 11-8-2011 as per `Consortium Agreement' dated 11-8-2011.

6. Further, the date of `CoD' was extended upto 1-2-2016 by the `Consortium' on 26-12-2014 and that the 1st Respondent/Punjab National Bank on 4-4-2015, issued a `Sanction Letter' for additional facilities to the tune of INR 18.67 Crores for which disbursal was to commence by 30-3-2015.

Also that, the development of construction of the project was delayed due to delay in clearance by the Local Authorities and that the interest payment was defaulted by the 'Corporate Debtor'.

7. The Learned Counsel for the Appellant comes out with a plea that the 1st Respondent/Bank projected the application under section 7 of the I & B Code which was served on the 'Corporate Debtor' by the Learned Counsel for the 1st Respondent/ Bank on 18-7-2019. Besides this, it is the version of the Appellant that the application under section 7 of the I & B Code, 2016 was filed before the 'Tribunal' on 18-7-2019 or any subsequent date.

8. The Learned Counsel for the Appellant takes a stand that since the 'Date of Default' for all the facilities by the 1st Respondent/Punjab National Bank as per Part-IV of the Application under section 7 of the Code was on 30-3-2016 and that the limitation lapsed on 29-3-2019. In any case, the date of 'Non-Performing Asset' was on 30-6-2016. The limitation period resting upon 'NPA' expired on 29-6-2019. As such, it is the submission of the Learned Counsel for the Appellant that the Application filed by the 1st Respondent/ Punjab National Bank (under Section 7 of the I & B Code) is barred by 'Limitation', as the same was filed on 18-7-2019 or any date thereafter.

9. The Learned Counsel for the Appellant emphatically contends that if the 'Date of Default' is considered as the date from which the limitation starts running then, the Petition under section 7 of the I & B Code is barred by 111 days or more and if date of 'NPA' is considered to be date from which the limitation starts running then, the Petition is barred by 19 days or more.

10. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' has no jurisdiction to admit the 'Corporate Debtor' for 'Corporate Insolvency Resolution Process' in spite of the fact the same being barred by 'Limitation'.

11. The Learned Counsel for the Appellant points out that the impugned order was passed in violation of the principles of 'Natural Justice', since no finding was rendered on the issue of Section 7 Application being barred by 'Limitation'.

12. The Learned Counsel for the Appellant projects an argument that 'CIRP' is a proceeding for 'Resolution of Insolvency' and not for repayment of 'Debt' and therefore, an 'Acknowledgement of Debt' will not help the cause of the 'Applicant'.

13. The Learned Counsel for the Appellant submits that the 'impugned order' is a 'nullity' in the eye of Law, because of the fact that the 'Adjudicating Authority' had not decided the 'issue of limitation'.

Appellant's Decisions:

14. The Learned Counsel for the Appellant cites the Hon'ble Supreme Court decision in *Babulal Vardharji Gurjar* v *Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 118 taxmann.com 323 wherein under the caption 'whether Section 18 Limitation Act could be applied to the present case' at Paragraphs 91 to 93 it is observed as under:

> "91. While the aforesaid principles remain crystal clear with the consistent

decisions of this Court, the only area of dispute, around which the contentions of learned Counsel for the parties have revolved in the present case, is about applicability of Section 18 of the Limitation Act and effect of the observations occurring in paragraph 21 of the decision in *Jignesh Shah* (*supra*).

92. We have noticed all the relevant and material observations and enunciations in the case of Jignesh Shah hereinbefore. *Prima facie*, it appears that illustrative reference to Section 18 of the Limitation Act, in paragraph 21 of the decision in Jignesh Shah, had only been in relation to the suit or other proceedings, wherever it could apply and where the period of limitation could get extended because of acknowledgement of liability. Noticeably, in contradistinction to the proceedings of a suit, this Court observed that a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding up proceeding is to be filed. It is difficult to read the observations in the aforesaid paragraph 21 of Jignesh Shah to mean that the ratio of B.K. Educational Services has, in any manner, been altered by this Court. As noticed, in B.K. Educational Services, it has clearly been held that the limitation period for application under section 7 of the Code is three years as provided by Article 137 of the Limitation Act, which commences from the date of default and is extendable only by application of Section 5 of Limitation Act, if any case for condonation of delay is made out. The findings in paragraph 12 in Jignesh Shah makes it clear that the Court indeed applied the principles so stated in B.K. Educational Services, and held that the winding up petition filed beyond three years from the date of default was barred by time.

93. Even in the later decisions, this Court has consistently applied the declaration of law in *B.K. Educational Services* (*supra*). As noticed in the case of *Vashdeo R. Bhojwani* (*supra*), this Court rejected the contention suggesting continuing cause of action for the purpose of application under section 7 of the Code while holding that the limitation started ticking from the date of issuance of recovery certificate dated 24-12-2001. Again, in the case of *Gaurav Hargovindbhai Dave* (*supra*), where the date of default was stated in the application under section 7 of the Code to be the date of NPA, *i.e.*, 21-7-2011, this Court held that the limitation began to run from the date of NPA and hence, the application filed under section 7 of the Code on 3-10-2017 was barred by limitation."

1st Respondent's Submissions:

15. The Learned Counsel for the 1st Respondent/Bank contends that the Appellant had not filed two vital documents *viz.* the 'Balance and Security Confirmation Letter' dated 20-2-2018 executed by the 'Corporate Debtor'. Further, on behalf of the 1st Respondent/Bank, attention of this 'Tribunal' drawn to the 'Balance Security

Confirmation Letter' dated 20-2-2018 for Rs. 78,74,73,945/- and the `Balance and Security Confirmation Letter' dated 20-2-2018 for Rs. 4,15,03,499.06, both of them duly signed by the `Guarantor(*s*)'.

16. The Learned Counsel for the 1st Respondent/Bank brings to the notice of this `Tribunal' that on 15-10-2018, a sum of Rs. 15,262.75 was paid by the `Corporate Debtor' to the Credit of the `Loan Account' and the above facts will clearly establish that there was an `Acknowledgement of Debt' as contemplated under sections 18 and 19 of the Limitation Act 1963.

17. The Learned Counsel for the 1st Respondent/Bank cites the Judgment of this Tribunal in *Yogesh kumar Jashwantlal Thakkar* v. *Indian Overseas Bank* (Company Appeal (AT)(Insolvency) No. 236 of 2020, dated 14-9-2020) wherein at Paragraphs 23, 25, 30, 33, 34, 36 and 38, it is observed and held as under:

> "23. It is to be pertinently pointed that that in the decision of Hon'ble Supreme Court `*Sampuran Singh*' v. *Naranjan Singh*', AIR 1999 SC 1047 at special page 1050 it is observed that Section 18 of sub-section (1) starts with the words `where, before the expiration of the prescribed period for a suit or application in respect of any property or right and acknowledgement of liability in respect of such property or right has been made'.
>
> 25. In the decision of Hon'ble Supreme Court in `*Babulal Vardharji Gurjar*' v. `*Veer Gurjar Aluminium Industries Pvt. Ltd.*' (Civil Appeal No. 6357 of 2019 - decided on 14-8-2020) at paragraph 33.1 it is observed as under:-
>
> *"33.1 Therefore, on the admitted fact situation of the present case, where only the date of default as '08-7-2011' has been stated for the purpose of maintaining the application u/s 7 of the Code, and not even a foundation is laid in the application for suggestions any acknowledgement or any other date of default, in our view, the submissions sought to be developed on behalf of the respondent no. 2 at the latest stage cannot be permitted. It remains trite that the question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provisions for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be adduced. Indisputably, in the present case, the respondent No. 2 never came out with any pleading other than stating the date of default as '08-7-2011' in the application. That being the position, no case for extension of period of limitation is available to be examined. In other words, even if section 18 of the Limitation Act and principle thereof were applicable, the same would not apply to the application under consideration in the present case looking to the very averment regarding default therein and for want of any other averment in regard to acknowledgement. In this view of the matter, reliance*

on the decision in Mahaveer Cold Storage Pvt. Ltd. does not advance the cause of the Respondent No. 2.

30. An acknowledgement of debt interrupts the running of prescription. An acknowledgement only extends the period of limitation as per decision `*P. Sreedevi*' v. `*P. Appu*', AIR 1991 Ker 76. It is to be remembered that a mere denial will not take sheen off the document and the claim of creditor remains alive within the meaning of Section 18 of the Limitation Act. Besides this, an acknowledgement is to be an 'acknowledgement of debt' and must involve an admission of subsisting relationship of debtor and creditor: and an intention to continue it and till it is lawfully determined must also be evident as per decision `*Venkata*' v. `*Parthasarathy*', 16 Mad 220. An acknowledgement does not create a new right.

33. It is to be relevantly pointed out that a judgment of the Court has to be read in the context of queries which arose for consideration in the case in which the judgment was delivered. Further, an 'obiter dictum' as distinguished from a 'ratio decidendi' is an observation by the court on a legal question suggested in a case before it not arising in such manner as to require a determination. An 'obiter' may not have a binding precedent as the observation was not necessary for the decision pronounced. Even though, an 'obiter' may not have a bind effect as a 'precedent', but it cannot be denied it is of immense considerable weight.

34. It is not out of place for this Tribunal to make a significant mention that in the decision `*Quinn*' v. `*Leathem*', (1901) A.C. 495 at 596 the dicta of Lord Halsbury is …….. every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides'.

