RESOLVE™

INSOLVENCY AND BANKRUPTCY JOURNAL

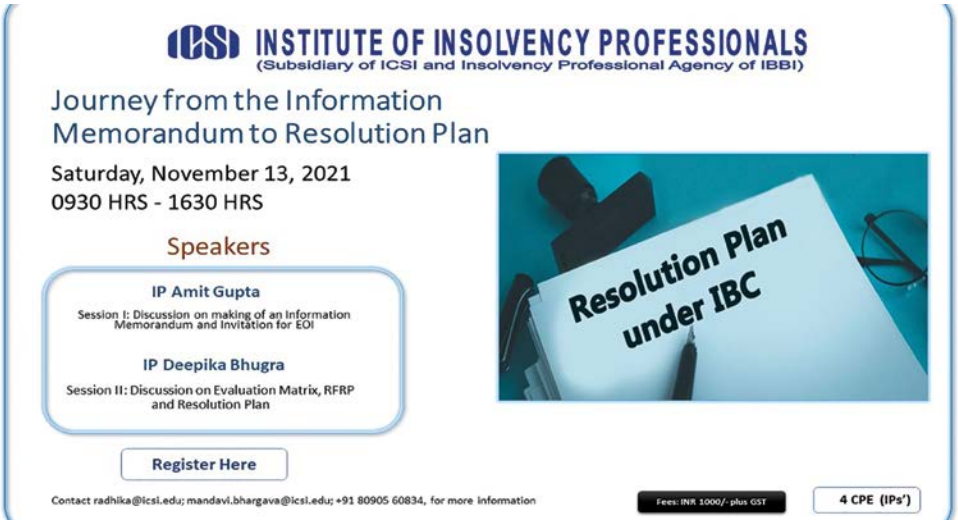
NO. 11 | PG. 1-100 | NOVEMBER 2021 | ₹ 500 (SINGLE COPY)

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

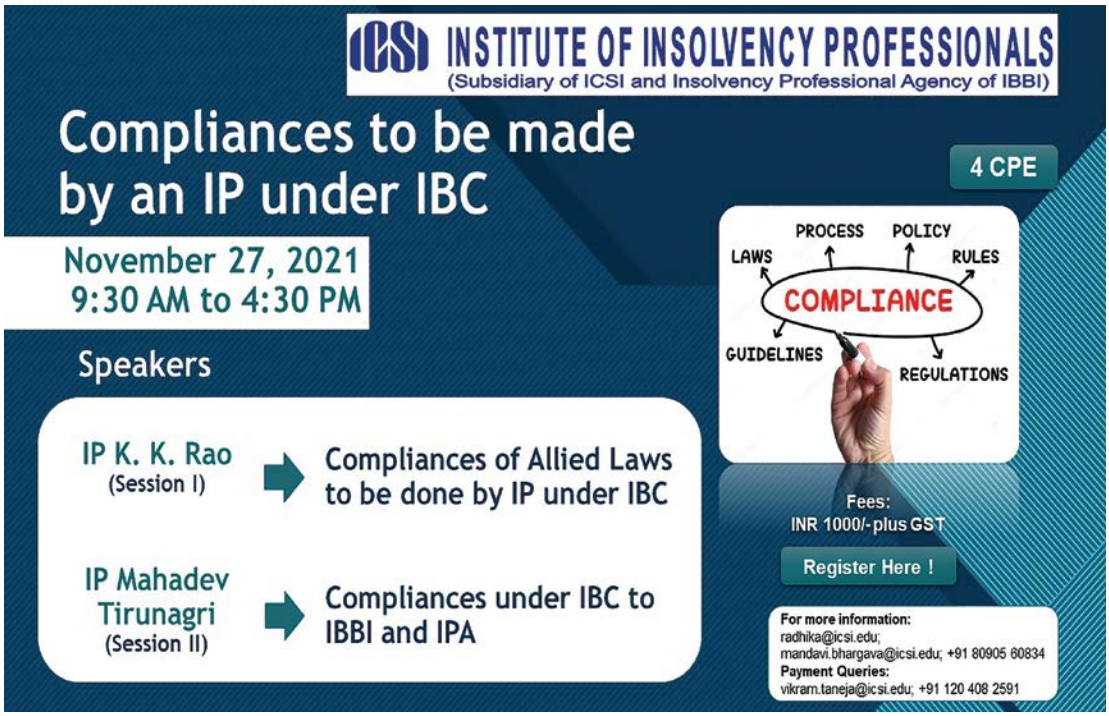
NEWS FROM THE INSTITUTE

- **Workshop on 'Journey from the Information Memorandum to Resolution Plan' on 13th November, 2021**



- **Workshop on 'An Insight into Individual Insolvency & Pre-Packaged Insolvency Resolution' on 20th November, 2021**

◆ Workshop on 'Compliances to be made by an IP under IBC' on 27th November, 2021



◆ LIT UP- Preparation Course for Limited Insolvency Examination

Pursuant to Regulation 5 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, an individual is eligible for registration as an Insolvency Professional only after passing Limited Insolvency Examination conducted by IBBI.

ICSI IIP organized three days intensive training program for preparation of Limited Insolvency Examination from 12th November, 2021 to 14th November, 2021.

◆ 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 17th November, 2021 to 23rd November, 2021.

BOARD OF DIRECTORS
CHAIRMAN
Mr. Prem Kumar Malhotra
INDEPENDENT DIRECTORS
Mr. Ashish Kumar Chauhan
Mr. Gopal Krishan Agarwal
OTHER DIRECTORS
CS Ashish Garg
CS Nagendra D. Rao
CS Devendra Vasant Deshpande
Dr. Binoy J. Kattadiyil
EDITOR & PUBLISHER
Dr. Binoy J. Kattadiyil
SUB-EDITOR
Mr. Nitin Satija

'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

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

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

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

At a Glance

No. 11 | Pg. 1-100 | November 2021

Section 60 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Whether NCLT can exercise its residuary jurisdiction under section 60(5)(c) to adjudicate contractual disputes between parties provided such dispute had arisen in relation to insolvency of corporate debtor - Held, yes - Appellant and corporate debtor had entered into a Build-Phase Agreement followed by a Facilities Agreement which obligated corporate debtor to provide premises with certain specifications and facilities to appellant for conducting examinations for educational institutions - clause 11(b) of Facilities Agreement stated that either party could terminate agreement immediately by written notice to other party, provided that a material breach committed by latter was not cured within thirty days of receipt of notice - Before initiation of CIRP, appellant had on multiple instances communicated to corporate debtor that there were deficiencies in its services and corporate debtor was put on notice that penalty and termination clauses of Facilities Agreement may be invoked - There was nothing on

record to indicate that termination of Facilities Agreement was motivated by insolvency of corporate debtor - Appellant had issued notice of termination in terms of clause 11(b) of Facilities Agreement - Whether therefore, NCLT did not have any residuary jurisdiction to entertain present contractual dispute which had arisen de hors insolvency of corporate debtor and, thus, in absence of jurisdiction over dispute, NCLT could not have imposed an ad-interim stay on termination notice - Held, yes - Whether NCLAT had incorrectly upheld interim order of NCLT - Held, yes (Paras 25, 26, 27 and 31)

- **Dewan Housing Finance Corporation Ltd. v. Union of India**
  (2021) 133 taxmann.com 338 (Bombay) • P-419

Section 32A of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Liability for prior offence - Corporate debtor DHFL was a co-accused, along with its erstwhile directors and promoters, in certain criminal proceedings - Concurrently, CIRP proceedings were going on against DHFL before NCLT and resolution plan submitted by PCFHL was approved by NCLT - DHFL made an application before CBI Special Court seeking its discharge from criminal proceedings which were on alleged acts committed by DHFL prior to initiation of CIRP which was rejected - On writ petition, DHFL argued that since it had been taken over by PCFHL, it should be absolved from all earlier liabilities - It was found that resolution plan had been approved by NCLT and such a resolution plan had resulted in change in management of DHFL in favour of persons who were not related to erstwhile management of DHFL - Further, merely because appeals before NCLAT were filed with a specific prayer to grant stay of resolution plan, it could not be said that application under section 32A was premature and not maintainable as NCLAT by reasoned order, declined to stay NCLT order - Whether therefore, immunities under section 32A could not have been denied and thus, all criminal proceedings against DHFL were to be discharged - Held, yes (Paras 19, 20 and 25)

- **Rajmee Power Construction Ltd. v. Jharkhand Urja Sancharan Nigam Ltd.**
  (2021) 133 taxmann.com 340 (NCLAT-New Delhi) • P-432

Section 238A, read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Limitation period - Arbitral award was first passed on 14-2-2008 in favour of appellant and against corporate debtor - Implementation was conveyed to appellant *vide* letter dated 30-4-2008 - Corporate debtor took board decision on 29-1-2016 to recover money paid to appellant but that decision was never communicated to appellant - An amount was deducted from payment made to appellant on 31-3-2016 - Appellant preferred an RTI application on 2-8-2016 seeking reasons for less payment, which was received by appellant on 6-8-2016 - Challenge to arbitral award was dismissed on 6-10-2018 - On 6-8-2016 after receipt of information under RTI, appellant got knowledge of recovery for very first time and filed application under section 9 on 4-6-2019 - Whether payment made by corporate debtor to appellant after deducting an amount on 31-3-2016 extended `date of default' - Held, yes - Whether since challenge to arbitral award dated 14-2-2008 was dismissed on 6-10-2018 and part payment was made on 31-3-2016, application filed under section 9 on 4-6-2019 was not barred by limitation - Held, yes (Paras 10, 11 and 12)

- **L. Ramalakshmamma v. State Bank of India**
  (2021) 133 taxmann.com 342 (NCLAT - Chennai) • P-436

Section 97 of the Insolvency and Bankruptcy Code, 2016, read with rule 8 of the Insolvency and Bankruptcy (Application to `Adjudicating Authority' for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 - Individual/firm's insolvency resolution process - Resolution professional, appointment of - `Adjudicating Authority' had passed `Impugned Orders' whereby and whereunder he had appointed an `Interim Resolution Profes-

sional' - Appellants submitted that 'Impugned Orders' were cryptic, unreasoned, non est and non-speaking orders which were passed in violation of ingredients of IBC as 'Adjudicating Authority' by 'Impugned Orders' had appointed 'IRP' without adhering to mandatory section 97 - However, on going through word 'shall' employed in section 97(1), it is viewed that it is only 'Directory' and not 'Mandatory' and NCLT may pick up any one for appointment of 'IRP' - Moreover, if viewed from object and purpose to be achieved by 'IBC', word 'employed' in section 97(1) can only be construed as 'directory' and not a mandatory one, that too by adopting a purposeful, meaningful, practical, pragmatic and result oriented approach, with a view to prevent an aberration of justice and to secure ends of justice - Whether therefore, provisions of section 97(1) and 97(2) of 'IBC' whereby 'Adjudicating Authority' is required to obtain confirmation of Board prior to appointment of 'Resolution Professional' being only directory in nature and not mandatory and/Adjudicating Authority' having exercised its judicial discretion in fair manner for appointment of an 'IRP', same could not be found fault with - Held, yes (Paras 29, 33 and 34)

- **Drip Capital Inc. v. Concord Creations (India) (P.) Ltd.**
  (2021) 133 taxmann.com 344 (NCLAT - Chennai) • P-440

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Whether initiation of CIRP does not amount to recovery proceedings and 'Adjudicating Authority' at time of determination as to whether to admit or reject an application under section 7 is not to take into account reasons for corporate debtor's default - Held, yes - Appellant-financial creditor had granted an export finance facility to respondent-corporate debtor, which corporate debtor had failed to repay - Corporate debtor failed to reply to demand notice sent by financial creditor - Financial creditor filed application under section 7 for initiation of corporate insolvency resolution process against corporate debtor - Adjudicating Authority by impugned order rejected said application observing that respondent was not an 'insolvent company' and that respondent should be given some more time to repay debt - Whether corporate debtor was in default of its admitted liability to pay as per terms of 'Receivables Purchase Agreement' - Held, yes - Whether Adjudicating Authority had exceeded its jurisdiction by taking defence of corporate debtor, especially in absence of any reply or objection projected by corporate debtor - Held, yes - Whether since order of Adjudicating Authority suffered from patent legal infirmities, impugned order was to be set aside and Adjudicating Authority was to be directed to admit application filed under section 7 - Held, yes (Paras 14, 27 and 29)

- **Shailendra Singh v. Nisha Malpani (Resolution Professional)**
  (2021) 133 taxmann.com 346 (NCLAT-New Delhi) • P-445

Section 5(1) of the Insolvency and Bankruptcy Code, 2016, read with sections 425 and 408 of Companies Act, 2013 - Corporate Insolvency Resolution Process - Adjudicating authority - Whether ingredients of section 425 of Companies Act, 2013 do not mention that provisions of power under Contempt of Courts Act, 1971 are applicable only in respect of proceedings before 'Tribunal' confined in respect of provisions of Companies Act, 2013 - Held, yes - Whether under I&B Code, 2016, Adjudicating Authority (NCLT) adjudicates all proceedings before it and renders its decision, just because I&B Code does not specifically mention about contempt provisions, it cannot be said that 'Adjudicating Authority' has no powers of contempt - Held, yes - Whether 'Contempt proceedings' can be exercised by 'National Company Law Tribunal', being 'Adjudicating Authority' as per section 5(1) - Held, yes - Whether a conjoined reading of sections 408 and 425 of Companies Act, 2013 will unerringly point out that power to punish for 'Contempt' is vested with 'Tribunal' shall be while adjudicating on matter not only

confined to Companies Act, 2013 but also to matters relating to I&B Code, 2016 - Held, yes (Paras 39, 40 and 41)

- **Central Board of Indirect Taxes and Customs v. Sundaresh Bhatt**
  (2021) 133 taxmann.com 347 (NCLAT-New Delhi) • P-451

Section 238, read with sections 53 and 60, of the Insolvency and Bankruptcy Code, 2016 - Overriding effect of Code - Tribunal ordered for liquidation of corporate debtor company and appellant was appointed as liquidator - Appellant sought release of material/goods of corporate debtor lying at customs bonded warehouse - However, Customs officials refused to release material without payment of customs duty - Appellant submitted that payment of Custom Authority in priority to other debts would be contrary to mechanism provided under section 53 and obtaining a release of material was imperative for discharge of his duty, hence it be allowed to release materials from Custom Bonded warehouse without payment of customs duty at this stage - Accordingly, Adjudicating Authority issued directions to appellant to allow removal of materials lying in Customs Bonded Warehouses without payment of Customs Duty under section 60(5) - However, it was found that goods imported for home consumption could not have been removed from custody of customs without payment of import duty and corporate debtor had abandoned imported goods in customs warehouses for several years and failed to pay import duty and other charges and had not taken any steps to take possession of those goods for several years - Whether therefore, assets lying in customs bonded warehouses could not be considered assets of corporate debtor as corporate debtor itself had relinquished its claim and abandoned goods and thus, liquidator would also have no power to take possession of goods except by payment of customs duty - Held, yes - Whether even before initiating CIRP, corporate debtor could not have secured possession of goods except by paying customs duty - Held, yes - Whether therefore, it was to be held that Adjudicating Authority committed an error in directing release of goods without paying customs duty and other applicable charges - Held, yes (Paras 7.14, 7.16, 7.23 and 7.24)

- **Committee of Creditors of Educomp Solutions Ltd. v. Mahender Kumar Khandelwal**
  (2021) 133 taxmann.com 349 (NCLAT-New Delhi) • P-459

Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Adjudicating Authority dismissed application filed by Resolution Professional under section 30(6), seeking approval of Resolution Plan filed by Resolution Applicant ESPL, as infructuous, on ground that application filed by Resolution Applicant seeking withdrawal of Resolution Plan had been allowed - Committee of creditors/appellants challenged withdrawal order which was allowed and withdrawal order passed by Adjudicating Authority was set aside - Appellant contended that order impugned in present case which rendered Plan Approval Application as infructuous, had been passed only on basis of withdrawal order, which had already been set aside, hence, as main order had already been set aside, present Appeal ought to be allowed with direction to Adjudicating Authority to dispose of Plan Approval Application on merits - Whether a submitted Resolution Plan is binding and irrevocable as between CoC and Successful Resolution Applicant in terms of provisions of IBC and CIRP Regulations - Held, yes - Whether therefore, impugned order was to be set aside and Adjudicating Authority shall proceed in accordance with law and decide application under section 30(6) as expeditiously as practicable and resolution applicant shall be bound by Plan - Held, yes (Paras 8 and 9)

- **Hemanshu Jamnadas Domadia Shareholder & Director of Silver Proteins (P.) Ltd. v. Central Bank of India**
  (2021) 133 taxmann.com 351 (NCLAT-New Delhi) • P-461

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 19 of the Limitation Act, 1963 - Corporate insolvency resolution process - Limitation period - Corporate Debtor had availed credit facilities from financial creditor-bank - However, corporate debtor had defaulted to repay loan amount and its account was classified as Non-Performing Asset (NPA) on 1-7-2015 - Financial creditor filed an application under section 7 on 22-10-2018 - Adjudicating Authority by impugned order admitted said application - Corporate debtor claimed that application was time barred as application was filed after prescribed limitation period of three years - Whether since an amount was credited to corporate debtor's account on 31-12-2015 and balance sheet proved that on 31-3-2016 there was a term loan of financial creditor-bank, there was a clear acknowledgement that an amount was due and payable to financial creditor and, therefore, Adjudicating Authority rightly admitted application filed under section 7 - Held, yes (Paras 5.11 and 5.12)

Section 5(7), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial creditor - Whether where principal officer of financial creditor-bank had been given authorization through General Power of Attorney to grant loan, execute documents for and on behalf of bank, recover loans, if necessary and further, entitled to initiate proceedings under Insolvency and Bankruptcy Code, application filed under section 7 by said officer on behalf of financial creditor was maintainable - Held, yes (Paras 4.2 and 4.3)

- **Committee of Creditors of Meenakshi Energy Ltd. v. Consortium of Prudent ARC Limited & Vizag Minerals and Logistics (P.) Ltd.**
  (2021) 133 taxmann.com 353 (NCLAT - Chennai) • P-463

Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Corporate Insolvency Resolution Process (CIRP) was initiated against corporate debtor and Resolution Professional (RP) was appointed - In CoC meeting, resolution plan furnished by respondent/resolution applicant was presented and lengthly discussed - Since, CIRP period was about to expire, RP sought extension of CIRP period for 90 days which was allowed - Subsequently, said extend period was also expired - RP filed an application before Adjudicating Authority to further extend period of CIRP - No extension of CIRP period was granted by Adjudicating Authority, although an application was pending determination before Adjudicating Authority - Meanwhile, Committee of Creditors had received/considered an resolution plan after expiry of CIRP period - Whether on facts, order of Adjudicating Authority whereby it directed Committee of Creditors and RP to only consider resolution plan received before expiry of CIRP period and forego resolution plans received subsequently was to be upheld - Held, yes (Para 117)

taxmann.com

Research

INCOME-TAX

CONTENT & TECHNOLOGY TO SUPERCHARGE YOUR PRACTICE IN ONE OR TWO CLICKS

Making your Research Holistic & All-Encompassing

Case Laws with Headnotes/Case Digest — INTERLINKED

COHESIVE — Always Amended Statutes

Commentaries & Articles — INTEGRATED

CASE LAWS

90,000+ Case Laws on Income Tax with Headnotes/Case Digest

15+ Filters to find the right Case Law

STATUTORY CONTENTS

20+ Acts | **120+** Rules | **300+** Forms

15,000+ Circulars & Notifications

COMMENTARIES & ARTICLES

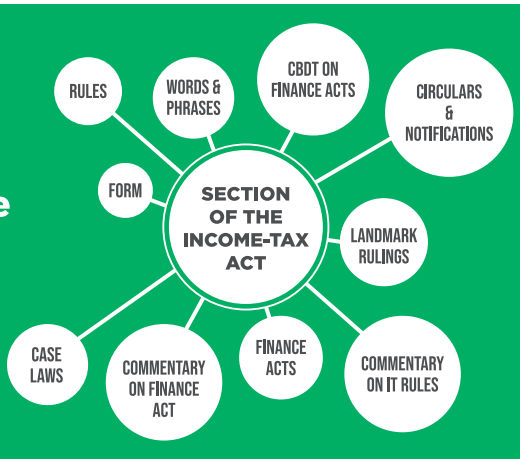
15+ Topical Commentaries | **9,000+** Articles

SCAN & SUBSCRIBE NOW

ALL ABOUT™ INCOME-TAX ACT

Taxmann's Trademarked Feature

Simplifying How You Work!



Follow us

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

From Chairman's Desk

Dear Professional Members,

We are now fast approaching the end of calendar year 2021, and as a stakeholder in the IBC process, we have already completed our brief journey of 5 years into this new legal regime. The 5 years have served us well in terms of the progress that has come and the road ahead that we see for us to tread.

Let me try to take you through some glimpses of this journey as well. In the year 2014, when the Ministry of Finance, Government of India had constituted the Bankruptcy Law Reform Committee (BLRC), the objective was to find a firm and long standing solution to the twin balance sheet problem in India. The BLRC had submitted its report in the year 2015, finding the then prevailing legal framework as *highly fragmented and incoherent,* as also marred by legislative and judicial uncertainty. Accordingly, recommendations were made for an overhaul of the insolvency law, and for constitution of a dedicated regulatory and institutional framework. The IBC thus got enacted with the objective of providing a time-bound insolvency resolution process and to help in value maximisation of the assets. The best evidence of IBC's success has been the improvement that India has seen in its ranking in the World Bank's Index on Ease of doing business, where India now stands at 63 (as against 130 in 2016), and its score in

resolving insolvency has moved from 32.6 to 62.0. However, the 5 years journey has not been a very smooth one. There have been several roadblocks which we have already successfully crossed over. However, there are new challenges that are emerging in the way and so a complimentary job needs to be carried out by the stakeholders to ensure that we do not fail in our attempts in realising our goal. The huge percentage of haircuts taken by the lenders and prolonged CIRP periods (in some cases) have made many to question whether IBC has been able to deliver on its promises. As for the huge percentage of haircuts, we all understand that the haircuts would invariably depend upon the quality of asset that is available for sale to the Resolution Applicant. Furthermore, it cannot be doubted or denied that the more time we allow a firm to remain in a state of insolvency (without resolution) , the more there is depletion of the value of its assets and accordingly, lesser shall be the realisable value. The other thing that needs to be kept in mind is that the IBC was never intended to be a tool for recovery. In fact, Hon'ble SC itself in Swiss Ribbons case highlighted the fact that IBC being a beneficial legislation endeavours to put the corporate debtor back on its feet. The other issue of non-completion of IBC proceedings within the given time-frame is another factor which is leading to value destruction of insolvent entities. The Apex Court has time and again underlined the fact that there is a necessity to allow an economic policy to work itself out and that an economic legislation is based on a `trial and error' method which means the government has the mandate and responsibility to stay experimentation in things economic, and in no case can this right be denied to the Government.

The jurisprudential growth journey of IBC in these five years has seen many landmark judgments of Hon'ble Supreme Court which have truly helped in settling a host of contentious issues. These issues include the question of commercial wisdom of CoC (*Essar Steel* case), right to proceed against personal guarantors to Corporate Debtors (*Lalit Kumar Jain* case), payment to dissenting financial creditors (*Jaypee Infratech* case) etc. We thus have available with us a robust skeletal foundation of the law which is helping us to work out further reforms at a faster pace now, including complex issues pertaining to the subject of *personal insolvency, cross-border insolvency, group insolvency et al.*

Currently, as we see, the market for stressed assets is also undergoing a major change. Efforts are on by the government, the RBI and the SEBI to introduce a series of reforms as a part of a strategy to address the NPA crisis in India. The institution of a new *bad bank* is being worked on which shall be complemented by structural reforms for facilitation of a vibrant market in stressed assets. In the month of September itself, the cabinet has approved the proposal of setting up of a National Asset Reconstruction Company Ltd. (NARCL) which shall takeover nearly ₹ 2 lakh crore worth of NPAs from the banking sector. Further, the RBI has also liberalised its norms on transfer of stressed loans. Also, the Banks, NBFCs, and All India Financial Institutions have been permitted to use resolution process under RBI's June 7, 2019 Circular to allow them to sell their stressed loans on cash basis directly to a new set of players including corporates as well as financial sector entities permitted to take on such loan exposures by their respective regulators. Besides these efforts, there are also plans for creation of a new sub-category of Alternative Investment Funds (AIFs) which shall invest in distressed loans from the banks and NBFCs. If we analyse it from the right perspective, all these reforms are not some ordinary usual reforms; rather, these are well-intended, structured and a well-thought out reform which are indeed in the right direction. These should help in unlocking the capital of banks and financial institutions, shall enable them to extend fresh loans to boost the post-pandemic economic recovery. Therefore, as a nation, we are on the right track and are moving towards reforming the Indian stressed assets market. These recent structural reforms and the anticipated reforms in the ARC sector together are very likely to make our stressed assets market an attractive option for all potential investors (including offshore investors). These changes shall also provide the banks and financial institutions an option to exit out of their stressed assets and focus more on sectors which require fresh lending.

I am happy to learn that your efforts and enthusiasm, looking to make this legislation work as a huge success, are now displaying themselves in very evident manner. I look forward to meet you all very soon!

Please keep yourself and your loved ones safe and secure!

●●●

taxmann.com
Research

GST
CONTENT & TECHNOLOGY TO SUPERCHARGE YOUR PRACTICE IN ONE OR TWO CLICKS

Making your Research Holistic & All-Encompassing

Case Laws with Headnotes/Case Digest
INTERLINKED
COHESIVE
Always Amended Statutes
Commentaries & Articles
INTEGRATED

CASE LAWS
68,000+ Case Laws on GST & other Indirect-tax Laws with Headnotes/Case Digests
15+ Filters to find the right Case Law

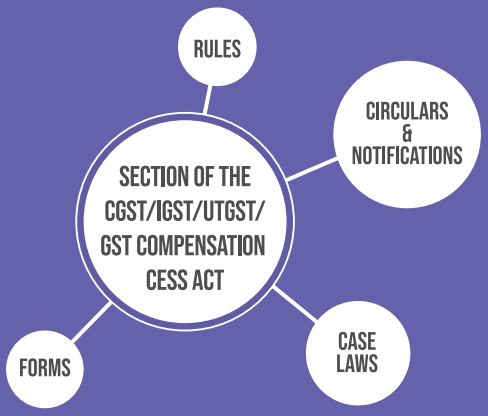
STATUTORY CONTENTS
35+ Acts | 40+ Rules
6,000+ Circulars | 16,000+ Notifications

COMMENTARIES & ARTICLES
10+ Topical Commentaries | 3,000+ Articles

SCAN & SUBSCRIBE NOW

ALL ABOUT™ CGST/IGST/UTGST/ GST COMPENSATION CESS
Taxmann's Trademarked Feature
Simplifying How You Work!

Follow us



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

Managing Director's Message

It is no use saying "we are doing our best". You have to succeed in doing what is necessary

...Winston Churchill

We all know that bringing discipline in life is very necessary. But what constitutes 'discipline' is often missed by most of us. Discipline would indicate actions that are needed to be taken keeping in view the prevailing circumstances. It can thus be characterized by presence of a sense to do exactly what is needed, and not any compulsive actions/reactions. In the context of IBC, I believe, discipline would definitely indicate complementary actions by all the stakeholders keeping in view what the circumstances are and what we wish to achieve through our actions. We have come this far in this small journey of 5 years only on account of courageous efforts put in by the Legislature, the Government, the Chief Regulator and the Professional Members. This journey has been extremely rewarding and is bound to be more encouraging as we go ahead.