36. The present case centres around mixed question of 'Facts' and 'Law'. The 1st Respondent/Bank, as per the format, as mentioned at para 20 of this judgment, had given the date of 'Default'/'NPA' as 1-1-2016 and that the Section 7 of the application of 'I&B' Code was filed before the Adjudicating Authority 1-4-2019, by the 1st Respondent/Bank. *Prima facie*, the Appeal needs to be allowed, if this is the single ground. However, in the interest case, the 1st Respondent/Bank had obtained balance confirmations certificate, the last one being 31-3-2017 as mentioned elaborately in Para 21 of this judgment. Although, this Appellate Tribunal had largely held in `*Rajendra Kumar Tekriwal*' v. `*Bank of Baroda*' in Company Appeal (AT) (Ins) No. 225 of 2020 and in *Jagdish Prasad Sarada* v. *Allahabad Bank* in Company Appeal (AT)(INS) No. 183 of 2020, (both being three Members Bench) had taken a stand that the Limitation Act, 1963 will be applica-

ble to all NPA cases provided, they meet the criteria of Article 137 of the Schedule to the Limitation Act, 1963, the extension of the period can be made by way of Application under section 5 of the Limitation Act, 1963 for condonation of delay; however, the peculiar attendant facts and circumstances of the present case which float on the surface are quite different where the 1st Respondent/ Bank had obtained Confirmations/ Acknowledgements in writing in accordance with Section 18 of the Limitation Act periodically. As a matter of fact, Section 18 of the Limitation Act, 1963 is applicable both for 'Suit' and 'Application' involving 'Acknowledgement of Liability', creating a fresh period of limitation, which shall be computed from the date when the 'Acknowledgement'

37. For better and fuller appreciation of the present subject matter in issue, it is useful for this Tribunal to make a pertinent reference to Section 18 of the Limitation Act, 1963 which runs as under:

> *"18 Effect of acknowledgement in writing:-*
>
> *(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.*
>
> (2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received. *Explanation*. - For the purpose of this section -
>
> (*a*) an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, delivery, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;
>
> (*b*) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and
>
> (*c*) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."

38. At this stage, this Tribunal, had perused the various confirmation letters as stated *supra* which are legally valid and binding documents between the *inter se* parties and the same cannot be repudiated on one pretext or other. Therefore, this Tribunal comes to an inevitable, inescapable and irresistible conclusion that the date of default *i.e.* 1-1-2016 gets extended by the debit confirmation letters secured by the 1st Respondent/Bank from the Corporate Debtor (for making a new period run from the date of debit confirmation letters) towards the outstanding debt in 'Loan Account'. Indeed, the application under section 7 of the I & B Code, 2016 was filed by the 1st Respondent/Bank on 1-4-2019 before the 'Adjudicating Authority' within the period of Limitation. Furthermore, in view of the fact, that ingredients of Section 18 of the Limitation Act, 1963 are quite applicable both for 'Suit' and 'Application' and the debit confirmation letters in the instant case were duly acknowledged in accordance with Law laid down on the subject, the instant Appeal deserves to be dismissed and accordingly the same is dismissed, since there being no legal infirmities found in the Impugned order passed by Adjudicating Authority in admitting CP No. (IB) 257/7/NCLT/AHM/2019 and declaring moratorium etc. Resultantly, all connected Interlocutory Applications are closed. There shall be no order as to costs."

18. The Learned Counsel for the 1st Respondent/Bank submits that the order of the Three Members Hon'ble Bench made in *Bishal Jaiswal* v *Asset Reconstruction Co. (India) Ltd.* (2021) 123 taxmann.com 390/164 SCL 429 (NCL - AT) on the file of National Company Law Appellate Tribunal, New Delhi relates to the reference for reconsideration of the Judgment of the 'Appellate Tribunal' rendered in the case of *V. Padmakumar* v. *Stressed Assets Stabilisation Fund (SAAF)* (2021) 123 taxmann.com 331 and in the said Judgment, the issue that arose with the 'Tribunal' was whether an 'Acknowledgement of Debt' in the 'Balance Sheet' can be treated as a valid acknowledgement for an extension of limitation period.

Discussions:

19. In the Application filed by the 1st Respondent/Punjab National Bank ('Financial Creditor') (under Section 7 of the I & B Code r/w Rule 4 of the Insolvency and Bankruptcy (Application to 'Adjudicating Authority') Rules, 2016) to initiate CIRP in respect of M/s. Saptarishi Hotels Private Limited, the Bank under Part-IV 'Particulars of the Financial Debt' had mentioned the following:

1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	17/06/2011 - Rs. 90.00 crs and 30/03/2015 - Rs. 18.67 crs.
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURD (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	Rs. 78,74,73,945/- as on 31-3-2016 against Term Loan-1 and Rs. 4,15,03,499.06 as on 31-3-2016 against Term Loan-II total Rs. 82,89,77,444/-. Presently total memorandum dues as at 30-6-2019 is Rs. 144,02,51,063.009

20. It comes to be known that the 1st Respondent/Applicant/'Financial Creditor' together with 'Punjab and Sind Bank' had sanctioned to the 'Borrower', a 'Financial Assistance' of an aggregate amount of Rs. 170 Crores on 11-8-2011. In the aggregate sum of Rs. 170 Crores, the share of the 'Financial Creditor' is Rs. 80 Crores in respect of the 'Term Loan' and Rs. 10 Crores against the 'Bank Guarantee Ltd.'

21. As a matter of fact, the Corporate Debtor/M/s. Saptarishi Hotels Private Limited, had agreed to avail letters of an aggregate sum of Rs. 15 Crores by means of sub-limits within the overall limits of the 'Term Loan' of Rs. 80 Crores and an aggregate sum of Rs. 10 Crores, in respect of 'Additional Bank Guarantee', based on the terms and conditions specified in the concerned 'Sanction Letters'.

22. According to the 1st Respondent/Bank, the Applicant/Bank/'Financial Creditor' and the Punjab and Sind Bank had sanctioned additional limits of Rs. 35 Crores and issued 'Sanction Letter' in this regard. Indeed, the Loans sanctioned by the 1st Respondent/ Bank/'Financial Creditor' along with the 'Punjab and Sind Bank' aggregating in all a loan amount of Rs. 205 Crores runs as under:

Name of the Lender	*Amount of Term Loan agreed to be availed by the Borrower (Rs. in Crores)*	*Amount of Letters of Credit agreed to be availed by the Borrower as sub-limits within the Term Loan facility*	*Amount of Bank Guarantees agreed to be availed by the Borrower (Rs. In Crores)*
Punjab National Bank	98.67	(15.00)	10.00
Punjab National Bank	86.33	(15.00)	10.00
Total	185.00	(30.00)	20.00

23. The 'Corporate Debtor'/M/s. Saptarishi Hotels Private Limited for securing the 'Credit facilities' of Rs. 205 Crores had created a Mortgage on the land admeasuring Ac. 3.00 together with buildings in Survey No. 91, Telecom Nagar, Gachibowli, Ranga Reddy District, Hyderabad. To monitor the 'Credit facilities' in respect of M/s. Saptarishi Hotels Private Limited/'Corporate Debtor', the 1st Respondent/Punjab National Bank was nominated as the 'Lead Bank'.

24. The clear cut stand of the 1st Respondent/Bank is that the 'Corporate Debtor' (as agreed) had failed in its repayment of the balance amount, inspite of repeated reminders given by the Bank/'Financial Creditor', in respect of the loan facilities availed by it.

25. It is brought to the fore that the 1st Respondent/Bank/'Financial Creditor' had issued a notice to the 'Corporate Debtor' on 2-6-2016, as per Section 13(2) of the SARFAESI Act and that the 'Corporate Debtor' had not paid the debt sum, despite the lapse of 60 days' time given to it.

26. As on 30-6-2019, the outstanding amount due to be paid to the 1st Respondent/'Financial Creditor'/Bank was Rs. 144.03 Crores. The 'Corporate Debtor' and the 'Guarantors' had executed 'Balance and Security Confirmation Letters' dated 20-2-2018 in respect of the accounts of Saptarishi Hotels Pvt. Ltd. thereby acknowledging the 'debt' in unequivocal terms. Admittedly, a payment of Rs. 15,262.75 was made by the 'Corporate Debtor' to the credit of the loan amount.

27. On behalf of the 'Appellant', the contention raised before this 'Tribunal' is that the Application filed by the 1st Respondent/ Punjab National Bank ('Financial Creditor') is barred by limitation, because of the fact that the application was filed on 18-7-2019 or any date thereafter. Furthermore, it is projected that the 'Date of Default' for all the facilities given by the Punjab National Bank in terms of Part-IV of the Application (filed under section 7 of the I & B Code) is 30-3-2016 and that the limitation came to an end on 29-3-2019. Moreover, the date of 'Non-Performing Asset' is 30-6-2013. As such, the Application (under Section 7 of the I & B Code, 2016) filed by the 1st Respondent/Punjab National Bank ('Financial Creditor') seeking initiation of 'CIRP' was admitted by the 'Adjudicating Authority' beyond the specified limitation period of 3 years.

28. The stand of the 'Appellant' is repelled by the 1st Respondent/Bank that the total amount of debt granted on 17-6-2011 was Rs. 90 Crores and on 30-3-2015 was Rs. 18.67 Crores and that the amount claimed to be in default was Rs. 78,74,73,945/- as on 31-3-2016 against the 'Term Loan-1' and Rs. 4,15,03,499.06 as on 31-3-2016 against the 'Term Loan-2', totalling in all, a sum of Rs. 82,89,77,444/- and the total memorandum dues as on 30-6-2019 was Rs. 144,02,51,063.09. Further, the guarantor(*s*) on 20-2-2018 had executed 'Balance and Security Confirmation Letters' for Rs. 78,74,73,945/- in respect of the account of Saptarishi Hotels Pvt. Ltd. ('Corporate Debtor') in respect of the 'Term Loan Facility', which clearly point out that there was an 'Acknowledgement of Debt', in terms of Sections 18 and 19 of the Limitation Act, 1963.

29. That apart, it is pertinently pointed out by this 'Tribunal' that the Hon'ble Supreme Court in the Judgment in the matter of '*Asset Reconstruction Co. (India) Ltd.* v. *Bishal Jaiswal* (2021) 126 taxmann.com 200 had set aside the Full Bench Judgment of the NCLAT in *V. Padma kumar* (*supra*) and the Full Bench Judgment of the NCLAT dated 22-10-2020 made in *Bishal Jaiswal* (*supra*) (vide paragraphs 33 and 34) and allowed the Appeal by remanding the matter to the NCLAT to be decided in accordance with law laid down in the Judgment.

Insolvency and Bankruptcy Code, 2016:

30. Section 3(6)(*a*) of the I & B Code, 2016, defines "claim" meaning 'a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured'. Section 3(8) of the Code defines "Corporate Debtor" meaning 'a Corporate person who owes a debt to any person'. Section 3(10) defines "Creditor" meaning 'any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder.

31. Section 3(11) of the I & B Code, defines "debt" meaning `a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Section 3(12) of the code, defines "default" meaning `non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.'

Limitation Act, 1963:

32. To be noted, that Section 18 of the Limitation Act, 1963 does not enjoin that an `acknowledgement' has to be in any particular form or to be express. It must be borne in mind that an `acknowledgement' is to be examined resting upon the attendant circumstances by an admission that the writer owes a `Debt'. No wonder, an `Unconditional Acknowledgement' implies a promise to pay because that is the natural inference if there is no other contrary material.

33. Further, to treat the writing signed by an individual as an `Acknowledgement', the person acknowledging must be conscious of his liability and the commitment ought to be made in respect of that liability.

34. Be that as if may, on a careful consideration of respective contentions projected on either side, this `Tribunal' considering the prime fact that the Guarantor(*s*) in respect of the Accounts of the `Corporate Debtor'/M/s. Saptarishi Hotels Private Limited had executed the `Balance and Security Confirmation Letters' dated 20-2-2018 for the due amount of Rs. 78,74,73,945/- (Confirmation of Correctness of Debit Balance) and keeping in mind yet another fact that a sum of Rs. 15,262.75 was paid by the `Corporate Debtor' on 15-10-2018 and as on 30-6-2019 the due amount was Rs. 144,02,51,063.09 comes to an irresistible, inevitable and inescapable conclusion that in respect of the loan account of the `Corporate Debtor', there was an `Acknowledgement of Debt' as per Sections 18 and 19 of the Limitation Act, 1963. In fact, the Application filed by the 1st Respondent/'Financial Creditor' (Punjab National Bank) in July 2019 (*vide* intimation given by the 1st Respondent/ Bank/Financial Creditor's Advocate through communication dated 18-7-2019 addressed to the Saptarishi Hotels Pvt. Ltd.(Corporate Debtor)) is perfectly maintainable in Law, of course, well within the period of Limitation. As such, the Contra Plea taken on behalf of the `Appellant' that the Application filed by the 1st Respondent/'Financial Creditor' (Punjab National Bank) (under Section 7 of the I & B Code) is barred by limitation is legally untenable and is rejected. In the present case, the 1st Respondent/Bank (`Financial Creditor') has proved the existence of `Debt and Default' (*vide* documents) filed along with the Application under section 7 of the Code against the `Corporate Debtor' and that the conclusion arrived at in admitting the `Application' by the `Adjudicating Authority' is free from legal infirmities, as opined by this `Tribunal'. Resultantly, the `Appeal' fails.

Conclusion:

35. In fine, the Instant Company Appeal (AT)(CH)(INS) No. 01 of 2021 is dismissed, but without costs. I.A. 03 of 2021 (Stay Application) is closed.

ANNEX

(2021) 127 taxmann.com 872 (NCLT - Hyd.)

NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH

Punjab National Bank v. Saptarishi Hotels (P.) Ltd.

K. ANANTHA PADMANABHA SWAMY, JUDICIAL MEMBER AND VEERA BRAMHA RAO AREKAPUDI, TECHNICAL MEMBER

CP(IB) NO. 599/7/HDB/2019

JANUARY 18, 2021

M. Satyanarayana, Adv. *for the Petitioner*.
P. Vikram, Adv. *for the Respondent*.

ORDER

Veera Bramha Rao Arekapudi, Technical Member – The Present Petition is filed by Punjab National Bank Limited, which is the Financial Creditor stating that the respondent - Corporate Debtor has defaulted in paying an amount of Rs. 144,02,51,063.09 as on 30-6-2019 as detailed in Part-IV, Colomn-2 of the application. Hence this petition is filed under section 7 of Insolvency and Bankruptcy Code, 2016, read with rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking commencement of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. The averments of the petition filed by the Petitioner/Financial Creditor in brief are:

a. It is averred that National Institute of Tourism & Hospitality Management (NITHM) issued an advertisement for inviting proposals for setting up 4 star Business Class Hotel under Public Private Partnership (PPP) mode. The proposals from Maha Hotel Projects Private Limited as lead developer in technical collaboration with Hilton International Manage LLC was selected for issue of Letter of Award (LOA) by NITHM.

b. It is averred that as per the terms and conditions of the Letter of Award issued by the NITHM, the Consortium lead by Maha Hotel Projects Pvt. Ltd. established M/s. Saptarishi Hotels Private Ltd. (Corporate Debtor here in) as a Special Purpose Vehicle (SPV) to implement its obligations under the Letter of Award.

c. It is averred that NITHM, Saptarishi Hotels Pvt. Ltd. and Maha Hotel Projects Private Limited executed a Lease Agreement dated 24th November, 2010 and also executed Registered Development & Management Agreement dated 10th August, 2011. It is averred that NITHM appointed the Corporate Debtor as the Developer for the due implementation of the Project and also granted lease of land admeasuring 3.00 acres approximately situated in Sy. No. 91 of Gachibowli Village, Serilingampally Mandal of Ranga

Reddy District. Subsequently NITHM handed over the possession of the aforesaid vacant land to the Corporate Debtor for a period of 33 years from Zero date.

d. It is averred that as per the Agreement the Corporate Debtor has been expressly permitted to raise loans from the recognized financial institutions or banks and through issue of debentures etc.. The total cost of the project is estimated of Rs. 251.69 crores. The meet the costs the borrower has approached the Punjab National Bank and Punjab & Sind Bank for grant of credit facilities. The financial creditors had sanctioned to the Borrower Financial assistance of an aggregate sum of Rs. 170.00 crores. Out of the aggregate sum of Rs. 170.00 crores, the Corporate Debtor has agreed to avail from all the lenders, a Fund Based Facility by way of a Term Loan aggregating to Rs. 150.00 crores. The Corporate Debtor has agreed to avail letters of Credit of and aggregate amount of Rs. 30.00 crores by way of sub-limits within the overall limits of the Term Loan Facility of Rs. 150.00 crores and additional Bank Guarantee facility of and aggregate amount of Rs. 20.00 crores, which are mentioned in the letters of sanction.

e. It is averred that both Punjab National Bank and Punjab & Sind Bank have issued their individual sanction letter sanctioning the following loans/facilities out of the total loan of Rs. 205.00 crores as per the following details:

Name of the lender	*Amount of Term loan agreed to be availed by the borrower*	*Amount of letters of credit agreed to be availed by the borrower as sub-limits with the term loan facility*	*Amount of Bank Guarantees agreed to be availed by the Borrower*
Punjab National Bank	98.67	15	10
Punjab & Sind Bank	86.33	15	10
Total	185	30	20

f. It is averred that Corporate Debtor has executed various loan documents before availing the credit facilities and the promoters of the corporate debtor *i.e.* Shri L.N. Sharma, Shri Y. Yashdeep Sharma and Smt. Sunita Sharma have executed a deed of guarantee extending their personal guarantees to the financial creditors for securing the loan sanctioned to Corporate Debtor to an extent for Rs. 170.00 crores. M/s. Maha Hotels Projects Pvt. Ltd. have also executed a Deed of Guarantee in favour of financial creditors by Shri L.N. Sharma, Shri Y. Yashdeep Sharma and Smt. Sunita Sharma

guaranting the repayment of loans/ facilities of Rs. 205.00 crores sanctioned to Corporate Debtor. The details of the loan documents which are executed by the Corporate Debtor and other guarantors are mentioned in para 6 of Page No. 10 to the petition.

g. It is further averred that the consortium of Banks entered into *inter se* Agreement dated 22-6-2016 between them for monitoring the credit facilities sanctioned to Corporate Debtor in which the Punjab National Bank was nominated as Lead Bank.

h. It is averred that for securing the credit facilities of Rs. 170.00 lakhs the corporate Debtor has created mortgage on the property *i.e.* land admeasuring Ac. 3.00 by executing the Memorandum Confirming Extension of Deposit of Title Deeds. The details of the land which is mortgaged is mentioned in para 8 of Page Nos. 10 & 11 to the Petition.

i. It is averred that pursuance to the mortgage of the documents the consortium banks have sanctioned additional Term loan-II to the Corporate Debtor No. 1 for an amount of Rs. 18.67 crores thus making the total exposure of Rs. 108.67 crores.

j. It is averred that the Corporate Debtor at its Board Meeting held on 28-6-2016 have passed a resolution authorizing Shri. Yashdeep Sharma to convey to the lenders acceptance on behalf of the Company of the terms and conditions of the sanction of the additional term loan and execute the loan documents by Shri L.N. Sharma and by Shri Yashdeep Sharma under the Common Seal of the Company.

k. It is averred that the Corporate Debtor having availed the loan facilities but failed to repay as agreed by them. Despite several reminders by the Financial Creditors Corporate Debtor failed to repay the loan outstanding amounts. Thus Financial Creditor had issued Demand Notice u/s.13(2) of the SARFAESI ACT on 2-7-2016 to the Corporate Debtor.

l. The Corporate Debtor is indebted to the Financial Creditor herein a total sum of Rs. 108.67 crores as on 30-6-2016 in respect of Term Loan-I and Term Loan-II and also Bank Guarantee facility of Rs. 48, 84,439/- as on 30-6-2016 together with interest from 1-7-2016. It is averred that the Corporate Debtor and guarantors of the loan have executed the balance and Security confirmation letters dated 20-2-2018 confirming a Term Loan-II. Thus Financial Creditor has filed the present Application before the Tribunal for initiating CIRP.