With universal acknowledgement and acceptance of the fact that the insolvency resolution process (including liquidation process) under the IBC, which has contributed in a big way in providing an optimum and time-efficient solution to the problems associated with an ever-swelling (and unresolved) NPA problem (including corporate failure) that was there in the Pre-IBC legal regime, we now see a very firm and well-balanced IBC legal structure (including its edifice) playing itself out as a model worth emulation by other jurisdictions. In this month, we saw a clarification being published by the IBBI concerning the requirement of obtaining a No-objection Certificate (or No-Dues Certificate) by the liquidator from the Income-tax Department. We all are aware that the Income-tax dues fall under the category of 'Operation Debt', and thus, all claims related to such dues are required to be filed with the liquidator itself within the time-window made available. In such circumstances, since the process of applying and obtaining an NoC or NDC (as aforementioned) from the Income-tax Department by the liquidators (which process generally takes a lot of time) was standing in the way of achieving the solemn objective of a time-bound completion of the process under the IBC, this clarification (*supra*) is bound to throw a lot of clarity on the process to be followed by the liquidators. Speed being the essence of insolvency resolution process (under the IBC) definitely needs to be respected by all the stakeholders, and the said clarification is definitely an endorsement of that fact.

In the past few months, we also saw a series of awareness programme(*s*) being conducted by IBBI for the Income-tax Departments. Several sessions were held to bring-in an awareness amongst the Department officers concerning rights of Government authorities and their implications of approved resolution plans under the IBC. It is no secret that both the legislations, *i.e.* Income-tax Act and IBC, have played their own respective crucial role concerning State functions, and therefore, the need to understand their respective area of operation is something which can neither be ignored nor be undermined. The programmes were conducted in a very efficient manner and included a threadbare deliberation on different provisions of IBC, such as moratorium, claim filing, interface between IBC and Income-tax Act, Resolution plan etc. In the given context, the rights, roles and responsibilities of Income-tax officers and the case law developed on the subjects like extinguishment of claims in event

of its delayed submission/non-submission during the resolution process, clean slate principle etc. were also deliberated upon.

In this month, we also saw the Working Committee's report concerning the subject of `*outcomes under the Code*'. The report, while underlining and endorsing efficient working of the Code, and significant role played by stakeholders (especially, IBBI in implementation of the Code and making extensive Data available *vis-a-vis* outcomes of the processes, took cognizance of the fact that cross-validation of data (sourced from multiple data banks) is a challenge in making credible assessments. A national dashboard for access to real-time insolvency data concerning performance of processes under IBC has accordingly been suggested. The Panel has recommended to track outcomes of IBC by way of identified quantitative as well as qualitative parameters, for which setting-up an institutional arrangement has been recommended. The identified parameters shall be a reflection on six foundational objectives of the Code, *i.e.*, resolution of stress, maximisation of value of assets, promoting entrepreneurship, enhancing availability of credit, balancing of interests of all stakeholders and establishing an ecosystem to serve as a framework for tracking outcomes. The Working Group, which consists of extremely eminent personalities, has thus emphasized for: (*a*) Constitution of a National Dashboard to provide Insolvency Data; (*b*) Provision of data on time, cost and recovery rates for a reliable evaluation of insolvency process *vis-a-vis* `Effectiveness' and `Efficiency' parameters; (*c*) Availability of Data concerning macro-economic indicating the objectives of IBC such as `promoting entrepreneurship' or `enhancing credit availability'; (*d*) measurement of non-quantifiable objectives of IBC such as `promoting entrepreneurship' or `enhancing credit availability'.

As an IPA, we have been taking many steps to keep working in the direction of achieving the solemn objective(*s*) which have been bestowed on us, and which have been the guide for us, however, what we definitely need on a regular basis is a constructive feedback from our professional members so that the journey becomes as delightful as the destination.

I am waiting to meet all of you in person very soon. Till then, please take good care of you and your family!

taxmann.com

2022 SUBSCRIPTION

TAXMANN.COM RESEARCH

INDIVIDUAL PLANS »

Get Taxmann's Premium News & Updates worth ₹3,500/- on a Complimentary Basis when you subscribe to Taxmann.com | Researchat

TAXMANN.COM RESEARCH

COMBO PLANS »

Introducing

0% NO COST EMI

AVAILABLE ONLY WHEN YOU SUBSCRIBE ONLINE

TAXMANN.COM RESEARCH

SPECIALIST PLANS »

SUBSCRIBE NOW

TAXMANN.COM RESEARCH

OFFLINE PLATFORM »

* GST @18% Extra

Module Name	Price in ₹*
☐ Income Tax	16,500
☐ Goods and Services Tax (GST)	12,100
☐ Company & SEBI Laws	8,100
☐ Insolvency & Bankruptcy Code	7,100
☐ FEMA, Banking & Insurance Laws	7,300
☐ Competition Laws	10,700
☐ Transfer Pricing	11,700
☐ International Taxation	11,900
☐ Accounts & Audit	9,900

☐ COMBO 1	☐ COMBO 2	☐ COMBO 3	☐ COMBO 4
Income Tax	Income Tax	Income Tax	Income Tax
Goods & Services Tax	Goods & Services Tax	Goods & Services Tax	Goods & Services Tax
	Company & SEBI Laws	Company & SEBI Laws	Company & SEBI Laws
		Insolvency & Bankruptcy Code	Insolvency & Bankruptcy Code
		Accounts & Audit	Accounts & Audit
			FEMA, Banking & Insurance Laws
			Competition Laws
₹22,900*	₹25,900*	₹31,900*	₹35,900*

☐ COMBO 5 (Direct Tax Specialist)	☐ COMBO 6 (Corporate Law Specialist)
Income Tax	Company & SEBI Laws
Transfer Pricing	Insolvency & Bankruptcy Laws
International Taxation	FEMA, Banking & Insurance Laws
FEMA, Banking & Insurance Laws	Competition Laws
₹29,900*	₹20,900*

Get the following on a Complimentary Basis when you subscribe to **Taxmann.com | Research | Combo or Specialist Plans**

Taxmann's Premium News & Updates worth ₹3,500/-	Taxmann's Indian Acts & Rules Module worth ₹5,100/-

Module Name	Price in ₹*
☐ Offline Research Platform on Income Tax (Works without the Internet)	16,900

INTERVIEW

CS ANAGHA ANASINGARAJU

Partner, KANJ & Co. LLP, Pune

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

In my view, this is a long pending welcome reform which was much needed in the Indian economy. Ease of doing business also includes ease of closing the business. This was one of the things which was wanting in the various laws governing businesses. Winding-up a company used to take years, if not decades. Declaring a company insolvent through the High Courts used to be a task in itself. Then the next step would be its winding-up. Similar was the case of companies referred to BIFR. Unending moratorium at the cost of the creditors and the economy had plagued the good intentions of the lawmakers. There was no special treatment to deserving MSMEs to get a chance to resolve. Most of the times the assets would get devalued due to efflux of time and realisations were very less.

This law has now changed things on its head. Time bound process, appointment of new class of independent professionals to handle it, creditor in control regime have all brought about a sense of urgency and professionalism to the entire concept of resolution. Now the focus is on maximising the value of the

asset in a time bound manner. The focus is on resolution, giving chances, encouraging entrepreneurship by allowing them chances in case of mistakes. Liquidation is a last resort. Even that is monitored and to be completed in a time bound manner.

Another major shift is in the thought process of crown or preferential debts. The government, by putting itself in the category of operational creditors, has shown its intent.

We may be in the stage of weeding out old rotten apples in the first five years, however the next five years are likely to be much more productive in implementing the actual intent of resolution of businesses on a greater scale.

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

I got my first assignment three years ago and from then, I am hooked on to this practice. The kind of personal and professional growth that came my way while handling these cases was totally unexpected. It has changed my perspectives about many things. Being in practice, I was privy to things from one side of the table; now I have a bird's eye view and that changes a lot of things.

As they say, change is the only constant. I am glad that the legislators are responding to the industry feedback and practical issues which need to be addressed. Even though that may mean frequent amendments and keeping us on our toes, these changes are necessary for the economy as a whole and I welcome the changes. These changes are also opening new opportunities for us - be it group insolvency, pre-packs, cross border insolvency - these are much needed to make India at par with the world.

3. Since you are also a Company Secretary by profession, how does being a Company Secretary help you in handling the assignments?

The CS profession had already given me a dream career which had opened a wide variety of challenging options for me. Right from working with one of the largest MNC in the world when being in employment to handling shareholder dispute matters, mergers, appearance before NCLT, NCLAT, agreement drafting after entering practice - these challenging areas had inculcated habits of discipline, timeliness, attention to detail, reading of the law, commentaries, application of mind, dealing with stakeholders. These are the basics for any professional and these habits helped me immensely in handling the time bound, complex assignments under IBC while again giving me the opportunity to learn something in each of them.

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

There was a mixed response from this category. In some cases, the promoters

were very co-operative and willing to find a resolution for their company. They looked at it as an opportunity to revive the company and come out of the mess. In couple of cases, there was hostility and total non-co-operation. I would say it depends on each individual.

5. One of the major duties of Insolvency professionals is to identify avoidable transactions and seek appropriate reliefs from Adjudicating Authority. How far filing of these applications have benefitted the corporates under insolvency? Further, what is your take on its implementation success?

Audit of avoidance transactions is one of the integral duties of the IP. The idea is to find out the reason for the insolvency of the company. In case the company has been subject to any of such transactions, the culprits should be made to make good the loss.

In my view, this aspect is a bit under tapped. In many cases, this audit is equated with forensic audit which has a different wider scope. We as IPs may consider undergoing more practical training in this area to make it more meaningful. Wider training will lead to more findings and more applications for various reliefs against these transactions. That is also likely to improve the turnaround time on the decisions on these applications.

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

The Pre-Pack insolvency resolution framework is a welcome addition to the tools available with businesses which need resolution. Even though there are some opinions which say that India has moved away from the creditor in control regime for this, in my view, this is a great opportunity to genuine deserving MSMEs to revive themselves. There is certainly some downside to the creditor in control and a one size fits all approach. Pre-pack will help such MSMEs to retain control of the company so that there are minimum business disruptions while having a professional to monitor the activities in a timebound manner. Failing this resolution, the MSME reverts to its original position and can avail this opportunity only once in fixed number of years. This will minimise its misuse.

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

The IBC, by recognising allottees of real estate projects as financial creditors, has changed the game and now the common man has a greater bargaining power. Project owners are now answerable to someone and the allottees have a voice which is being heard. This has changed the sector dynamics and will eventually lead to more transparency and discipline in this business.

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

Currently there is a severe dearth of professionals who are well versed with the Insolvency Law - practical and legal aspects. This is a huge opportunity for professionals who may otherwise not meet the eligibility requirements to act as IP. No IP can work alone - a team is a must. The aspirants may consider working in the teams of IPs, practice in NCLT. You may also consider witnessing NCLT hearings to understand the perspective of the judiciary in dealing with these matters. This goes a long way when one is handling such cases. Once you are eligible to become an IP, you would have been trained for a few years working with IPs and supporting them on real life cases.

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

The role of IBBI and IPAs is very crucial in ensuring success of this law in its right spirit. Like any profession, this profession is also vulnerable to wrong doings with far reaching consequences on the intent of the law. Hence, monitoring is a must. These entities help in training the IPs with requisite skills to do their jobs effectively and diligently.

Going forward, these entities may consider holding physical sessions/workshops on certain aspects of practical significance to all IPs in smaller geographical areas so that best practices can be shared and IPs can actually discuss practical issues amongst each other. Also, wherever there is some duplication in reporting requirements to IBBI and IPAs, these may be consolidated to the extent possible.

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

I am very upbeat and positive about the future of the Code and the profession of IP in the next 5 years. New opportunities will open up, international avenues will also be available to IPs who may not be part of big firms. More companies are likely to find resolution as compared to liquidation. This in turn will be good for the economy overall.

Insight!

Disciplinary Mechanism under IBC

MS. SUNITA UMESH

FCA, CPA

IP, Managing Partner

The Author in a series of Articles seeks to analyze the disciplinary cases that have been instituted against the Insolvency Professionals by IBBI/IPA along with the outcome of such cases.

The first such article is based on the disciplinary proceedings where the subject matter is Authorization for Assignment. These proceedings are taken up by the Disciplinary Committee of Insolvency Professional Agency (IPA) and of Board (IBBI).

A. Background on IBC:

Insolvency and Bankruptcy Code, 2016 (**IBC, 2016**) came into force w.e.f. December 1, 2016 through an Act of Parliament. During the 5 year's journey from 2017, the Act has undergone many amendments and changes to meet the various challenges.

Some of the basic key features of the Code are:

- Insolvency Resolution: The Code outlines separate insolvency resolution processes for individuals, companies and partnership firms. The process may be initiated by either the debtor or the creditors.

- Insolvency Regulator: The Code establishes "The Insolvency and Bankruptcy Board of India" (IBBI), to oversee the insolvency proceedings and regulate the entities registered under it in India like Insolvency Professional Agencies, Insolvency Professionals and Information Utilities.

- Insolvency Professionals: An individual, who has required qualifications and experience and passed the Limited Insolvency Examination, and is enrolled with IPA as a professional member is registered as an IP. The insolvency process will be managed by such licensed professionals. These professionals will also control the assets of the debtor during the insolvency process.

- Bankruptcy and Insolvency Adjudicator: There are two separate tribunals to oversee the process of insolvency resolution, for individuals and companies:

  (*i*) the National Company Law Tribunal for Companies and Limited Liability Partnership firms; and

  (*ii*) the Debt Recovery Tribunal for individuals and partnerships.

Insolvency Resolution: The provisions relating to Corporate Insolvency Resolution Process (CIRP) came into force on December 1, 2016. Since then, a total of 4708 CIRPs have commenced by the end of September, 2021. The status of these cases is as under:

Particulars	*Numbers*
Total cases	4708
Cases closed on appeal or review or settled	701
Closed by approval of Resolution Plan	421
Closed by order of Liquidation	1419
Ongoing cases	1660

Source - IBBI Newsletter July - September, 2021

Status of Insolvency professionals:

A **total of 3836 IPs' are registered** till date - the status of which is as under:

Particulars	*Numbers*
Total cases	3836
Registration cancelled through disciplinary action	4
cancelled on failing to fulfil the requirement of fit and proper person status	2
IPs having valid AFA	2464

Source - IBBI Newsletter July - September, 2021

B. Authorization for Assignment (AFA) :

Let us understand more about **AFA:**

i. Meaning:

As per Regulation 2(*aa*) of the IBBI (IP) Regulations, "Authorization for Assignment" means an authorization to undertake an assignment, issued by an Insolvency Professional Agency (Agency) to an insolvency professional, who is its professional member, in accordance with its bye-laws.

ii. **Authorities eligible for issuing AFA:**

Insolvency Professionals Agency (IPA) which are registered with Boards some of the IPAs are:

- Indian Institute of Insolvency Professionals of ICAI (IIIP-ICAI)
- ICSI- Institute of Insolvency Professionals
- Insolvency Professional Agency of The Institute of Cost Accountants of India

iii. **Eligibility criterion for obtaining AFA:** The professional:

(*a*) is registered with the Board as an IP;

(*b*) is a fit and proper person in terms of the *Explanation* to clause (*g*) of regulation 4 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;

(*c*) is not in any employment;

(*d*) is not debarred by any direction or order of the Agency or the Board;

(*e*) has not attained the age of seventy years;

(*f*) has no disciplinary proceeding pending against him before the Agency or the Board;

(*g*) has no criminal/disciplinary proceeding pending against him under any law;

(*h*) complies with requirements with respect to-payment of fee to the Agency and the Board; -filings and disclosures to the Agency and the Board; -continuous professional education; and -other requirements, as stipulated under the Code, regulations, circulars, directions or guidelines issued by the Agency and the Board, from time to time.

iv. **Consequence if not having an AFA**

i. One of the essential conditions for undertaking any assignment by an IP is that he should have a valid AFA which is issued by the IPA with which he is enrolled. In other words, without AFA, an IP is not eligible to undertake assignments or conduct various processes.

ii. Also, for an IP who wishes to empanel themselves with

Board (IBBI), banks (such as SBI, PNB, IDFC, Canara Bank etc.) and regulatory authorities (such as SEBI etc.), an IP needs to have a valid AFA.

iii. Disciplinary actions and a penalty of minimum Rs. 10,000 can also be levied by the disciplinary committee of IPA.

***v.* Surrender of Authorization for Assignment**

Professional member shall make an application to surrender his authorization for assignment to the Agency at least thirty days before he/she -

(*a*) becomes a person resident outside India;

(*b*) takes up an employment; or

(*c*) starts any business, except as specifically permitted under the Code of Conduct,

Upon acceptance of such surrender, the same shall be intimated to the Board by the IPA within one working day of acceptance of surrender.

C. Disciplinary Cases procedure:

The Disciplinary Committee constituted by IBBI undertakes inspection of the Insolvency Professionals on yearly bases based on the criteria as specified to check the process, procedure and compliance of IBC Code, 2016, are duly complied by the IP while executing an assignment.

Steps:

1. Inspection Authority is constituted.
2. Conduct inspection on IP.
3. Inspection Authority submits inspection report to Disciplinary Committee of IBBI.
4. IBBI based on material facts available on inspection report issue SCN (which includes the contraventions, is any) to IP.
5. IP submit the reply to SCN along with the necessary documents/ evidence.
6. After considering the reply and documents/data, Disciplinary Committee does analysis and findings.
7. The DC finally makes order based on their analysis and finding.

Each IPA also have a process for conducting any proceedings and the order of the IPAs are then examined by IBBI.

Up-till now, out of the total inspections made by the Inspection Authority, 87 orders are passed by the Disciplinary Committee of IBBI for various non-compliances (source listing on IBBI website till January 15, 2022 - last case uploaded is of December 29, 2021.)

Out of the 87 disciplinary order, 26 orders relate to Authorization of Assignment (AFA). So, AFA is one of the important aspects related to compliance by an IP.

D. Relevant Section & Regulation for AFA disciplinary proceedings:

IBBI/IPA referred to Section 208 and Regulation 7A of the Code as the governing sections while proceedings for AFA against the IPs.

Let us understand what these are:

- Section 208(2)

"208. Functions and obligations of insolvency professionals. -

(2) Every insolvency professional shall abide by the following code of conduct: -

(*a*) to take reasonable care and diligence while performing his duties;

(*b*) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member; and

(*e*) to perform his functions in such manner and subject to such conditions as may be specified."

- Regulation 7A reads as follows:

"7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorization for assignment on the date of such acceptance or commencement of such assignment, as the case may be:

Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-

(*a*) 31st December, 2019; or

(*b*) the date of expiry of his authorization for assignment."

E. AFA Cases:

The gist of outcome of the 26 cases is as under:

Particulars	*Nos.*	*Contention*	*Authority*	*penalty*	*IBBI order*
Guilty of professional misconduct	10	Assignment accepted post December 31, 2019 without valid AFA	4 cases by - ICSIIIP 6 cases by IIIPI - ICAI	All cases attracted a penalty of Rs. 10,000	IBBI agreed with the outcome
Not Guilty of professional misconduct	7	Consent given prior to December 31, 2019 though CIRP/Liquidation commenced post December 31, 2019	1 case by - ICSIIIP 6 cases by IIIPI - ICAI	NIL	IBBI agreed with the outcome
Not Guilty of professional misconduct	1	IP aged more than 70 years and hence could not apply for AFA. Also Consent given prior to December 31, 2019.	1 case by IIIPI - ICAI	NIL	IBBI agreed with the outcome

Particulars	*Nos.*	*Contention*	*Authority*	*penalty*	*IBBI order*
Issued warning	7	Consent given prior to December 31, 2019 though CIRP/Liquidation commenced post December 31, 2019	7 cases by - ICSIIIP 1 case by IPA -ICMAI	NIL	IBBI agreed with the outcome
Issued warning	1	IP aged more than 70 years and hence could not apply for AFA. Also Consent given prior to December 31, 2019.	1 case by IIIPI - ICAI	NIL	IBBI agreed with the outcome

Individual case wise summary is given hereunder:

REFER SEPARATE EXCEL SHEET FOR THIS ATTACHED.

F. Conclusion:

From the above summary and Board's decisions it is clear that for an Insolvency Professional is mandatory to have an AFA (Authorization of Assignment) to undertake any assignment of CIRP, Liquidation and/or Voluntary Liquidation.

These cases were more during the transition period when the AFA was made mandatory as many IPs were of the belief that having filed consent earlier, they need not seek AFA even where the CIRP/Liquidation commenced after December 31, 2019.

(2021) 132 taxmann.com 232 (SC)

SUPREME COURT OF INDIA

TATA Consultancy Services Ltd. *v.* Vishal Ghisulal Jain, Resolution Professional of SK Wheels (P.) Ltd.

DR. DHANANJAYA Y. CHANDRACHUD

AND A.S. BOPANNA, JJ.

CIVIL APPEAL NO. 3045 OF 2020†

NOVEMBER 23, 2021

Section 60 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Whether NCLT can exercise its residuary jurisdiction under section 60(5)(c) to adjudicate contractual disputes between parties provided such dispute had arisen in relation to insolvency of corporate debtor - Held, yes - Appellant and corporate debtor had entered into a Build-Phase Agreement followed by a Facilities Agreement which obligated corporate debtor to provide premises with certain specifications and facilities to appellant for conducting examinations for educational institutions - clause 11(b) of Facilities Agreement stated that either party could terminate agreement immediately by written notice to other party, provided that a material breach committed by latter was not cured within thirty days of receipt of notice - Before initiation of CIRP, appellant had on multiple instances communicated to corporate debtor that there were deficiencies in its services and corporate debtor was put on notice that penalty and termination clauses of Facilities Agreement may be invoked - There was nothing on record to indicate that termination of Facilities Agreement was motivated by insolvency of corporate debtor - Appellant had issued notice of termination in terms of clause 11(b) of Facilities Agreement - Whether therefore, NCLT did not have any residuary jurisdiction to entertain present contractual dispute

which had arisen de hors insolvency of corporate debtor and, thus, in absence of jurisdiction over dispute, NCLT could not have imposed an ad interim stay on termination notice - Held, yes - Whether NCLAT had incorrectly upheld interim order of NCLT - Held, yes (Paras 25, 26, 27 and 31)

FACTS

- The appellant and the corporate debtor entered into a Facilities Agreement on 1-12-2016. The Facilities Agreement obligated the corporate debtor to provide premises with certain specifications facilities to the appellant for conducting examination for educational institutions. Clause 11(*b*) under the Facilities Agreement empowered either party to terminate the agreement immediately by written notice to the other party provided that a material breach committed by the latter was not cured within thirty days of the receipt of the notice. A termination notice was issued by the appellant to the corporate debtor on 10-6-2019 which came into effect immediately.

- As per the appellant, there were multiple lapses by the corporate debtor in fulfilling its contractual obligations, which it failed to remedy satisfactorily. The appellant accordingly notified the corporate debtor on 1-8-2018 that it intended to invoke the penalty clause of the Facilities Agreement for the alleged contractual breaches.

- The CIRP was initiated against the corporate debtor on 29-3-2019. The appellant alleged that it came to know about the CIRP against the corporate debtor when the electricity board disconnected the supply of electricity to the corporate debtor on 24-4-2019. The appellant claimed that the material breaches by the corporate debtor resulted in a liability of Rs. 20.79 lakhs. It did not initiate recovery proceedings on account of the moratorium imposed under section 14 of the IBC. The appellant issued a notice of termination dated 10-6-2019 in terms of clause 11(*b*) of the Facilities Agreement.

- The corporate debtor, on the other hand, submitted that certain routine operational requirements were highlighted by the appellant from time-to-time, which were rectified within a reasonable duration. The corporate debtor had allegedly invested Rs. 8.35 crores to fulfil its contractual obligations. The corporate debtor claimed that it complied with the directions of the appellant and cured all minor deficiencies pointed out. The corporate debtor further submitted that while the electricity was disconnected by the electricity board in April, 2019, it was eventually restored.

- The corporate debtor contested the issuance of the termination notice on the ground that no material breaches had occurred, and in an event, a thirty-day period was to be given to a party to cure the defects before the agreement

could be terminated under clause 11(*b*) of the Facilities Agreement.

- The corporate debtor instituted a miscellaneous application before the NCLT under section 60(5)(*c*) of the IBC for quashing the termination notice. The NCLT passed an order granting an *ad interim* stay on the termination notice issued by the appellant and directed the appellant to comply with the terms of the Facilities Agreement. The NCLT observed that *prima facie* it appeared that the contract was terminated without serving the requisite notice of thirty days.

- On appeal, the NCLAT by its order dated 24-6-2020 upheld the order of the NCLT observing that it had correctly stayed the operation of the termination notice since the main objective of the IBC was to ensure that the corporate debtor remains a going concern. The NCLAT referred to section 14 to highlight that a moratorium is imposed to ensure the smooth functioning of the corporate debtor to safeguard its status as a going concern. Further, the NCLAT held that it was the responsibility of the Resolution Professional under section 25 of the IBC to preserve the corporate debtor as a going concern.

- On appeal before the Supreme Court :

HELD

- Section 60(5)(*c*) grants residuary jurisdiction to the NCLT to adjudicate any question of law or fact, arising out of or in relation to the insolvency resolution of the corporate debtor. Clause 12(d) of the Facilities Agreement provides that any dispute between the parties relating to the agreement could be the subject matter of arbitration. However, the Facilities Agreement being an 'instrument' under section 238 of the IBC can be overridden by the provisions of the IBC. In terms of section 238 and the law laid down by this Court, the existence of a clause for referring the dispute between parties to arbitration does not oust the jurisdiction of the NCLT to exercise its residuary powers under section 60(5)(*c*) to adjudicate disputes relating to the insolvency of the corporate debtor.(Para 21)

- The appellant has contested the reliance of the NCLAT on section 25 of the IBC to hold that the RP can invoke the jurisdiction of the NCLT to stay the termination of the Facilities Agreement in pursuance of its duty to preserve the corporate debtor as a going concern. The appellant has submitted that the jurisdiction of the NCLT cannot be determined based on the duties of the RP. While the duty of the RP and the jurisdiction of the NCLT cannot be conflated, in *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta (2021) 125 taxmann.com 150* (SC), this Court has clarified that the RP can approach the NCLT for adjudication of disputes which relate to the insolvency resolution process. But when the dispute arises *de hors*

the insolvency of the corporate debtor, the RP must approach the relevant competent authority. In the subsequent paragraphs it has been discussed whether there is a nexus between the termination notice and the insolvency resolution proceedings. (Para 22)

- It was also urged on behalf of the appellant that the NCLT and NCLAT have re written the agreement changing its nature from a determinable contract to a non-terminable contract overlooking the mandate of section 14 of the Specific Relief Act, 1963. It is a settled position of law that IBC is a complete code and section 238 overrides all other laws. The NCLT in its residuary jurisdiction is empowered to stay the termination of the agreement if it satisfies the criteria laid down by this Court in *Gujarat Urja Vikas Nigam Ltd. (supra)*. In any event, the intervention by the NCLT and NCLAT cannot be characterized as the re writing of the contract between the parties. The NCLT and NCLAT are vested with the responsibility of preserving the corporate debtor's survival and can intervene if an action by a third party can cut the legs out from under the CIRP. (Para 23)