3. The respondent/corporate debtor filed reply. The objections raised in the counter, in brief, are as under:-

i. The Corporate Debtor contended that the present petition is not maintainable and submitted that

the allegations made in Company petition are false.

ii. It is averred that to bring better standard in tourism and hospitality sectors Government of India and Government of Andhra Pradesh (now Telangana) have funded and felicitated the establishment and operation of the NITHM.

iii. It is averred that NITHM in pursuance of its proposal to build a 4 star hotel under Public Private Partnership mode, issued advertisement for inviting proposals from the competent bodies. After bidding and due evaluation Maha Hotels was awarded with the project of setting up a 4 star business class hotel and subsequently Maha Hotels to execute the project incorporated an SPV (Special Purpose Vehicle) *i.e.* Corporate Debtor M/s. Saptarishi Hotels Private Limited.

iv. It is averred that on 24-11-2010 NITHM, Maha Hotels and Corporate Debtor executed Lease Agreement and also executed Development and Management Agreement on 10-8-2011.

v. It is averred based on the assurances made by NITHM corporate debtor approached the financial creditor for loans. Based on the representations made by the corporate debtor, the financial creditor sanctioned the total loan amount of Rs. 170 crores/-. The sanctioned loan amounts given by the financial creditor banks are given below:

BANK	*Term Loan*	*Letter of Credit*	*Bank Guarantees*
Punjab National Bank	80 cr.	15 cr.	10 cr.
Punjab & Sind Bank	70 cr.	15 cr.	10 cr.

vi. It is further submitted that financial creditor along with Punjab and Sind Bank together formed consortium lenders of the corporate debtor and financial creditor was selected as the lead banker of the joint lender forum.

vii. It is averred that due to various reasons the project faced lot of losses and hardship because of site relocation like delay GHMC permissions and due to Public Interest Litigation *i.e.* PIL No. 108/2014 which was filed in High Court of Telangana and Andhra Pradesh and stayed the work later on it was vacated.

viii. It is averred that due to reasons beyond the control of the corporate debtor the project incurred heavy loss and thus the corporate debtor approached the consortium for additional term loan facility of Rs. 18.67 crores from the Financial Creditor and 16.33 crores from Punjab National and Sind Bank was availed.

ix. It is submitted that due to events that were beyond the control of the corporate debtor, he addressed a letter on 11-2-2015 to NITHM requesting for extension for further two years for completion of the project. But despite of which NITHM issued a lease termination notice dated 23-7-2016 with baseless allegations.

x. It is averred that financial creditor declared the account of corporate debtor as a Non-Performing Asset on 29-5-2016. Further in view of clarification and discussion between officials and the corporate debtor and NITHM, The officials of NITHM promised the corporate debtor that before taking any gruesome step they would consider the factual circumstances and delays caused by them and other statutory authorities for no fault of the corporate debtor. However, NITHM against the promise and assurances invoked the Bank Guarantee on 26-8-2016 by issuing a letter to M/s. Punjab & Sind Bank demanding to transfer the Bank Guarantees amount of Rs. 1,88,75,000/- without mentioning any reason for issuing any notice to the corporate debtor.

xi. It is averred in para 22 that corporate debtor has offered OTS for an amount of Rs. 100 Crore and further improved the OTS amount of Rs. 115 Crores on 26-6-2018. It is averred that corporate debtor created Escrow Account and transferred Rs. 10 lakh Rupees *vide* account transfer on 18-6-2018 stating that ready to discharge debt amount. But financial creditor stalled the OTS proposal and approached the Debt Recovery Tribunal for the claim amount which is numbered as OA No. 189/2019 which is pending adjudication.

xii. It is further submitted that financial creditor has filed two separate cases for the same relief in two different forums. The Corporate Debtor was ready to discharge its liability towards the financial creditor has filed the insolvency petition and put corporate debtor in severe hardship. Since Corporate Debtor is in incurred loss and is not liable to pay any amount as prayed by the financial creditor. Thus prayed the Tribunal to dismiss the Petition.

4. We have heard the counsel for financial creditor and the counsel for the corporate debtor. This is an application filed under section 7 of the IBC Code, 2016. The case of the applicant/financial creditor is that it has extended various loan facilities to the corporate debtor from time-to-time. Details of financial debt like documents, record and evidence of default are shown as Part V of the Petition.

5. The financial creditor also filed written submissions dated 2-12-2020 stating that the counter filed by the corporate debtor dated 17-1-2020 have admitted the sanction of loans under the sanction letter dated 17-6-2011 and the only defence is that they approached their OTS finally by Rs. 115 crores against total dues of about 250 crores. The stand taken by the corporate

debtor is totally untenable either on facts or under Law. Thus, the financial creditor is able to establish sanction of loan and further the corporate debtor has committed default.

6. It is contended by the learned counsel for the corporate debtor that the petition filed under section 7 of IBC Code, 2016 is barred by limitation and is not maintainable and is liable to be dismissed.

7. The cotention of the learned counsel for the corporate debtor in its written submissions that the development and construction of the project was delayed and due to that delay in clearance by the local authorities the payment was defaulted by the corporate debtor. The Financial Creditor thus issued a notice under section 13(2) of the SARFAESI ACT on 2nd July, 2016. The notice also states that the accounts of the corporate debtor has been classified as Non-Performing Assets as per RBI guidelines due to non-payment of interest.

8. The learned counsel for the corporate debtor would contend that the Application was served on 18th July, 2019. Further it is to be noted that no date of filing is mentioned anywhere on the application but the affidavit verifying the application on Page 16 of the application bears stamp of date 17th July, 2019. Therefore it is clear that the petition filed after 18th July, 2019 after a delay of over 108 days beyond 3 years. Thus, the learned counsel contended that the petition cannot be admitted as it has been filed beyond the limitation period prescribed *i.e.* 3 years.

9. The Counsel for Corporate Debtor also filed a copy of Judgment in *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 118 taxmann.com 323 (SC) which is annexed as Annexure-2. Therefore the Application under section 7 of IBC which has been filed on or after 18th July, 2019 for a default is to be admitted on 31st March 2016 is barred by limitation and any acknowledgement of liability can't extend the date of default. Therefore the petition is liable to be dismissed.

10. The Financial Creditor has suggested the name of Interim Resolution Professional, namely, TSN Raja having address at No. 16 (11-20-18), Shop cum flat, Huda Complex, Kothapet, Hyderabad-500035, E-Mail: tsnraja@gmail.com Registration No. IBBI/IPA-003/IP-N00065/2017-18/10551, who has given affidavit of consent in Form-2. The Financial Creditor has established the debt and default through various documents filed along with the application. The application is, therefore, liable to be admitted

11. Hence, the Adjudicating Authority admits this Petition under section 7 of IBC, 2016, declaring moratorium for the purposes referred to in section 14 of the Code, with the following directions:—

(*i*) The Bench hereby prohibits 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; Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest

created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;

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

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

(*iv*) That the order of moratorium shall have effect from 18-1-2021 till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under sub-section (1) of section 31 or passes an order for liquidation of Corporate Debtor under section 33, whichever is earlier.

(*v*) We hereby appoint Shri TSN Raja having address at No. 16 (11-20-18), Shop cum flat, Huda Complex, Kothapet, Hyderabad-500035, E-Mail: tsnraja@gmail.com Registration No. IBBI/IPA-003/IP-N00065/2017-18/10551, who has given affidavit of consent in Form-2..

(*vi*) That the Public announcement of Corporate Insolvency Resolution Process shall be made immediately as specified under section 13 of the code.

(*vii*) Accordingly, petition is admitted.

(*viii*) Registry to send a copy of this order to the Registrar of Companies, Hyderabad for appropriately changing the status of Corporate Debtor herein on the MCA-21 site of Ministry of Corporate Affairs.

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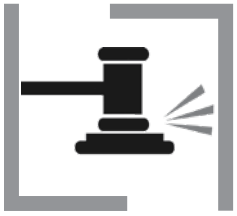
† Arising out of order passed by NCLT, Hyderabad Bench in *Punjab National Bank* v. *Saptarishi Hotels (P.) Ltd.* (2021) 127 taxmann.com 872.



(2021) 127 taxmann.com 864 (Karnataka)

HIGH COURT OF KARNATAKA

Dreams Infra India (P.) Ltd. v. Competent Authority Dreamz Infra India (P.) Ltd.

H.P. SANDESH, J.

WRIT PETITION NO.13477/2020 (GM-RES)

MAY 24, 2021

Section 238, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 3 of Karnataka Protection of Interest of Depositors in Financial Establishment Act, 2004 - Corporate insolvency resolution process - Overriding effect of Code - Petitioner/corporate debtor, a real estate company, had floated multiple projects - Petitioner had executed an Agreement of sale and Memorandum of Understanding with thousands of home buyers for sale of apartments in these under construction projects - As per agreement, home buyers were asked to pay certain amount as advance money or earnest in lieu of booking their apartments in said projects - Apartments were not handed over after collecting advance money from home buyers and thus, home buyers asked petitioner to refund amount paid as advance - Since petitioner failed to pay same an application was filed under section 7 - Adjudicating Authority admitted said application and moratorium was declared - Meanwhile, owing to various complaints lodged against promoters and directors of petitioner, respondent-Authority appointed by Government of Karnataka initiated proceedings under Karnataka Protection of Interest of Depositors in Financial Establishment Act, 2004 and attached all properties of petitioner - Whether section 238 had an overriding effect over any other law; therefore, proceedings initiated against petitioner under Karnataka Protection of Interest of Depositors in Financial Establishment Act, 2004 were to be quashed - Held, yes (Para 22)

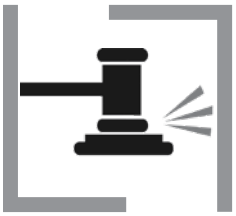
CASES REFERRED TO

Shree Krantiveer Sangali Rayanna Co-op Society Ltd. v. *Nana Dhondiba Desai* ILR 2018 Kar. 4125 (para 7), *M.S. Shivashankar* v. *State of Karnataka* ILR 2010 Kar. 328 (para 8), *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 9), *Anand Rao Korada, Resolution Professional* v. *Varsha Fabrics (P.) Ltd.* (2019) 111 taxmann.com 474/(2020) 157 SCL 350 (SC) (para 12), *Alchemist Asset Reconstruction Co. Ltd.* v. *Hotel Gaudavan (P.) Ltd.* (2017) 88 taxmann.com 202/(2018) 145 SCL 428 (SC) (para 13) and *J. Manivannar* v. *Dy. Superintend of Police, Economic Officers Wings* (2019) 103 taxmann.com 389/153 SCL 95 (NCLT - Chennai) (para 14).