- On behalf of the appellant, it has been further submitted that the NCLAT misread section 14 of the IBC, which has no application to the present case. Admittedly, the appellant is neither supplying any goods or services to the corporate debtor in terms of section 14(2) nor is it recovering any property that is in possession or occupation of the corporate debtor as the owner or lessor of such property as envisioned under section 14(1)(*d*). It is availing of the services of the corporate debtor and is using the property that has been leased to it by the corporate debtor. Thus, section 14 is indeed not applicable to the present case. However, in Gujarat Urja Vikas (supra) it was held that the NCLT's jurisdiction is not limited by section 14 in terms of the grounds of judicial intervention envisaged under the IBC. It can exercise its residuary jurisdiction under section 60(5)(*c*) to adjudicate on questions of law and fact that relate to or arise during an insolvency resolution process. (Para 24)

- Before the initiation of the CIRP, the appellant had on multiple instances communicated to the corporate debtor that there were deficiencies in its services. The corporate debtor was put on notice that the penalty and termination clauses of the Facilities Agreement maybe invoked. This is evident from the appellant's communications dated 1-8-2018, 17-9-2018, 1-10-2018 and 11-10-2018. In its e-mail dated 13-10-2018, the appellant specifically noted that the housekeeping staff being provided by the corporate debtor was inadequate. The appellant was apparently constrained to deploy its own staff for housekeeping, evinced from its e-mail dated 19-11-2018. The corporate debtor has

admitted that the appellant was using its own housekeeping staff and deducting the costs from the invoice. The appellant again intimated the corporate debtor to change faulty batteries of the UPS and provide cleaning products in its e-mail dated 3-2-2019. The termination notice dated 10-6-2019 also clearly lays down the deficiencies in the services of the corporate debtor. (Para 25)

- In Gujarat Urja Vikas (supra), the contract in question was terminated by a third party based on an *ipso facto* clause, i.e., the fact of insolvency itself constituted an event of default. It was in that context, this Court held that the contractual dispute between the parties arose in relation to the insolvency of the corporate debtor and it was amenable to the jurisdiction of the NCLT under section 60(5)(c). This Court observed that the NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor. The nexus with the insolvency of the corporate debtor must exist. Thus, the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the corporate debtor. (Para 26)

- It is evident that the appellant had time and again informed the corporate debtor that its services were deficient, and it was falling foul of its contractual obligations. There is nothing to indicate that the termination of the Facilities Agreement was motivated by the insolvency of the corporate debtor. The trajectory of events makes it clear that the alleged breaches noted in the termination notice dated 10-6-2019 were not a smoke screen to terminate the agreement because of the insolvency of the corporate debtor. Thus, it is viewed that the NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen *de hors* the insolvency of the corporate debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an *ad interim* stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT. (Para 27)

- Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the corporate debtor. (Para 28)

- The narrow exception crafted by this Court in Gujarat Urja Vikas Nigam Ltd. (supra) must be borne in mind by the NCLT and NCLAT even while examining prayers for interim relief. The order of the NCLT dated 18-12-2019 does not indicate that the NCLT has applied its mind to the centrality of the Facilities Agreement to the success of the CIRP and corporate debtor's

survival as a going concern. The NCLT has merely relied upon the procedural infirmity on part of the appellant in the issuance of the termination notice, *i.e.*, it did not give thirty days' notice period to the corporate debtor to cure the deficiency in service. The NCLAT, in its impugned judgment, has averred that the decision of the NCLT preserves the 'going concern' status of the corporate debtor but there is no factual analysis on how the termination of the Facilities Agreement would put the survival of the corporate debtor in jeopardy. (Para 29)

- Admittedly, this Court has clarified the law on the present subject matter in Gujarat Urja Vikas (supra) after the pronouncements of the NCLT and NCLAT. Going forward, the exercise of the NCLT's residuary powers should be governed by the above decision. (Para 30)
- Accordingly, the judgment of the NCLAT dated 24-6-2020 is set aside. The proceedings initiated against the appellant shall stand dismissed for absence of jurisdiction. The appeal is disposed of in the above terms. (Para 31)

CASE REVIEW

Tata Consultancy Services Ltd. v. *Vishal Ghisulal Jain* (2021) 123 taxmann.com 294/163 SCL 645 (NCL-AT)*set aside*.

Gujarat Urja Vikas Nigam Ltd. v. *Amit Gupta* (2021) 125 taxmann.com 150 (SC) (para 30) *followed*.

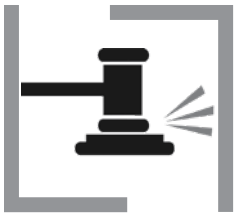
CASES REFERRED TO

Tata Consultancy Services Ltd. v. *Vishal Ghisulal Jain* (2021) 123 taxmann.com 294/163 SCL 645 (NCL-AT) (para 11), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150 (SC) (para 13), *Ashoka Marketing* v. *PNB* (1990) 4 SCC 406 (para 14), *Indus Biotech (P.) Ltd.* v. *Kotak India Venture (Offshore) Fund* (2021) 125 taxmann.com 393/166 SCL 129 (SC) (para 19) and *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 22).

Ms. Fereshte D. Sethna, **Ms. Anuradha Dutt**, **Aniket Nimbalkar**, **Ms. Suman Yadav**, **Abhishek Tilak**, **Ms. Aboli Mandlik**, **Ameya Pant** and **Ms. B. Vijayalakshmi Menon**, Advs. *for the Appellant*. **Udita Singh**, AOR *for the Respondent*.

† Arising out of order passed by NCLAT in *Tata Consultancy Services Ltd.* v. *Vishal Ghisulal Jain* (2021) 123 taxmann.com 294/163 SCL 645 (NCL-AT).

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 132 taxmann.com 232 (SC)



(2021) 133 taxmann.com 338 (Bombay)

HIGH COURT OF BOMBAY

Dewan Housing Finance Corporation Ltd. *v.* Union of India

SANDEEP K. SHINDE, J.

WRIT PETITION NOS. 3157 AND 3221 OF 2021

INTERIM APPLICATION (ST.) NO. 14632 OF 2021

NOVEMBER 16, 2021

Section 32A of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Liability for prior offence - Corporate debtor DHFL was a co-accused, along with its erstwhile directors and promoters, in certain criminal proceedings - Concurrently, CIRP proceedings were going on against DHFL before NCLT and resolution plan submitted by PCFHL was approved by NCLT - DHFL made an application before CBI Special Court seeking its discharge from criminal proceedings which were on alleged acts committed by DHFL prior to initiation of CIRP which was rejected - On writ petition, DHFL argued that since it had been taken over by PCFHL, it should be absolved from all earlier liabilities - It was found that resolution plan had been approved by NCLT and such a resolution plan had resulted in change in management of DHFL in favour of persons who were not related to erstwhile management of DHFL - Further, merely because appeals before NCLAT were filed with a specific prayer to grant stay of resolution plan, it could not be said that application under section 32A was premature and not maintainable as NCLAT by reasoned order, declined to stay NCLT order - Whether therefore, immunities under section 32A could not have been denied and thus, all criminal proceedings against DHFL were to be discharged - Held, yes (Paras 19, 20 and 25)

FACTS

- DHFL was a Non-Banking Financial Company and Financial Service Provider, regulated by Reserve Bank of India (RBI). On 20-11-2019, the RBI superseded the Board of Directors of the DHFL owing to governance concerns and defaults in meeting various payment obligations; whereupon an administrator was appointed to manage the affairs, of DHFL.
- On 29-11-2019, the RBI filed company petition to initiate Corporate Insolvency Resolution Process (CIRP) against the DHFL under IBC.
- On 3-12-2019, the NCLAT admitted the said company petition and directed commencement of moratorium period in terms of section 14 of the IBC, from the date of filing of the company petition and confirmed the appointment of Administrator.
- On 7-3-2020, the respondent No. 1-CBI registered FIR against the DHFL, its erstwhile Directors and others under section 420 read with section 120B of the Indian Penal Code and sections 7, 12, 13(2)

read with section 13(1)(B) of the Prevention of Corruption Act, 1988. All the transactions which formed the subject matter of the FIR were prior to initiation of CIRP against DHFL.

- In the meantime, as required by provisions of the IBC, the Administrator appointed by the NCLAT and nominated by the RBI in the discharge of its duties invited resolution plans from prospective resolution applicants to resolve the Insolvency of DHFL under the provisions of IBC.
- The resolution plan submitted by the PCHFL was approved by majority of 93.65 per cent of votes in the Committee of Creditors (CoC) and the same was approved by the NCLAT and an interim monitoring committee was appointed.
- On 6-7-2021, PC obtained all requisite regulatory and statutory approvals in relation to the scheme of arrangement between PC and corporate debtor i.e. reverse merger of the PCHFL, into and with DHFL, the corporate debtor.
- The resolution plan order dated 7-6-2021 was challenged by one, 63, Moons Technologies Limited, before the NCLAT by filing company appeals. However, the NCLAT, rejected 63 Moon's prayer for a stay on implementation of resolution plan.
- On 2-7-2021, DHFL filed an application under section 32A of the IBC, seeking discharge from CBI case in view of the order passed by the NCLT under section 31 of the IBC.
- In the meantime, erstwhile Chairman of the DHFL, also challenged the said section 31 order and resolution plan before the NCLAT. On 2-8-2021 the NCLAT issued notice in this appeal. However, no interim relief was granted.
- On 5-8-2021, erstwhile Chairman of the DHFL, intervenor herein, sought intervention in the application of the DHFL under section 32A of the IBC. Although the application by co-accused was not maintainable, it was allowed and erstwhile Chairman of the DHFL was permitted to intervene in section 32A application, proceedings.
- On 20-8-2021, the CBI Court partially allowed the section 32A application by which the prayer for discharge made by the DHFL, was rejected; yet corporate debtor was permitted to be prosecuted through its erstwhile Directors.
- On appeal by the DHFL and PCHFL, the successful resolution applicant, against above order dated 20-8-2021.

HELD

- Facts of the case and in particular subsequent events have indisputably established, change in management of a corporate debtor. This fact is hardly disputed by the intervenor

in his affidavit, contending that, `DHFL ought to issue equity shares to shareholders of PCHFL i.e. PEL and thereafter upon allotment, DHFL will become a wholly-owned subsidiary of PEL.' It maybe stated that, intervenor has not disputed appointment of six Additional Directors on the Board of Director of DHFL, with effect from 30-9-2021, consequent to reverse merger and implementation of resolution plan. The objection in respect of subsequent events, sought to be raised by the intervenor is that, petitioners ought to have followed the due procedure, to place on record the subsequent events and certainly not by filing a, `purshis'. The intervenor would therefore submit that this Court shall not take cognizance of the subsequent events. In the alternative, it is submitted that let the subsequent events, be first assessed by the Trial Court and therefore the intervenor, urged that parties be relegated to the Trial Court for reconsideration. (Para 17)

- It maybe stated that, the subsequent events were placed on record vide purshis dated 12-10-2021 and thereafter intervenor had filed a reply affidavit, dated 20-10-2021 and dealt with subsequent events extensively. As such, it is not appropriate to keep the subsequent events out of consideration and relegate the parties to the Trial Court for reconsideration. (Para 18)

- Herein, subsequent events indisputably caused change in management and control of corporate debtor. The immunities sought by the corporate debtor though conditional; yet all these conditions have been fulfilled and satisfied; *viz.*

  (*i*) Resolution Plan in regard to corporate debtor has been approved by the adjudicating Authority under section 31 IBC.

  (*ii*) Resolution plan approved caused and resulted in change in management of corporate debtor.

  (*iii*) Change in management is in favour of persons who were not related to party of corporate debtor. Thus, it is viewed that immunities under section 32A of the IBC, cannot be denied to corporate debtor. (Para 19)

- For these reasons, it is held that, the petitioner-DHFL, stands discharged from the CBI Special Case pending before the CBI Cases Sessions Court, Mumbai. (Para 20)

- The next question is, `whether successful resolution applicant was eligible to invoke section 32A of IBC, when appeals against the order of the adjudicating authority, were pending before the NCLAT? (Para 21)

- The intervenor, would submit that, once appeal is admitted, the correctness of order of adjudicating authority becomes 'made open' and in such an appeal, the Court is entitled to go into both, questions of facts, as well as law, and in such an event, the correctness of the order dated 7-6-2021 is in jeopardy. It is therefore argued that, until appeals which are statutorily provided under the IBC, are finally disposed off, there is no finality to the order under section 31 and therefore application under section 32A moved by the successful resolution applicant was premature and not maintainable. In the case in hand, certain appeals under section 32 read with section 31 have been filed by various parties including intervenor against the plan approval order with prayers for interim relief. However, the NCLAT, refused to stay, the plan approval order. (Para 22)

- Be that as it may, although section 32 provides for appeal against an order approving the resolution plan, yet, mere filing of appeal would by itself not operate as a stay, until a specific prayer in this regard is made and orders thereon are passed. Infact, herein appeals were filed with a specific prayer to grant stay to the section 31 order. However, the NCLAT by reasoned order, declined to stay the order. Thus, in consideration of the facts of the case it is held that the application preferred by the successful resolution person, was not pre-matured. The point is answered accordingly. (Para 23)

- Further, the last submission of the petitioners who contended, that impugned order permitting to prosecute the corporate debtor through accused Nos. 2 and 3 was erroneous and perverse, in as much as, accused Nos. 2 and 3, who were Directors of the corporate debtor, were ousted from the Board of Directors by the Reserve Bank of India, approximately two years ago and has since no control over the management of the petitioner. There is no reason to discard this submission to hold that, the judge has committed an error by permitting the prosecution of the corporate debtor to the accused Nos. 2 and 3, who were ousted from the Board of Directors, by the RBI two years ago. (Para 24)

- For the reasons stated above, the impugned order is quashed and set aside. The application of the DHFL moved under section 32A is granted. (Para 25)

CASE REVIEW

Sai Shipping Services (P.) Ltd. v. *Union of India* 2017 SCC Online Bom. 6655 (para 23) *followed.*

CASES REFERRED TO

Manish Kumar v. *Union of India* (2021) 123 taxmann.com 343 (SC) (para 10), *Balveer Singh* v. *State of Rajasthan* (2016) 6 SCC

680 (para 15), *Union of India* v. *West Coast-Paper Mills Ltd.* (2004) 2 SCC 747 (para 15), *Dharam Pal* v. *State of Haryana* (2014) 3 SCC 306 (para 16), *PTI Emloyees Union* v. *Press Trust of India* 2021 SCC Online Delhi 939 (para 17), *Madan Kumar Singh* v. *District Magistrate* (2009) 9 SCC 79 (para 23) and *Sai Shipping Services* (*P.*) *Ltd.* v. *Union of India* 2017 SCC Online Bom. 6655 (para 23).

Ravi Kadam, **Karan Kadam**, **Aditya Mithe**, **Vivek Shetty**, **Amey Mirajkar**, **Nishant Upadhyay**, **Ayush Chaddha**, **Aabad Ponda**, Sr. Advs., **Ms. Chitra Rentala**, **Pranav Badheka**, **Rohan Dakshini**, **Ms. Pooja Kothari**, **Ms. Urvi Gupte**, **Ninad More**, **Siddhant Rai** and **V.M. Nakhawa**, APP *for the Appearing Parties.*

JUDGMENT

1. Rule. Rule, made returnable forthwith. By consent of the parties, taken up for hearing forthwith.

2. Writ Petition No. 3157 of 2021 under Article 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code, seeks to challenge order dated 20th August, 2021, by which the learned Special Judge, CBI, Greater Bombay in exercise of jurisdiction under section 32A of the Insolvency and Bankruptcy Code, 2016 ("IBC" for short), declined to discharge Dewan Housing Finance Corporation Limited-Corporate Debtor, from the CBI Special Case No. 830 of 2021 and permitted prosecution of the, Corporate Debtor through its erstwhile Directors (accused nos. 2 and 3) in CBI Special Case No. 830 of 2021.

3. Petitioner, in Writ Petition No. 3221 of 2021, is the successful resolution applicant, whose Resolution Plan dated 22nd December, 2020 has been approved by the Committee of Creditors of Dewan Housing Finance Corporation Limited (DHFL)-(Corporate Debtor) with an overwhelming majority of 93.65% voting and thereafter by the National Company Law Appellate Tribunal (NCLAT), Mumbai, *vide* its order dated 7th June, 2021.

4. Applicant in Interim Application No. 14632 of 2021 is the erstwhile Chairman and Managing Director of Dewan Housing Finance Corporation Limited and the co-accused in Special Case No. 820/2021.

5. Background facts disclosed in these petitions are as under :

(*i*) Dewan Housing Finance Corporation Limited (DHFL), is a Non-Banking Financial Company ("NBFC") and Financial Service Provider (FSP), regulated by Reserve Bank of India (RBI). On 20th November 2019, RBI superseded Board of Directors of DHFL owing to governance concerns and defaults in meeting various payment obligations; whereupon Shri. R. Subramaniakumar was appointed as, Administrator to manage the affairs, of the DHFL.

(*ii*) On November 29, 2019, RBI filed Company Petition under the Insolvency and Bankruptcy (Insolvency and Liquidation proceedings of Financial Service Provider and Application to Adjudicating Authority) Rules, 2019 to initiate Corporate Insolvency Resolution Process (CIRP) against DHFL under IBC.

(*iii*) On December 3, 2019, National Company Law Tribunal (NCLAT) admitted the said Company Petition and directed commencement of moratorium period in terms of Section 14 of IBC, from the date of filing of the Company Petition and confirmed the appointment of Administrator.

(*iv*) On March 7, 2020, respondent no. 1-CBI registered FIR against the DHFL, its erstwhile Directors, Kapil Wadhwan (accused no. 2), Dhiraj Wadhwan (accused no. 3) and others including one, Mr. Rana Kapoor under section 420 read with section 120B of the Indian Penal Code and sections 7, 12, 13(2) read with section 13(1)(B) of the Prevention of Corruption Act, 1988.

(*v*) All the transactions which form the subject matter of the FIR were prior to initiation of CIRP against the DHFL.

(*vi*) On June 25, 2020, CBI filed a chargesheet before the learned Metropolitan Magistrate under section 420 read with section 120B of the Indian Penal Code and sections 7(12), 13(2) read with section 13(1)(*d*) of the Prevention of Corruption Act.

(*vii*) In the meantime, as required by provisions of the IBC the Administrator appointed by NCLAT and nominated by RBI in discharge of its duties invited Resolution Plans from prospective resolution applicants to resolve the Insolvency of DHFL under the provisions of IBC.

(*viii*) The Resolution Plan submitted by Piramal Capital and Housing Finance Limited (Petitioner in Cri. Writ Petition No. 3221 of 2021) was approved by majority of 93.65% of votes in the Committee of Creditors (CoC).

(*ix*) Pursuant, to approval of Resolution Plan by CoC and no-objection being granted to the same by RBI, on February 24, 2021 the Administrator filed an application under section 31 of IBC, before the NCLAT (Adjudicating Authority), seeking approval to Resolution Plan of Piramal Capital.

(*x*) On 7th June 2021, NCLAT approved Piramal Capitals' Resolution Plan for DHFL with effect from 7th June, 2021 and appointed Interim Monitoring Committee.

(*xi*) On 6th July 2021, Piramal Capital obtained all requisite regulatory and statutory approvals in relation to the scheme of arrangement between Piramal Capital and Corporate Debtor *i.e.* Reverse Merger of the Piramal Capital and Housing Finance Limited, into and with DHFL, the Corporate Debtor.

(*xii*) The Resolution Plan order dated 7th June, 2021 was challenged by one, 63, Moons Technologies Limited, before the NCLAT by filing Company Appeals.

(*xiii*) On 6th July, 2021 and 23rd July, 2021, NCLAT, rejected 63 Moon's

prayer for a stay on implementation of Resolution Plan (*i.e.* order dated 7th June, 2021).

(*xiv*) In the meantime, Mr. Kapil Wadhwan, erstwhile Chairman of the DHFL, also challenged the said section 31 order, and Resolution Plan before NCLAT. On 2nd August, 2021 NCLAT issued notice in this Appeal. However, no interim relief was granted.

(*xv*) On 2nd July 2021, DHFL filed an application under section 32A of IBC, seeking discharge from CBI case in view of the order passed by the NCLT under section 31 of the IBC.

(*xvi*) On 5th August, 2021, Kapil Wadhwan (intervenor herein), sought intervention in the application of the DHFL under section 32A of the IBC. Although the application by co-accused was not maintainable, it was allowed and Mr. Kapil Wadhwan was permitted to intervene in section 32A application, proceedings.

(*xvii*) On August 20, 2021 the CBI Court partially allowed the section 32A application by which the prayer for discharge made by the DHFL, was rejected; yet Corporate Debtor was permitted to be prosecuted through its erstwhile Directors, Kapil Wadhwan (accused no. 2) and Dhiraj Wadhwan (accused no. 3).

6. Feeling aggrieved by the order dated 20th August, 2021 DHFL and Piramal Capital Housing Finance Limited, a successful resolution applicant, have challenged this order in these petitions, under Article 227 read with section 482 of the Criminal Procedure Code.

7. Before adverting to deal with the contentions of rival parties, events post impugned order, which has bearing over the issue, are as under :

DHFL (Corporate Debtor) *vide* purshis dated 12th October, 2021 brought on record the fact that;

(*i*) Piramal Capital and Housing Finance Limited, has merged into DHFL with effect from 30th September, 2021, pursuant to the reverse merger as contemplated under the scheme of arrangement provide under the Resolution Plan, and;

(*ii*) On 1st October, 2021 intimation to that effect was provided to the National Stock Exchange of India Limited and Bombay Stock Exchange Limited by DHFL and Piramal Enterprises Limited and further apprised that consequent to reverse merger, DHFL shall issue such number of equity shares to the shareholders of Piramal Enterprises Limited in accordance with the scheme of arrangement provided under the Resolution Plan, and;

(*iii*) *Vide* intimation letter dated 1st October, 2021 DHFL, apprised BSE and NSE of the change in management of DHFL, by way of appointment of six additional Directors, namely Mr. Ajay Gopikisan Piramal, Ms. Swati Ajay Piramal, Mr. Anand Ajay Piramal, Mr. Gautam Bhailal Doshi, Mr. Khushroo B. Jijina and Mr. Sohail Amin Nathani.

8. Heard Mr. Ravi Kadam, learned Senior Counsel for the petitioner in Writ Petition No. 3157/2021, Mr. Aabad Ponda, learned Senior Advocate with Writ Petition No. 3221/2021 and Mr. Pranav Badheka for Intervenor and Mr. Venegaonkar, Learned Prosecutor for the CBI.

Issue :

9. Broad question raised in these petitions is :

> "Whether section 32(1)(*a*) of IBC lays down a direction that, Corporate Debtor, would be absolved of all criminal offences committed prior to commencement of CRIP, from the date of approval of Resolution Plan, although, appeals against section 31 order of the IBC were pending before the NCLAT ?"

Submissions :

10. Mr. Ravi Kadam, Learned Senior Counsel submitted that, Corporate Debtor would not be liable for any offence committed prior to commencement of CRIP and prosecution would not continue against once Resolution Plan is approved by the Adjudicating Authority. Mr. Kadam, learned Senior Counsel would rely on the provisions of section 32(1)(*a*) of the IBC, as inserted by Insolvency of Bankruptcy Code (Amendment) Act, 2020 and would also rely on the judgment of the Apex Court in the case of *Manish Kumar* v. *Union of India* (2021) 123 taxmann.com 343 Mr. Kadam, would largely rely on paragraph no. 317 of *Manish Kumar* (*supra*), to submit that, section 32A is divided into three parts, consisting of sub-sections (1) to (3). Under sub-section (1), liability of a Corporate Debtor for an offence committed prior to CRIP, ceases and the Corporate Debtor shall not be liable to be prosecuted for such an offence subject to conditions that, (*i*) a Resolution Plan with regard to Corporate Debtor must be approved by the adjudicating authority under section 31 of the Code, (*ii*) the Resolution Plan, so approved must result in change in the management or control of Corporate Debtor and (*iii*) the change in management or control under the approved Resolution Plan must not be in favour of a person who was Promoter and in management or control of Corporate Debtor or in favour of related party of the Corporate Debtor.

11. Mr. Kadam learned Senior Counsel submitted that, herein Resolution Plan was approved by the Adjudicating Authority on 7th June, 2021 and pursuant thereto, Piramal Capital and Housing Finance Limited has merged into DHFL with effect from 30th November, 2021 as contemplated under scheme of arrangement (reverse merger) provided under the Resolution Plan. Mr. Kadam, further submitted that, consequent to reverse merger, six Directors have been appointed as Additional Directors on the Board of Directors of DHFL, with effect from 30th September, 2021 to hold the office until the conclusion of next Annual General Meeting of DHFL. Mr. Kadam, thus submitted that, with effect from 30th September, 2021 new Board superseded the Administrator and the Monitoring Committee which was constituted under the Resolution Plan. It is therefore argued that, there is a change of management and control of Corporate Debtor and such change in the management or control is in favour of party, who is not related to Corporate Debtor. Mr. Kadam, therefore

submitted that in view of the subsequent events/developments, the requirements of section 32A of the Code, are fully satisfied.

12. Mr. Kadam, learned Senior Counsel submitted that, constitutional validity of Section 32A of IBC was, challenged in *Manish Kumar* (*supra*), wherein the Apex Court held :

"(*i*) That no case whatsoever is made out to seek invalidation of section 32A.

(*ii*) Having regard to the object of the Code, the experience of the working of the code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere.

(*iii*) The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate.

(*iv*) That the impugned provision is part of an economic measure.

(*v*) Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.

(*vi*) That the immunity is premised on various conditions being fulfilled. There must be a resolution plan. It must be approved. There must be a change in the control of the corporate debtor.

(*vii*) The new management cannot be the disguised avatar of the old management. It cannot even be the related party of the corporate debtor. The new management cannot be the subject matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence and the report or complaint filed thereto.

(*viii*) The Corporate Debtor and its property in the context of the scheme of the code constitute a distinct subject matter justifying the special treatment accorded to them.

(*ix*) Creation of a criminal offence as also abolishing criminal liability must ordinarily be left to the judgment of the legislature."

13. Mr. Kadam, therefore submitted, having fulfilled conditions contemplated under section 32A of IBC and Corporate Debtor and its property, in context of the Scheme of the Code, being a distinct subject matter, justifying special treatment accorded to them, the learned Special Judge, unnoticing the law enunciated in Manish Kumar (*supra*), erroneously permitted, the prosecution of the Corporate Debtor through its erstwhile Directors, accused nos.2 and 3.

14. Mr. Kadam, has taken me through the impugned order to submit that, the learned Judge has failed to appreciate rational of section 32A of the IBC, inasmuch as,

although he was satisfied that the approval of the Resolution Plan by the NCLAT has, caused change in the management, yet prosecution of the Corporate Debtor has been permitted through erstwhile Directors, overlooking the object of section 31A of the IBC which intends to give a, `clean break', to the successful resolution applicant. Nextly, he submitted that, pendency of appeals before the NCLAT against the Section 31 order of the IBC would not impede the operation of provisions of section 32A of the Code, once its requirements are satisfied which stood fully satisfied and thus submitted, the impugned order be quashed and *set aside* and DHFL, be absolved of criminal liability and offences committed prior to commencement of CRIP.