A. Mahesh Chowdhary, Adv. *for the Appellant*. **H.R. Showri**, HCGP *for the Respondent*.

For Full Text of the Judgment see

(2021) 127 taxmann.com 864 (Karnataka)



(2021) 127 taxmann.com 341 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI BENCH

Regional Provident Commissioner Employees Provident Fund Organisation v. Vandana Garg

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

COMPANY APPEAL (AT) (CH) (INS.) NO. 50 OF 2021†

MAY 12, 2021

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution plan - Resolution plan - Approval of - Whether after approval of Resolution Plan under section 31, claims as provided in Resolution Plan shall stand frozen and will be binding on corporate debtor and its employees, members, creditors including Central Government, any State Government or any Local Authority, Guarantors and other Stakeholders - Held, yes - Whether on approval of Resolution Plan by Adjudicating Authority, all such claims that are not a part of Resolution Plan shall stand extinguished - Held, yes - Whether no person will be entitled to initiate/continue any proceedings regarding a claim that is not part of Resolution Plan - Held, yes (Para 34)

CASE REVIEW

Vandana Garg, In re (2021) 123 taxmann.com 89 (NCLT - Chennai) (SB) (para 35) *affirmed*.

CASES REFERRED TO

Committee of Creditors of Essar Steel India Ltd. v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 26), *Sawan Godiwala* v. *Apalla Siva Kumar* (2020) 116 taxmann.com 750 (NCL - AT) (para 28) and *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132 (SC) (para 33).

Manish Dhir, Adv. *for the Appellant*. **Rajeev K. Panday**, Adv. **A.R.L. Sundaresan**, Sr. Adv. and **Alwin Godwin**, Adv. *for the Respondent*.

JUDGMENT

V.P. Singh, Technical Member - This Appeal emanates from the Order dated July 20, 2020, passed by the National Company Law Tribunal, Chennai Bench, Chennai in MA No. 1433 of 2019 in CP/941/IB/2018, whereby the Adjudicating Authority/NCLT approved the Resolution Plan, which waves off a major portion of the Provident Fund dues owed by the Corporate Debtor. The original parties status in the Company Petition represents them in this Appeal for the sake of convenience.

Brief facts

2. The Corporate Debtor M/s GVR Infra Projects Limited had defaulted in payment of dues/damages/interest, including

employees share of contributions, since April 2014, which were deducted from their wages. The total EPF dues up to the date are to the tune of Rs. 2,84,69,797/-.

3. The Adjudicating Authority had *vide* its Order dated October 15, 2018, initiated CIR Process against the Corporate Debtor 'GVR Infra Projects Limited'. Under the same, the Interim Resolution Professional (in short, 'IRP') issued a public announcement inviting claims pending against the Corporate Debtor. The Interim Resolution Professional was subsequently replaced by Respondent No. 1, appointed as the Resolution Professional (in short, 'RP').

4. The Appellant submitted its claims in Form 'F', as suggested by the IRP *vide* his letter dated December 31, 2018. The claim Form 'F' was forwarded to the Resolution Professional on January 7, 2019. The RP, *vide* an email dated May 10, 2019, asked the Appellant to submit its claim and the supporting documents in Form 'B' again. In response to that, the Appellant submitted the claim in Form 'B', under protest to Respondent No. 1/ RP, along with all supporting documents *vide* its letter dated May 22, 2019.

5. After that, Respondent No. 1/RP *vide* letter dated January 22, 2020, has informed that the claim in form 'B' for the period from April 2014 to October 2017 amounting to Rs. 1,95,01,301/- is admitted to be paid when the prospective bidder takes over M/S GVR Infra Projects Limited. The RP further communicated that the PF dues from May 2017 to April 2019 of the Corporate Debtor had been admitted. As per the dues settlement, as forwarded by the Resolution Professional, the Corporate Debtor had to remit the total of Rs. 75,14,594/- from November 2017 to April 2019. However, out of these dues of Rs. 75,14,594/-, only dues amounting to Rs. 9,48,183/- was admitted.

6. The Appellant, *vide* its letter dated August 13, 2020, sought clarification from the RP regarding the amount payable to the Appellant. Then the RP responded that the claim already admitted would be settled as per the Resolution Plan.

7. The Appellant contends that waving off the Provident Fund dues is not only the violation of Section 11 of the Employees Provident Fund Act (EPF Act), which lays down the priority of charge of Provident Fund dues but also a violation of section 36(4)(*a*)(*iii*) and section 30(2)(*e*) of The Insolvency and Bankruptcy Code, 2016 which lays down that the Provident Fund dues are outside Liquidation Estate.

Respondent's contention

8. The Corporate Insolvency Resolution Process against the Corporate Debtor 'GVR Infra Projects Limited' was initiated by the Adjudicating Authority *vide* Order dated October 15 2018. After that, IRP/RP was appointed. During the CIRP under the public announcement, the Appellant submitted the claim in Form 'B' for an amount of Rs. 1,95,01,301/-about the outstanding Provident Fund dues to Respondent No. 1, which Respondent No. 1/RP admitted in total.

9. Respondent No. 2 submitted a Resolution Plan to the Committee of Creditors' (in short, CoC). The Appellant's claim amounting to Rs. 1,95,01,301/- has been dealt with in the Resolution Plan in conformity with Section 30(2) of the I&B Code, 2016.

10. The CoC approved the said Resolution Plan for the Corporate Debtor on November

27, 2019. After that, Respondent No. 1 filed an Application being MA/1433/2019 on December 5, 2019, before the Adjudicating Authority under section 30(6) of I&B Code read with regulation 39(4) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 seeking approval of the same. The Adjudicating Authority approved the Resolution Plan *vide* its Order dated July 20, 2020, a Monitoring Committee was also constituted, and Respondent No. 1/RP has been appointed as the Monitoring Agent.

11. The Resolution Plan subsumes all the Financial Creditors, Operational Creditors, and any pending statutory dues per the payout plan under the resolution Plan. The Resolution Plan also subsumes all the dues of the Appellant as well, and the total claim amount of Rs. 1,95,01,301/-, as filed in Form `B', was admitted and considered under the Resolution Plan.

12. Despite filing a claim of Rs. 1,95,01,301/-, in the present Appeal, the Appellant raises a claim of Rs. 2,84,69,797/-, *i.e.* much higher than the amount claimed by the Appellant in its claim before the Resolution Professional. There is no basis on which the Appellant has raised the additional claim, despite having full knowledge of the CIRP and having calculated its dues, which were admitted, cannot now enhance the same and seek more. The debts of the Corporate Debtor stood crystallised as on the date of initiation of CIRP.

13. Furthermore, there is no occasion for referring to the provisions of section 36(4)(*a*)(*ii*) of the Insolvency and Bankruptcy Code, 2016 in the present matter since it would only arise upon the formation of the Liquidation Estate by the Liquidator in terms of the Code. The Corporate Debtor has not gone into Liquidation in the present matter and is currently under a Resolution Plan.

14. Furthermore, no separate corpus was maintained for the Provident Fund by the Corporate Debtor in the present case. Therefore, in the absence of any such funds of any recurring cash flows with the Corporate Debtor, Respondent No. 1/RP is not in a position to now make provision for the payment of Provident Fund dues. Therefore, no fund could be excluded from the Liquidation Estate in terms of Section 36(4)(*a*)(*iii*) of the I&B Code to be paid to the Appellant, even in Liquidation of the Corporate Debtor. However, in the present matter, the Corporate Debtor is currently under a Resolution Plan. Therefore, the said provisions are not applicable in the present case.

Respondent No. 2's Contention

15. The Appellant submitted the claim about its outstanding Provident Fund dues about the Corporate Debtor `GVR Infra Projects Limited', in Form `B', amounting to Rs. 1,95,01,301/-. The claim of the Appellant admitted by Respondent No. 1/RP had been considered while formulating the Resolution Plan of the Corporate Debtor. The Adjudicating Authority/NCLT further approved the said Resolution Plan *vide* its Order dated July 20, 2020, in conformity with section 30(2) of the I&B Code, 2016 and the Rules and Regulations framed thereunder. The Appellant has not provided any reason or justification for raising the claim of Rs. 2,84,69,797/-, which is much higher than the amount claimed by the Appellant in Form `B'. In terms of section 31 of the Code, the approved Resolution Plan is binding on the Corporate Debtor, Stakeholders,

including the statutory authorities, to whom the Corporate Debtor owes any debt. No preferential treatment can be given to the creditor who has submitted a claim with the Resolution Professional. Accordingly, the Adjudicating Authority has approved the claim submitted by the Appellant, having been accorded suitable treatment in the approved Resolution Plan in terms of section 31 of the Code. Every Stakeholder, including the present Appellant, is bound by such treatment of its claim in the approved Resolution Plan.

16. We have heard the arguments of the Learned Counsel for the parties and perused the record.

Discussions and findings

17. The Appellant challenges the approved Resolution Plan because the Adjudicating Authority has failed to consider and appreciate the legislative intent behind the exclusion of Provident Fund dues from the Liquidation Estate of the Corporate Debtor. The Adjudicating Authority has failed to consider that Provident Fund dues ought to be given priority over all other dues owed by the Corporate Debtor in view of the express provision of section 36 of the Insolvency and Bankruptcy Code, 2016 and section 11 of the Employees Provident Fund and Miscellaneous Provision Act, 1952 (in short "EPF Act"). The Appellant further contends that the Adjudicating Authority *vide* the impugned Order upheld a Resolution Plan which waves off the major portion of the Provident Fund dues owed by the Corporate Debtor.

18. Admittedly the Corporate Debtor "GVR Infra Projects Limited" has defaulted in payment of dues/damages/interest, including the employees share of contribution, since 2014, which were deducted from employees' wages. The Appellant now claims overall dues towards the Provident Fund to the tune of Rs. 2,84,69,747/-. In contrast, Appellant's Provident Fund claim amounting to Rs. 1,95,01,301/- had already been admitted and dealt with in the Resolution Plan.

19. The CIR Process started against the Corporate Debtor on October 15, 2018. The Appellant submitted its claim in form `F' on December 31, 2018. After that, the RP suggested the Appellant for filing its claim in Form `B'. In response to that, the Appellant submitted its claim in form "B". Thereafter, the Resolution Professional informed the Appellant about approval of the Resolution Plan by the Adjudicating Authority.

20. The Appellants claim that section 11 of the EPF Act contains a *non obstante* clause and lays down that if any amount is due from an employer, whether in respect of employees contribution deducted from the wages of employees or the employer's contribution, the same shall be deemed to be the 1st charge on the assets of the establishment and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts, gives a statutory priority to the amount payable to the employees over other debts.