15. Mr. Badheka, learned Counsel for the Intervenor, would contend that, execution of the Resolution Plan is subject to outcome of appeals preferred by Mr. Kapil Wadhwan and 63 Moons Technologies Ltd. and therefore, pending final adjudication, the discharge of DHFL under section 32A of the Code is overhasty. Mr. Badheka, submitted that, outcome of the appeal would be crucial consideration in discharge of DHFL from all criminal liabilities and in the event, the appeal is adjudged in favour of intervenor, it would become burdensome for prosecution agencies to once again initiate proceedings against DHFL, which may not be possible once DHFL is discharged from all criminal liabilities. Besides, Mr. Badheka, argued that, in any event, the management or control of DHFL has not yet changed and vested in resolution applicant, which is essential condition, before Corporate Debtor seeks discharge. Mr. Badheka has taken me through the Affidavit of Mr. Kapil Wadhwan (Intervenor) sworn on 22nd September, 2021 in support of this contention. Mr. Badheka, submitted that if DHFL is discharged at this stage and if Appeal is adjudged in favour of the Intervenor, again a cognizance cannot be taken against a Corporate Debtor since cognizance of an offence, can only be taken once. In support of the submission, he has relied on the judgment of the Apex Court in the case of *Balveer Singh* v. *State of Rajasthan* (2016) 6 SCC 680. His next contention is, once an Appeal is filed before the NCLAT, the order Section 31 cannot be said to have attained finality and therefore discharge plea was pre-mature. In support of the submission, Mr. Badheka, would rely on the judgment of the Apex Court in the case of *Union of India* v. *West Coast Paper Mills Ltd.* (2004) 2 SCC 747. It is therefore submitted that, impugned order being passed in application under section 32A which was pre-mature, it be kept in abeyance till the Section 31, order attains finality.

16. Mr. Venegaonkar, learned Counsel for the CBI, would rely on the judgment of the Apex court in the case of *Dharam Pal* v. *State of Haryana* (2014) 3 SCC 306 to contend that, a cognizance of the offence cannot be taken twice and therefore until statutory appeals are decided, it would not be appropriate to discharge the Corporate Debtor of criminal liability incurred prior to CRIP.

Reasons :

17. Facts of the case and in particular subsequent events (stated above), has indisputably established, change in management of a Corporate Debtor. This fact is hardly disputed by the Intervenor

in his Affidavit, contending that, "DHFL ought to issue equity shares to shareholders of PCHFL *i.e.* PEL and thereafter upon allotment, DHFL will become a wholly owned subsidiary of PEL." It may be stated that, Intervenor has not disputed appointment of six Additional Directors on the Board of Director of DHFL, with effect from 30th September, 2021, consequent to reverse merger and implementation of Resolution Plan. The objection in respect of subsequent events, sought to be raised by Mr. Badheka, learned Counsel for Intervenor is that, petitioners ought to have followed the, due procedure, to place on record the subsequent events and certainly not by filing a, `purshis'. Mr. Badheka, has placed reliance on judgment of the Delhi High Court in the case of *PTI Employees Union* v. *Press Trust of India* 2021 SCC Online Delhi 939 wherein it was held that;

"It is well settled that the parties have to amend their pleadings to incorporate new facts and documents. This Court deprecates the manner in which new averments and documents beyond pleadings are sought to be filed without permission of this Court, as such a belated stage for which no explanation has been given."

Mr. Badheka, would therefore submit that this Court shall not take cognizance of the subsequent events. In the alternative, it is submitted that let the subsequent events, be first assessed by the trial Court and therefore Mr. Badheka, urged that parties be relegated to the trial Court for reconsideration.

18. It may be stated that, the subsequent events were placed on record *vide* purshis dated 12th October, 2021 and thereafter intervenor had filed a reply Affidavit, dated 20th October, 2021 and dealt with subsequent events extensively. As such, I do not think it appropriate to keep the subsequent events out of consideration and relegate the parties to the trial Court for reconsideration.

19. Herein, subsequent events indisputably caused change in management and control of Corporate Debtor. The immunities sought by the Corporate Debtor though conditional; yet all these conditions have been fulfilled and satisfied; *viz*

(*i*) Resolution Plan in regard to Corporate Debtor has been approved by the Adjudicating Authority under section 31 IBC.

(*ii*) Resolution Plan approved caused and resulted in change in management of Corporate Debtor.

(*iii*) change in management is in favour of persons who were not related to party of Corporate Debtor.

Thus, in my view, immunities under section 32A of IBC, cannot be denied to Corporate Debtor.

20. For these reasons, I hold that, the petitioner-DHFL, stands discharged from the CBI Special Case No. 830 of 2021 pending before the CBI Cases Sessions Court, Mumbai.

21. The next question is, "Whether successful resolution applicant was eligible to invoke section 32A of IBC, when appeals against the order of the Adjudicating Authority, were pending before NCLAT?"

22. Mr. Badheka, learned Counsel for the Intervenor, would submit that, once Appeal is admitted, the correctness of order of Adjudicating Authority becomes "made open" and in such an Appeal, the Court is entitled to go into both, questions of facts, as well as law, and in such an event, the correctness of the order dated 7th June, 2021 is in jeopardy. It is therefore argued that, until Appeals which are statutorily provided under the IBC, are finally disposed off, there is no finality to the order section 31 of IBC, and therefore application under section 32A moved by the successful resolution applicant was premature and not maintainable. Mr. Badheka, has relied on the judgment of the Apex Court in the case of *West Coast Papers Mills* (*supra*). In this case, a suit was filed by respondent-plaintiff based on declaration dated 18th April, 1966 made by the Railway Rates Tribunal, qua, revised freight charges. Order of tribunal was challenged in Special Leave Petition by Railways. Apex Court passed, limited interim orders but refused to grant stay. In January 1972, Supreme Court dismissed the Special Leave Petition. Whereafter, plaintiff instituted a suit in December, 1973 against the Railways to recover excess freight charges. A plea of limitation was raised by the Railways. It was turned down by two Courts. After which, Union filed Civil Appeal before the Hon'ble Supreme Court. In the context of these facts, the Apex Court has held that, "lis unless determined by last Court cannot be said to have attained the finality. The observations in paragraphs no. 41 and 42 in *West Coast Papars Mills* (*supra*) were in context of law of limitation, *vis-a-vis* a doctrine of merger. Be that as it may, in the case in hand, certain appeals under section 32 read with section 31 of IBC have been filed by various parties including intervenor against the plan approval order with prayers for interim relief. However, the NCLAT, refused to stay, the plan approval order, in the following terms :

"Suffice it to say that having gone through the rival contentions of the Learned Counsel for both sides, we do not find that these are Appeals wherein interim order should be passed for grounds being raised by the Appellant. The objections raised to the Resolution Plan which has been challenged in Company Appeal (AT) (Insolvency) No. 455 of 2021 are also based on similar footing. The rival claims, which are more questions of law would require deliberation and decision at appropriate stage. If the averments made by the Appellant are juxtaposed with averments made by Respondents, we do not find it a fit case to pass interim orders as sought. We do not think that any interim order as sought with regard to Resolution plan approved needs to be passed."

23. Be that as it may, although section 32 provides for appeal against an order approving the Resolution Plan, yet, mere filing of appeal would by itself not operate as a stay, until a specific prayer in this regard is made and orders thereon are passed, as held in the case of *Madan Kumar Singh* v. *District Magistrate* (2009) 9 SCC 79. Infact, herein appeals were filed with a specific prayer to grant stay to the Section 31 order. However, the NCLAT by reasoned order, declined to stay the order. In this regard, the order of the Division Bench of this Court in the case of *Sai Shipping Services* (*P.*) *Ltd.* v. *Union*

of India 2017 SCC Online Bom. 6655, would support the contention of the petitioners, in which the Division Bench has held;

"The tribunal is last fact finding court of appeal and presided over by retired judge of the High Court. They exercise judicial powers. In the circumstances, their orders bind the parties. Once, the appeal of the revenue in this case has been admitted, but interim stay is refused, then we do not think that, the Tribunals order can be kept in abeyance and indefinitely."

Thus, in consideration of the facts of the case and in view of the law laid down in aforesaid judgment and order, I hold that the application preferred by the successful resolution person, was not pre-matured. The point is answered accordingly.

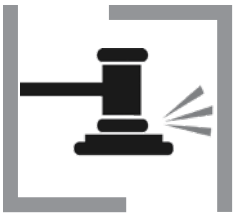
24. It takes me to the last submission of the petitioners who contended, that impugned order permitting to prosecute the Corporate Debtor through accused nos.2 and 3 was erroneous and perverse, in as much as, accused nos.2 and 3, who were Directors of the Corporate Debtor, were ousted from the Board of Directors by the Reserve Bank of India, approximately two years ago and has since no control over the management of the petitioner. I do not see any reason to discard this submission to hold that, the learned Judge has committed an error by permitting the prosecution of the Corporate Debtor to the accused nos. 2 and 3, who were ousted from Board of Directors, by the RBI two years ago.

25. For the reasons stated above, the impugned order is quashed and set aside. The application of Dewan Housing Finance Corporation Limited moved under section 32A of the Insolvency and Bankruptcy Code, 2016 in Criminal Complaint No. 355/PW/2002 corresponding Sessions Case No. 830 of 2021 is granted.

26. Rule is made absolute in aforesaid terms. Petitions are disposed off.

27. With disposal of the petitions, the intervention application does not survive. The same also stands disposed off.

28. At this stage, the Counsel for the Intervenor seeks stay to the operation of the judgment. The request is rejected.



(2021) 133 taxmann.com 340 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Rajmee Power Construction Ltd. *v.* Jharkhand Urja Sancharan Nigam Ltd.

ANANT BIJAY SINGH, JUDICIAL MEMBER AND MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 596 OF 2020†

NOVEMBER 18, 2021

Section 238A, read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Limitation period - Arbitral award was first passed on 14-2-2008 in favour of appellant and against corporate debtor - Implementation was conveyed to appellant *vide* letter dated 30-4-2008 - Corporate debtor took board decision on 29-1-2016 to recover money paid to appellant but that decision was never communicated to appellant - An amount was deducted from payment made to appellant on 31-3-2016 - Appellant preferred an RTI application on 2-8-2016 seeking reasons for less payment, which was received by appellant on 6-8-2016 - Challenge to arbitral award was dismissed on 6-10-2018 - On 6-8-2016 after receipt of information under RTI, appellant got knowledge of recovery for very first time and filed application under section 9 on 4-6-2019 - Whether payment made by corporate debtor to appellant after deducting an amount on 31-3-2016 extended 'date of default' - Held, yes - Whether since challenge to arbitral award dated 14-2-2008 was dismissed on 6-10-2018 and part payment was made on 31-3-2016, application filed under section 9 on 4-6-2019 was not barred by limitation - Held, yes (Paras 10, 11 and 12)

FACTS

- An arbitral award was passed in favour of the appellant and against the corporate debtor on 14-2-2008, which was not challenged, but was duly implemented. The decision in this regard was conveyed to the appellant on 30-4-2008 and the money was paid by cheque dated 10-5-2008.
- After payment of the award money on 10-5-2008 some tentative steps were taken by the officials of the corporate debtor reverse and recovery paid money but nothing had happened finally.
- The final decision to make recovery was taken only on 29-1-2016 but was never conveyed to the appellant. The appellant filed an RTI application and the file notings gave the knowledge about the fact that a board decision was taken on 29-1-2016 and the amount

to be deducted was mentioned as less arbitration- Rs. 11 crores. The total payable sum had been calculated as Rs. 2,47,16,999 after deducting Rs. 11 crores.

- The appellant was given a cheque for Rs. 2,47,16,999 on 31-3-2016 and having no knowledge about the reason for less payment, the appellant wrote several letters, but there was no response. It was only on account of the information received through RTI that the appellant came to know about the internal decisions.
- It was only on 6-8-2016 after the receipt of the information under RTI, that the appellant got the knowledge of recovery for the very first time and filed the application under section 9 on 4-6-2019.
- The Adjudicating Authority (NCLT) by the impugned order, had dismissed the application preferred by the appellant under section 9 solely on the ground of limitation. The Adjudicating Authority held that operational creditor had failed to show that there was a continuous chain of events even after 14-2-2008 without violating provisions of Limitation Act, 1963.
- On appeal :

HELD

- It is not in dispute that the arbitral award was first passed on 14-2-2008 in favour of the appellant and against the corporate debtor. The award was accepted on 30-4-2008 and the decision of the board was conveyed to the appellant. The implementation was conveyed to the appellant vide letter dated 30-4-2008 based on award dated 14-2-2008. (Para 4)
- It is also an admitted fact that an amount of Rs. 10,75,46,964 was paid to the appellant vide cheque dated 10-5-2008. (Para 5)
- Subsequently, corporate debtor i.e. JUSNL, the statutory successor of Jharkhand State Electricity Board (JSEB), took board decision on 29-1-2016 to recover the money paid to the appellant. It is the appellant's case that this decision was never communicated to them. It is also not the case of the corporate debtor that they had communicated this decision to the appellant. The appellant drew attention to the transfer scheme. The transfer scheme issued under the Electricity Act, by which JUSNL became the statutory successor of the rights and liabilities of JSEB. Subsequently, the board took a decision that an amount of Rs. 11 crores is to be deducted and the same was shown under the head 'keep back arbitration' and an amount of Rs. 2,47,16,999 was paid to the appellant vide cheque dated 31-3-2016 after deducting Rs. 11 crores. The appellant preferred an RTI application on 2-8-2016 seeking the reasons for the less payment which was received by the appellant on 6-8-2016.(Para 6)