21. The Appellant further claims that the legislature has inserted an exclusion in the IBC regarding the Provident Fund from the liquidation estate of the Corporate Debtor. Thereby making the intention clear that the Provident Fund dues cannot be equated with other debts and liabilities of the Company, as the amount relating to the same does not form part of the

assets or estate of the Corporate Debtor. At best, the said amount can be seen to be that of workmen, lying with the Corporate Debtor.

22. The Appellant contends that the approved Resolution Plan fails to comply with the above-stated provisions and is therefore in contravention of EPF Act and the I&B Code, is accordingly barred under section 30(2) Insolvency and Bankruptcy Code, 2016.

23. The Resolution Professional contends that the Appellant, despite filing the claim of Rs. 1,95,01,301/-, is now raising a claim of Rs. 2,84,69,797/-. There is no basis to raise the additional claim in the matter, and the Appellant having full knowledge of the CIRP and having calculated its due, which was admitted, cannot now enhance the same and seek more and has now estopped from doing so.

24. The RP submits that debts of the Corporate Debtor stood crystallised as on the date of initiation of CIRP. Further, it is established law by the Hon'ble Supreme Court that all claims which have not been submitted to or dealt with by the Resolution Professional stood extinguished.

25. The RP further contends that there is no occasion for referring to the provisions of section 36(4)(*a*)(*iii*) of the I&B Code in the present matter since it would only arise upon the formation of the Liquidation Estate by the Liquidator in terms of the I&B Code. In the facts of the present case, it is a matter of record that the Corporate Debtor has not gone into Liquidation and is currently under Insolvency Resolution. Moreover, there is no fund that could be excluded from the Liquidation Estate in terms of section 36(4)(*a*)(*iii*) of the I&B Code to be paid to the Appellant. Since no separate corpus was created for the Provident Fund, the said provisions are not applicable in the present case.

26. It is necessary to mention that the Hon'ble Supreme Court in the case of "The *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 has held:

"A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a Hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the corporate debtor".

27. Further, it is necessary to mention that the question of applicability of section 36(4)(*a*)(*iii*) of the Insolvency and Bankruptcy Code 2016 arises at the stage of the formation of Liquidation Estate by the Liquidator. Since the Corporate Debtor has not gone into Liquidation and is currently under Insolvency Resolution, section 36 of the I&B Code cannot be applied. Moreover, no fund could be excluded from the Liquidation Estate in terms of Section 36(4)(*a*)(*iii*) of the I&B Code, 2016.

28. It is pertinent to mention that this Appellate Tribunal while dealing with the same issue in the matter of *Sawan Godiwala* v. *Apalla Siva Kumar* (2020) 116 taxmann.com 750 (NCL - AT) held:

> "Thus it is the settled position of law that the provident fund, the pension fund and the gratuity fund, do not come within the purview of 'liquidation estate' for the purpose of distribution of assets under section 53 of the Code.

Based on this, the only inference which can be drawn is that Pension Fund, Gratuity Fund and Provident Fund can't be utilised, attached or distributed by the Liquidator, to satisfy the claim of other creditors.

Sec. 36(2) of the I&B Code, 2016 provides that the Liquidator shall hold the Liquidation Estate in fiduciary for the benefit of all the Creditors. The Liquidator has no domain to deal with any other property of the corporate debtor, which is not the part of the Liquidation Estate. In a case, where no fund is created by a company, in violation of the Statutory provision of the Sec. 4 of the Payment of Gratuity Act, 1972, then in that situation also, the Liquidator cannot be directed to make the payment of gratuity to the employees because the Liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate.

On perusal of the statutory provision of section 5 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. It is apparent that the establishment, to which the said Scheme of Employees' Provident Fund applies, has to create a fund in accordance with the provision of the Act and the Scheme. Section 5(1)(*a*) provides that the Fund shall vest in, and be administered by the Central Board constituted under section 5(*a*). Section 4 of the Payment Gratuity Act, 1972 provides that Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years:

(*a*) On his superannuation,

(*b*) On his retirement or resignation,

(*c*) On his death or disablement due to accident or disease.

In this case, we are not concerned with determination about the entitlement of Gratuity by the employees of the 'Corporate Debtor'. Payment of Gratuity to employees depends on their entitlement of Gratuity, subject to the fulfilment of the conditions laid down under the payment of Gratuity Act, 1972 and also on the availability of the fund in this regard.

Based on the judgment of this Appellate Tribunal in case of the *State Bank of India* v. *Moser Baer Karamchari Union and Another* 2019 SCC Online NCLAT 447, it is clear that in terms of sub-section (4)(*a*)(*iii*) of section 36 all sums due to any workman or employees from the Provident Fund, Pension Fund and the Gratuity Fund, do not form part of the liquidation estate/liquidation assets of the 'Corporate Debtor'. Therefore, the question of distribution of Provident Fund or the Pension Fund or the Gratuity Fund in order to priority, and within such period as prescribed under section 53(1), does not arise. It is further held in the above case that Section 53(1)(*b*)(*i*) of the I&B Code, regarding distribution of assets, relating to workmen's dues is confined to a period of 24 months, preceding the liquidation commencement date. This question has already been decided that Gratuity Fund does not form the part of the liquidation asset. Therefore, the question of distribution of the Gratuity Fund in Order of priority,

provided under section 53(1) of the Code does not arise. However, the Adjudicating Authority has given direction to the Liquidator that, ? the Liquidator cannot avoid the liability to pay Gratuity to the employees, on the ground, that `Corporate Debtor `did not maintain separate funds, even if, there is no fund maintained, the Liquidator has to provide sufficient provision for payment of Gratuity to the Applicants according to their eligibility."

29. The ratio of the above case applies to the facts of the present case. It is further necessary to mention that since the Corporate Debtor was under severe financial distress, CIRP was initiated, culminating in the Resolution Plan.

30. In this regard, the proviso to section 14B of the EPF Act is relevant. The said provision provides that the Central Board constituted under the EPF Act may reduce or waive the damages levied under the said section about an established sick industrial company. The Board has sanctioned a Scheme of Rehabilitation for Industrial and Financial Reconstruction. Section 14B of EPF Act reads as under:

> "14B. *Power to recover damages.*— Where an employer makes default in the payment of any contribution to the Fund, the Pension Fund or the Insurance Fund) or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:
>
> **Provided** that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:
>
> **Provided further** that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme."

31. It is thus clear that before coming into force of the Insolvency and Bankruptcy Code, 2016 while sanctioning a scheme for rehabilitation of a sick company under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 Central Board constituted under the EPF Act was authorised under section 14B of the Act to reduce or waive off the damages levied about an establishment which is a sick industrial company.

32. In the instant case, the Appellant, despite filing a claim of Rs. 1,95,01,301/- has raised a claim of Rs. 2,84,69,797/-,*i.e.* much higher than the amount claimed by the Appellant in its claim before the

Resolution Professional. The Appellant's claim admitted by Respondent No. 1/RP had been considered while formulating the Resolution Plan of the Corporate Debtor. The said Resolution Plan was further approved by the Adjudicating Authority/ NCLT *vide* its Order dated July 20 2020, in conformity with section 30(2) of the I&B Code, 2016 and the Rules and Regulations framed thereunder. The Appellant has not provided any reason or justification for raising the enhanced claim of Rs. 2,84,69,797/-, which is much higher than the amount claimed.

33. Hon'ble the Supreme Court of India in case of *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132 has held:

> "86. As discussed hereinabove, one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon admission of petition under section 7, there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an on-going concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in sub-section (2) of section 30 of the I&B Code. Only thereafter, the Adjudicating Authority can grant its approval to the plan. It is at this stage, that the plan becomes binding on Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.
>
> 87. We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief. We therefore hold, that the 2019 amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

Conclusion

95. In the result, we answer the questions framed by us as under:

(*i*) That once a resolution plan is duly approved by the Adjudicating Authority under sub-section (1) of section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(*ii*) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;

(*iii*) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under section 31 could be continued."

(*Emphasis Supplied*)

34. Based on the above the law laid down by Hon'ble Supreme Court, it is clear that after approval of the Resolution Plan under section 31, the claims as provided in the Resolution Plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors including the Central Government, any State Government or any Local Authority, Guarantors and other Stakeholders. On the approval of the Resolution Plan by the Adjudicating Authority, all such claims that are not a part of the Resolution Plan shall stand extinguished. No person will be entitled to initiate continuing any proceedings regarding a claim that is not part of the Resolution Plan. The Appellants claim about Provident Fund dues amounting to Rs. 1,95,01,301/-, which was earlier raised at the time of initiation of CIRP and was later admitted, stood frozen and will be binding on all the Stakeholders, including the Central Government. After approval of the Resolution Plan by the Adjudicating Authority, all such claims that are not part of the Resolution Plan shall stand extinguished. No person is entitled to initiate or continue any proceeding regarding a claim that is not part of the Resolution Plan.

35. In the circumstances as stated above, we believe that the Appeal sans merit and deserve to be dismissed.

ORDER

The Appeal is dismissed - no order as to costs.

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† Arising from out of order in *Vandana Garg*, In re (2020) 123 taxmann.com 89 (NCLT - Chennai) (SB).

Code and Conduct of Insolvency Professionals Confidentiality

1. Introduction

The role of Insolvency Professional under Insolvency and Bankruptcy Code is such that he is entitled to all confidential information relating to the Corporate Debtor. An Insolvency Professional should respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority unless required by law. Confidential information of Corporate Debtor should not be used for the personal advantage of the Insolvency Professional or third parties. The Insolvency Professional should take reasonable steps to ensure that personnel who works with him and individuals from whom advice and assistance are obtained respect the Insolvency Professional's duty of confidentiality.

The principle of confidentiality is not only to keep information confidential, but also to take all reasonable steps to preserve confidentiality. An Insolvency Professional should continue to comply with the principle of confidentiality even after

completion of insolvency resolution process, liquidation or bankruptcy process. An Insolvency Professional is entitled to use prior experience but should not use or disclose any confidential information acquired or received as a result of a professional or business relationship.

2. Statutory Provisions

With reference to Confidentiality, 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 ensure that confidentiality of the information relating to the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law."

Section 29(2) of the Insolvency and Bankruptcy Code, 2016 provides that the resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes:

(*a*) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(*b*) to protect any intellectual property of the corporate debtor it may have access to; and

(*c*) not to share relevant information with third parties unless clauses (*a*) and (*b*) of this sub-section are complied with.

As per Regulation 35(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Insolvency Professional shall provide the fair value and the liquidation value to member of Committee of Creditors in electronic form after the receipt of resolution plans on receiving an undertaking from the members of Committee of Creditors to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements of section 29(2) of the Insolvency and Bankruptcy Code. As per Regulation 35(3) of said regulations the resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value.

As per Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the insolvency professional shall share the information memorandum after receiving an undertaking from a member of the committee to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements of section 29(2) of the Insolvency and Bankruptcy Code.

Further, the Insolvency and Bankruptcy Board of India *vide* its circular dated 23rd February, 2018 provided that Insolvency Professionals are restricted to disclose any information except as provided for in the Code, or rules, regulations or circulars issued thereunder. Unauthorised access to or leakage of such information has the potential to impact the processes under the Code. An Insolvency Professional, whether acting as Interim Resolution Professional, Resolution Professional or Liquidator, except to the extent provided in the Code and rules, regulations or circulars issued thereunder shall keep every information related to confidential; and shall not disclose or provide access to any information to any unauthorised person.

Safeguards To Maintain Confidentiality

- The Insolvency professional should make best endeavours to document all initial assessments, investigations and conclusions, including any conclusion that determines that further investigation or action is not required or feasible, and also any other decision.
- The Insolvency Professional should ensure there are clear guidelines for individuals including key managerial personnel within the company on issues of security and confidentiality, including requiring such key managerial personnel to sign confidentiality agreement.
- Confidentiality should be maintained by the Insolvency Professional when hiring external advisors including registered valuers, lawyers or any other professionals. Confidentiality or non-disclosure agreements may be entered into with such advisors.
- Liquidation, valuation report by the two registered valuers should only be shared with the Committee of Creditors and the contents of the report shall be treated as confidential information. Further, the Insolvency Professional shall maintain confidentiality by ensuring that the two valuers are independent of each other and in no manner discuss with each the valuation report.
- The video-conferencing, etc. provided by the Insolvency Professional for meetings of the Committee of Creditors should be through secured/protected computer systems. The Insolvency Professional shall also ensure that the identification and authorization of persons is checked before they can participate in the meetings of the Committee of Creditors.
- Confidentiality should be maintained in respect of the resolution plan for the restructured company, and in respect of the negotiations conducted to reach there solution plan. Resolution Plan should only be shared with the Committee of Creditors.
- Insolvency Professional should ensure that its servers are protected from unauthorised access by third parties by use of appropriate firewall protection. Server backup procedures should be in place.

- Insolvency Professional should provide training and support to its staff members and ensure that relevant policies are in place for prevention of unauthorised access to confidential information (for instance, strict physical separation of insolvency teams, and confidential and secure data filing).
- Insolvency Professional should minimise unnecessary duplication of confidential documents and secure destruction of unneeded copies.
- Insolvency Professional should maintain a tidy working environment ("clear desk") in order that documents are not viewed by unauthorised persons.

3. Judicial/Regulatory Rulings

Insolvency Professional cannot disclose resolution plan

In the matter of *Rajputana Properties (P.) Ltd.* v. *Ultra Tech Cement Ltd.* (2019) 108 taxmann.com 88 (NCL - AT) held that the Resolution Professional is required to examine whether resolution plan confirm the provisions as mentioned therein but he cannot disclose it to any other person including Resolution Applicant(*s*), who has submitted the resolution plan. The resolution plan submitted by one or other Resolution Applicant being confidential cannot be disclosed to any competitor Resolution Applicant nor any opinion can be taken or objection can be called for from other Resolution Applicants with regard to one or other resolution plan.

Disciplinary Action against Insolvency Professional for breach of Confidentiality

Disciplinary Committee of IBBI *vide* its order dated 27th April, 2020, in *Ashwini Mehra, In re* (2020) 117 taxmann.com 564 observed that an Insolvency Professional shared confidential information *i.e.* Information Memorandum discreetly with one of the resolution applicants in 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. Disciplinary Committee suspended the Insolvency Professional for period of six months.

4. References

Insolvency Code of Ethics, UK

https://www.insolindia.com/uploads_insol/draft_best_practices/files/confidentiality-1012.pdf

FAQs on Voluntary Liquidation under IBC

1. When and how public announcement w.r.t. voluntary liquidation shall be made?

Public Announcement shall be made in FORM A of Schedule 1 of IBBI (Voluntary Liquidation Process) Regulations, 2016 within 5 days from the date of appointment of liquidator. It shall be published in one English and one Regional language newspaper, on the website of Corporate Person and at IBBI Website (public.ann@ibbi.gov.in).

2. What are the conditions to be met for a corporate undergoing voluntary liquidation proceedings?

Voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions:

- a declaration from majority of Directors/Designated Partners to be verified by an Affidavit
- declaration made shall be accompanied by latest two years audited financial statements or for a period since incorporation as the case may be.
- a report of the valuation of the assets of the company, if any prepared by a registered valuer

3. When shall special resolution for Voluntary Liquidation shall be passed?

Within four weeks of making the declaration there shall be a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator.

4. When shall the Board and Registrar of Companies be informed regarding voluntary liquidation proceedings?

The company shall notify the Registrar of Companies and the Board about the resolution to liquidate the company within seven days of such resolution or the subsequent approval by the creditors.

5. Who shall open the Bank Account w.r.t. proceeds of Liquidation?

The liquidator shall open a bank account in the name of the corporate person followed by the words 'in voluntary liquidation', in a scheduled bank, for the receipt of all moneys due to the corporate person.

6. What are the reporting requirements to be made by the Liquidator?

The liquidator shall prepare and submit-

(*a*) Preliminary Report;

(*b*) Annual Status Report;

(*c*) Minutes of consultations with stakeholders; and

(*d*) Final Report.

7. When shall preliminary Report be submitted?

The liquidator shall submit a Preliminary Report to the corporate person within forty five days from the liquidation commencement date, detailing-

(*a*) the capital structure of the corporate person;

(*b*) the estimates of its assets and liabilities as on the liquidation commencement date based on the books of the corporate person.

8. What shall Final Report consist of?

After the completion of liquidation process, liquidator shall prepare the Final Report consisting of:

(*a*) audited accounts of the liquidation, showing receipts and payments pertaining to liquidation since the liquidation commencement date; and

(*b*) a statement demonstrating that the assets and debts of the corporate person have been disposed of and no litigation is pending against it

(*c*) a sale statement in respect of all assets.

9. Within what time period liquidation process should be completed?

The liquidator shall endeavour to complete the liquidation process of the corporate person within twelve months from the liquidation commencement date.

In case the liquidation process continues for more than twelve months, the liquidator shall-

(*a*) hold a meeting of the contributories of the corporate person within fifteen days from the end of the twelve months from the liquidation commencement date, and at

the end every succeeding twelve months till dissolution of the corporate person; and

(*b*) shall present an Annual Status Report(*s*)indicating progress in liquidation including - settlement of list of stakeholders, details of any assets that remains to be sold and realized, distribution made to the stakeholders, distribution of unsold assets made to the stakeholders, developments in any material litigation, by or against the corporate person and filing of, and developments in applications for avoidance of transactions.

10. How shall Liquidator deal with the claims?

Any person, who claims to be a stakeholder, shall prove his claim for debt or dues to him, including interest, if any, as on the liquidation commencement date.The liquidator may call for such other evidence or clarification as he deems fit from a claimant for substantiating the whole or part of its claim.

Where the amount claimed by a claimant is not precise due to any contingency or any other reason, the liquidator shall make the best estimate of the amount of the claim, based on consultation with the claimant and the corporate person and the information available with him.

11. When shall distribution be made of the proceeds received from realization?

The liquidator shall distribute the proceeds from realization within six months from the receipt of the amount to the stakeholders and the liquidation costs shall be deducted before such distribution is made.

12. Where shall amount from unclaimed proceeds of liquidation or undistributed assets be deposited?

A liquidator shall deposit the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in a liquidation process along with any income earned thereon till the date of deposit, into the Corporate Voluntary Liquidation Account before he submits an application for dissolution of the company after all the affairs of the company have been wound up.

13. How long the records regarding liquidation shall be preserved?

The liquidator shall preserve a physical or an electronic copy of the reports, registers and books of account for at least eight years after the dissolution of the corporate person, either with himself or with an information utility.

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Regulatory updates (May 2021)

1. IBBI issued Guidelines for Association for Summer/Winter/Short Term/ Certificate Courses with Academic Institutions/Civil Services Academies/ Judicial Academies, 2021.

(Guidelines are available at: https://ibbi.gov.in//uploads/legalframwork/084be521e2-4d0f9d894191296bdb4b32.pdf)

2. IBBI amended the IBBI (Online Delivery of Educational Course and Continuing Professional Education by IPAs and RVOs) Guidelines, 2020 and extends it till 30th September 2021.

(Guidelines are available at: https://ibbi.gov.in//uploads/legalframwork/af68aec6a9ff864bb2ea1a13ec1ac66f.pdf)

Finance Act 2021 Publications

GST & CUSTOMS

STATUTES

GST Manual with GST Law Guide & Digest of Landmark Rulings (Set of 2 Vols.) | Compilation of amended, updated & annotated GST Acts, Rules, Circulars & Notifications along-with guide to GST laws & Case Laws Digest **[16th Edition | 2021]**

GST Tariff with GST Rate Reckoner (Set of 2 Vols.) | Updated GST Tariff for Goods and Services along-with HSN-wise and SAC-wise Tariff of all the Goods and Services **[15th Edition | 2021]**

GST Law & Practice | Compendium of amended, updated & annotated text of GST Acts along-with 'text of relevant' Rules & Notifications, Circulars, Case Laws and Allied Laws **[2nd Edition | 2021]**

GST Acts with Rules/Forms & Notifications | Compilation of amended, updated & annotated GST Acts, Rules, Forms, Forms' action points & Notifications along-with GST Law Guide **[9th Edition | 2021]**

GST Acts with Rules & Forms | Compilation of amended, updated & annotated GST Acts, Rules & Forms along-with GST Law Guide **[4th Edition | 2021]**

GST Acts (Paperback Pocket Edition) | Compilation of amended, updated & annotated GST Acts along-with GST Law Guide **[5th Edition | 2021]**

Maharashtra GST Act with Rules & Case Laws Digest | Compilation of amended, updated & annotated text of Maharashtra GST Acts, relevant Rules, Forms, Notifications and Circulars, along-with GST Case Laws Digest

COMMENTARIES

GST How to Meet Your Obligations (Set of 2 Vols.) | Commentary on all provisions of GST in a lucid manner along-with judicial pronouncements **[11th Edition | 2021]**

GST Ready Reckoner | A ready referencer for all provisions of GST Law, covering all-important topics of GST along-with relevant Case Laws, Notifications, Circulars, etc. **[16th Edition | 2021]**

GST Practice Manual | Comprehensive guide for understanding the background, concepts, execution, challenges and solutions involved in your day-to-day compliance **[5th Edition | 2021]**

GST Mini Ready Reckoner | Acquire basic working knowledge of GST, starting from the GST process to the procedure & payment of tax and penalties, along-with FAQs, flow charts and diagrams **[2021 Edition]**

GST Made Easy | Simple and lucid presentation of FAQ on GST containing the issues relating to various provisions in GST. The book serves as an introduction to GST from the basics but at the same time covers the various aspects of GST right from the supply to the assessment in GST

Customs Law & Foreign Trade Policy | Covering comprehensive & amended analysis on Customs Law & Foreign Trade Policy along-with relevant Judicial pronouncements, Circulars & Notifications **[23rd Edition | 2021]**

Law Relating to GST | Section-wise detailed commentary on GST Laws **[2020 Edition]**

SUBJECT-SPECIFIC COMMENTARIES

GST Refunds | Step-wise approach incorporating all relevant screenshots of GST Portal to explain the GST refund related process along-with relevant Notifications, Circulars and Case Laws **[7th Edition | 2021]**

GST Search, Seizure & Arrest | Detailed commentary on GST search, seizure, summons and arrest proceedings along-with Case Laws **[2021 Edition]**

GST Works Contract & Real Estate Transactions | Extensive coverage on issues pertaining to projects/transfer of development rights, floor space index, leasing, renting, services to & by Govt. etc. along-with numerical illustrations **[4th Edition | 2021]**

GST Works Contract & Other Construction/EPC Contracts | Comprehensive coverage on GST implications on works contract along-with practical case studies & their implications on various sectors **[7th Edition | 2021]**

GST Audit & Annual Returns | Comprehensive coverage on GST Audit and Annual Returns which is in complete sync with the current features available at GST Common Portal along-with cross-referenced Sections, Rules, Forms & Case Laws **[8th Edition | 2021]**

GST e-Invoicing | A comprehensive guide to e-Invoicing **[2nd Edition | 2020]**

GST Input Tax Credit | Complete guidance on input tax credit, refund of input tax credit & export issues relating to input tax credit **[10th Edition | 2021]**

GST E-Way Bill | Complete & updated insight of all provisions relating to GST E-Way Bill, in a simplified manner **[8th Edition | 2021]**

GST Practitioners Question Bank with Quick Exam Guide | Do-it-yourself guide for aspiring GST Practitioners, where legal provisions are provided in a concise & precise manner along-with bulleted explanations, section-wise key points, 5,500+ MCQs with reasoning **[4th Edition | 2020]**

GST Investigations, Demands, Adjudication and Appeals | Commentary-cum-guide on investigation, search, seizure, show cause notices, adjudication, appeals, prosecution and recovery under GST with insights into relevant jurisprudence

CASE LAWS

GST Case Laws Digest | Section-wise Case Book of 1900+ Judgments of Supreme Court, High Courts, AAAR, AAR & NAA **[3rd Edition | 2021]**

Australia: Changes in Insolvency as a response to COVID-19

There are separate insolvency regimes in Australia for individual insolvencies and corporate insolvencies. There is the Corporations Act 2001 for corporates and the Bankruptcy Act 1966 for individuals. The key test for insolvency in Australia is the cash flow test rather than the balance sheet test.

As per Corporations Act 2001, "Insolvency is when a company or person can't pay debts when they are due." Under the Act, an external administrator is appointed to handle insolvencies. This is similar to an Insolvency Professional in India.

There are several options available to an insolvent company or person:

- the most common corporate insolvency procedures for an insolvent company are liquidation, voluntary administration and receivership
- the available personal insolvency procedures for an insolvent person are bankruptcy and personal insolvency agreements.

The Coronavirus Economic Response Package Omnibus Act 2020 (Response Act)[1]

The Australian government took swift action to enact new legislation that significantly changes the insolvency laws relevant to all business as a result of the ongoing developments related to COVID-19.

The Coronavirus Economic Response Package Omnibus Act 2020 (Response Act) became effective on March 25, 2020 and was seen as an effort to provide temporary relief to companies experiencing financial distress as a result of the ongoing and rapidly changing economic slowdown caused by COVID-19. The amendments of the Response Act were temporary and were applicable for six months, until September 23, 2020. However, subject to economic and health developments, the provisions may be expanded in both their application and scope.

Some salient features of this Response Act are as follows:

- The most significant temporary relief relates to directors' duties to prevent insolvent trading. The Response Act adds a new section to the Corporations Act 2001, providing directors with a new safe harbor during the six-month period, which protects them from incurring personal liability for insolvent trading for debts incurred in the ordinary course of their businesses. The new relief measures protect directors from personal liability, provided that the transactions that the company enters into (*i*) are in the ordinary course of business after the enactment of the Response Act, and (*ii*) occur prior to the engagement or appointment of any external administrator.
- Creditors with undisputed debt of a minimum dollar threshold (originally of AU$2,000; now, temporarily, AU$20,000) may issue a formal demand for payment of their debt. If the company fails to pay the debt by the deadline (originally 21 days; now, temporarily, of six months), the company will be deemed insolvent.
- The minimum dollar threshold to issue a creditors' statutory demand is raised from AU$2,000 to AU$20,000.
- The deadline for a company to respond to a creditors' statutory demand is increased from 21 days to six months.
- The minimum dollar threshold for a creditor to initiate bankruptcy proceedings against a debtor is raised from AU$5,000 to AU$20,000.
- The deadline for a company to respond to a creditors' initiation of the bankruptcy proceedings is extended from 21 days to six months.
- A declaration of intention provides the company with a period of time (originally 21 days; now, temporarily, six months), during which the debtor can decide whether it wants to declare bankruptcy. During this time, unsecured creditors cannot take action against the debtor. The protection under the declaration of intention is extended from 21 days to six months.
- The amendments implemented by the Response Act recognise that,

if companies are to survive the challenges posed by the virus and its associated economic slowdown, directors will need to address the financial challenges of their businesses in new and potentially expanded ways, including obtaining new debt, seeking credit, raising equity and moving business operations away from traditional headquarters while retaining and enabling a more mobile workforce.

- The relief under the new measures will only be afforded to new debts incurred in the "*ordinary course of business*". Accordingly, much will depend on the scope and application of that term to different types of businesses. The explanatory memorandum to the Response Act provides that: "A director is taken to incur a debt in the ordinary course of business if it is necessary to facilitate the continuation of the business during the six month period that begins on commencement of the sub-paragraph. This could include, for example, a director taking out a loan to move some business operations online. It could also include debts incurred through continuing to pay employees during the coronavirus pandemic."

- Directors noted that none of the relief measures were intended to, or permit, the delay of debts payments during the relief period. Accordingly, where debts cannot be paid as and when they become due, directors should seek appropriate advice and otherwise engage with their stakeholders and in particular, their priority creditors under the Corporations Act, 2001.

- Traditional safe harbor protections under the Corporations Act are predicated on companies' compliance with statutory lodgement and reporting obligations to appropriate authorities, including, but not limited to, the Australian Taxation Office. These prerequisites have not been extended to the new safe harbor protections under the Response Act.

The Corporations Amendment (Corporation Insolvency Reforms) Act 2020[2]

It represents the most significant reform to Australia's corporate insolvency regime in almost 30 years, and is the latest in a series of measures introduced in response to the economic impact of the pandemic. The main objective of the Legislation is to help small and medium enterprises (SMEs) in Australia overcome the economic, financial and operational challenges caused by the pandemic. The reforms also recognise that, for a variety of reasons, the current insolvency processes in Australia have become compromised or impractical in the SME space.[3]

The Legislation[4] centres on the introduction of two new restructuring and insolvency processes for SMEs, and consist of:

1. a simplified debtor-in-possession restructuring process
2. a simplified liquidation pathway
3. additional "complementary measures" aimed at increasing the

number of insolvency practitioners available to regulate the new processes

The reforms include a new[5]:

- debt-restructuring process for incorporated small businesses
- simplified liquidation process for incorporated small businesses
- `class' of registered liquidator
- There is also an ability to extend the temporary relief.

The new restructuring process draws on some debtor-in-possession aspects of Chapter 11 of the US Bankruptcy Code and introduces a new process for eligible businesses to work with specialist restructuring practitioners to restructure existing liabilities under a restructuring plan approved by creditors.

The Legislation, which establishes the framework for the insolvency reforms, has been available for eligible small businesses since 1 January 2021. The details governing the operation of the new simplified processes have been included in subordinate legislation. The regulations to the Legislation were released on 21 December 2020 and the rules were released on 22 December 2020.

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1. https://www.squirepattonboggs.com/-/media/files/insights/publications/2020/04/global-impact-of-covid19-on-insolvency-laws/global-impact-of-covid19-on-insolvency-laws.pdf
2. https://www.nortonrosefulbright.com/en/knowledge/publications/cd46e9a1/insolvency-law-reform-in-australia
3. https://asic.gov.au/regulatory-resources/insolvency/
4. https://www.legislation.gov.au/Details/C2020A00130#:~:text=Corporations%20Amendment%20(Corporate%20Insolvency%20Reforms)%20Act%202020,-%2D%20C2020A00130&text=This%20Act%20is%20the%20Corporations,Corporate%20Insolvency%20Reforms)%20Act%202020.&text=(b)%20to%20enter%20into%20a%20restructuring%20plan%20with%20creditors.&text=(ii)%20a%20restructuring%20practitioner%20for%20the%20company%20should%20be%20appointed.
5. https://asic.gov.au/regulatory-resources/insolvency/

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