- It was only on 6-8-2016 after the receipt of the information under RTI, that the appellant got the knowledge of recovery for the very first time and filed application under section 9 on 4-6-2019, well within three years. In the instant case the respondent/corporate debtor does not deny the main contention of the appellant that the decision with respect to recovery and deduction of the arbitral amount was never communicated to the appellant. Even in their reply before the Adjudicating Authority and before the Tribunal and in the submissions filed the corporate debtor is completely silent with respect to this communication having been made to the appellant. Therefore, keeping in view the facts of instant case, it is considered that the date of knowledge of happening of the default is a relevant date. (Para 7)

- The issue of limitation in the instant case is to be adjudicated on the touchstone of the ratio laid down in *Dena Bank v. C. Shivakumar Reddy* (2021) 129 taxmann.com 60 (SC). (Para 8)

- Limitation is essentially a mixed question of law and facts and the material evidence on record establishes that the appellant got the knowledge of the deduction for the very first time only after receipt of information vide RTI application on 6-8-2016. It is pertinent to mention that an amount of Rs. 2,47,16,999 was paid admittedly to the appellant with a cheque dated 31-3-2016. Also section 19 of the Limitation Act, 1963 is applicable. (Para 9)

- The part payment made on 31-3-2016 further extends the `date of default' keeping in view the facts and circumstances of the attendant case on hand. The challenge to the arbitral award was dismissed on 6-10-2018. The recovery made in 2016 was provisional, subject to the challenge against the arbitral award, which got dismissed on 6-10-2018 and the same was not challenged further. The application was filed on 4-6-2019 which is within three years of this date. (Para 11)

- The contention of the respondents that the arbitral award was dated 14-2-2008 and this date was mentioned as a `date of default' in both the section 8 notice as well as in part IV of the application under section 9 and therefore only that date should be considered as the `date of default', is unsustainable, keeping in view that the same award was challenged and got dismissed on 6-10-2018; that the award dated 14-2-2008 was also implemented with cheque dated 10-5-2008; a fresh default arose on 31-3-2016, caused by the reversal/ deduction from other bills, the knowledge of accrual of the `Right of issue' was on 6-8-2016 (when the appellant received information under RTI); section 9 application was filed on 4-6-2019 which is well within the limitation of three years. (Para 11)

- In the instant case, the challenge to the arbitral award was dismissed on 6-10-2018, and hence has attained finality, the part payment was made on 31-3-2016 and therefore it is opined that the application filed on 4-6-2019 is not barred by limitation. (Para 12)
- The appeal is allowed and the impugned order is set aside and the Adjudicating Authority shall proceed in accordance with law keeping in view the timelines under the Code. (Para 13)

CASE REVIEW

Ramjee Power Construction Ltd. v. *Jharkhand Urja Sancharan Nigam Ltd.* (2021) 133 taxmann.com 339 (NCLT - Kol.) (para 13) *reversed* ***(See Annex)***.

Dena Bank v. *C. Shivakumar Reddy* (2021) 129 taxmann.com 60 (SC) (para 8) *followed*.

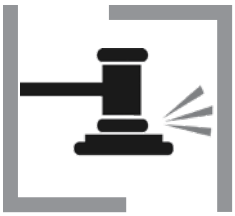
CASES REFERRED TO

B.K. Educational Services (P.) Ltd. v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 2), *Vashdeo R. Bhojwani* v. *Adhyudaya Co-operative Bank Ltd.* (2019) 109 taxmann.com 198/156 SCL 539 (SC) (para 3), *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* (2019) 109 taxmann. 395/156 SCL 297 (SC) (para 3), *Sagar Sharma* v. *Phoenix ARC (P.) Ltd.* (2019) 110 taxmann.com 50/156 SCL 707 (SC) (para 3), *Jignesh Shah* v. *Union of India* (2019) 109 taxmann.com 486/156 SCL 542 (SC) (para 3), *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 118 taxmann.com 323 (SC) (para 3) and *Dena Bank* v. *C. Shivakumar Reddy* (2021) 129 taxmann.com 60 (SC) (para 8).

Pandey Neeraj Rai and **Ms. Rachita Priyanka Rai**, Advs. *for the Appellant.* **Anup Kumar**, Sr. Standing Counsel, **Saurabh Jain** and **Ms. Shruti Singh**, Advs. *for the Respondent.*

† Arising out of Order of NCLT, Kolkata in *Rajmee Power Construction Ltd.* v. *Jharkhand Urja Sancharan Nigam Ltd.* (2021) 133 taxmann.com 339.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 340 (NCLAT- New Delhi)



(2021) 133 taxmann.com 342 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

L. Ramalakshmamma *v.* State Bank of India

M. VENUGOPAL, JUDICIAL MEMBER AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH) (INSOLVENCY) NOS. 220 AND 221 OF 2021†

NOVEMBER 22, 2021

Section 97 of the Insolvency and Bankruptcy Code, 2016, read with rule 8 of the Insolvency and Bankruptcy (Application to 'Adjudicating Authority' for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 - Individual/ firm's insolvency resolution process - Resolution professional, appointment of - 'Adjudicating Authority' had passed 'Impugned Orders' whereby and whereunder he had appointed an 'Interim Resolution Professional' - Appellants submitted that 'Impugned Orders' were cryptic, unreasoned, non est and non-speaking orders which were passed in violation of ingredients of IBC as 'Adjudicating Authority' by 'Impugned Orders' had appointed 'IRP' without adhering to mandatory section 97 - However, on going through word 'shall' employed in section 97(1), it is viewed that it is only 'Directory' and not 'Mandatory' and NCLT may pick up any one for appointment of 'IRP' - Moreover, if viewed from object and purpose to be achieved by 'IBC', word 'employed' in section 97(1) can only be construed as 'directory' and not a mandatory one, that too by adopting a purposeful, meaningful, practical, pragmatic and result oriented approach, with a view to prevent an aberration of justice and to secure ends of justice - Whether therefore, provisions of section 97(1) and 97(2) of 'IBC' whereby 'Adjudicating Authority' is required to obtain confirmation of Board prior to appointment of 'Resolution Professional' being only directory in nature and not mandatory and/Adjudicating Authority' having exercised its judicial discretion in fair manner for appointment of an 'IRP', same could not be found fault with - Held, yes (Paras 29, 33 and 34)

FACTS

- The 'Adjudicating Authority' had passed the 'Impugned Orders' whereby and whereunder he had appointed an 'Interim Resolution Professional'.
- The appellants submitted that the 'Impugned Orders' were cryptic, unreasoned, *non est* and non-speaking orders which were passed in violation of the ingredients of the Insolvency and Bankruptcy Code, 2016 ('IBC').
- The stand of the appellants is that the 'IBC', 2016 provides that appointment of the 'IRP' under section 97(5) of IBC requires mandatory compliance of section 97(1) and 97(2) of IBC read with rule 8 of Insolvency and Bankruptcy (Application to Adjudicating

Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. Clearly, before 'IRP' being appointed the same was to seek confirmation from the IBBI that no disciplinary proceedings are against him. However, in the instant case, the 'Impugned Orders' are completely silent as to whether the 'Adjudicating Authority' was in receipt of communication issued by the IBBI confirming the appointment of the 'IRP' under section 97 of 'IBC' or in receipt of any database to confirm that no disciplinary proceedings were pending against the 'IRP' under rule 8.

- The appellants contends that section 95(1) of the 'IBC' enjoins that a creditor may, either by himself or through a Resolution Professional file an Application for initiating 'Insolvency Resolution Process' against the 'Personal Guarantor' or a Partnership Firm. Also, that it is the stand of the appellants that even Application under section 95 of 'IBC' is filed through Resolution Professional, as in the instant case, then section 97(1) and 97(2) of the 'IBC' can get attracted.

HELD

- The Core pleas of the appellants in the two appeals are that the 'Impugned Orders' are silent on the List/panel of 'Insolvency Professional' as enumerated by IBBI and that section 95(1) of 'IBC' provides that a creditor may apply either by himself or jointly with other creditors or through Resolution Professional may file an application to the 'Adjudicating Authority' for initiation of CIRP and that as per section 97(1) of 'IBC', if the Application under section 94 or 95 is filed through the Resolution Professional, the 'Adjudicating Authority' shall direct the Board within 7 (seven) days of the date of Application to confirm that there are no disciplinary proceedings pending against the Resolution Professional. Moreover, as per section 97(2) of 'IBC', the Board within 7 (seven) days of receipt of direction under sub-section (1) communicate the 'Adjudicating Authority' either (*a*) confirm the appointment of the Resolution Professional or (*b*) reject the appointment of the Resolution Professional and nominate another Resolution Professional for Insolvency Resolution Process. As per section 97(5) of 'IBC', the 'Adjudicating Authority' by an order appoint the Resolution Professional recommended under sub-section (2) or as nominated by Board under sub-section (4). Rule 8(1) of the Insolvency and Bankruptcy (Application to 'Adjudicating Authority' for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 relates to confirmation or nomination of 'Insolvency Professional' by the Board which may share data base of the 'Insolvency Professional' including information about the disciplinary proceedings against them with the 'Adjudicating Authority' from time-to-time. As such the contentions raised on behalf of the appellants that the requirements under section 97(1)

and 97(2) were not fulfilled by the 'Adjudicating Authority' at the time of passing of the 'Impugned Orders' especially in the teeth of word 'shall' employed in section 97 of 'IBC'. To put it differently, the stand of the appellants is that before the 'Adjudicating Authority' can pass order as per section 97(5) of 'IBC', the word 'shall' employed under section 97(1) and 97(2) of IBC are to be satisfied and in the instant case, the 'Adjudicating Authority' had not fulfilled the requirements as enunciated by 'IBC' and as such, the 'Impugned Orders' are not sustainable in the eye of law. (Para 27)

- The other contention projected on the side of the 'appellants' is that without determining the aspect of non-compliance of section 97 of 'IBC', any decision under section 100 of 'IBC' shall affect the vital rights of the appellants. (Para 28)

- According to the respondents, the provision of section 97(1) and 97(2) of 'IBC' whereby the 'Adjudicating Authority' is required to obtain confirmation of the Board prior to the appointment of 'Resolution Professional' is only directory in nature and not a mandatory one and further that the rule 8(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 that the Board may share database containing the relevant details in regard to the Resolution Professional to enable the 'Adjudicating Authority' to appoint 'Resolution Professional' in a time bound manner. (Para 29)

- On behalf of the respondents, it is brought to the notice of this 'Tribunal' that the appellants had filed an application under section 98 of 'IBC' to replace 'Resolution Professional'. (Para 30)

- To be noted, that the 'Insolvency Professional' to act as 'IRP', Liquidator, Resolution Professional and Bankruptcy Trustee (Recommendation) Guidelines, 2021 under the caption 'Panel of IPs'. (Para 31)

- A 'Resolution Professional' is an indispensable person in 'Insolvency Resolution Process', as he has a pivotal part to play. No wonder, an 'Adjudicating Authority' can exercise his judicial discretion in appointing a 'Resolution Professional' in a given case, based on the facts and circumstances of the case, which float on the surface. (Para 32)

- Moreover, if viewed from the object and purpose to be achieved by 'IBC', the word 'employed' in section 97(1) shall can only be construed as 'directory' by any stretch of imagination and not a mandatory one, that too by adopting a purposeful, meaningful, practical, pragmatic and result oriented approach, with a view to prevent an aberration of justice and to secure the ends of justice. (Para 33)

- In the instant case on hand, ongoing through word 'shall' employed in section 97(1) of 'IBC', it is viewed

that it is only 'Directory' and not 'Mandatory' and holds it so, in the teeth of rule 8(1) of the Insolvency and Bankruptcy (Application to 'Adjudicating Authority' for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 and also by which the NCLT may pick up any one from the Panel for appointment of 'IRP' Liquidator, Resolution Professional and Bankruptcy Trustee. As such, when the 'Adjudicating Authority' had exercised its judicial discretion in fair manner for the appointment of an 'IRP', the same cannot be found fault with as opined by this 'Tribunal'. (Para 34)

- In view of the foregoings, the contra plea, taken on behalf of the appellants that before passing of an order under section 97(5) of 'IBC', the ingredients of section 97(1) and 97(2) of 'IBC', are ought to be satisfied, is not acceded to by this 'Tribunal'. Looking at from any angle, the 'Impugned Orders' for appointment of 'IRP' and directing him to file 'Report' under section 19(9) of 'IBC' are free from any legal patent legal errors. Hence, the 'Appeals' fail and are dismissed. (Para 35)

CASE REVIEW

L. Ramalakshmamma v. *State Bank of India* (2021) 133 taxmann.com 341 (NCLT - Hyd.) and *L. Madhusudhan Rao* v. *State Bank of India* (2021) 132 taxmann.com 309 (para 34) (NCLT - Hyd.) *affirmed* (***See Annex***).

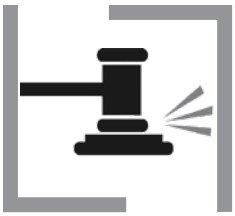
CASES REFERRED TO

State of Haryana v. *Raghubir Das* (1995) 1 SCC 133 (para 13), *Mohan Singh* v. *International Airport Authority of India* (1997) 9 SCC 132 (para 13), *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 14), *Embassy Property Developers (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/ (2020) 157 SCL 445 (SC) (para 14), *Tata Capital Financial Services Ltd.* v. *G. Ramakrishna Reddy* (IBA/475/2020, dated 1-6-2021) (para 15), *State Bank of India* v. *Shagufta Khan* ((IB)-947 (PB)/2020 (para 15), *State Bank of India* v. *Farah Kahn* (IB)-950 (PB)/2020 (para 15), *State Bank of India* v. *Nazuk Khan* (IB)-949 (PB)/2020 (para 15), *State Bank of India* v. *Waseem Ahmad Khan* (IB)-951 (PB)/2020 (para 15), *State Bank of India* v. *Sameer Ahmad Khan* (IB)-948 (PB)/2020 (para 15), *Ravi Ajit Kulkarni* v. *State Bank of India* (2021) 130 taxmann.com 442 (NCLAT - New Delhi) (para 18), *Kailash* v. *Nanhku* (2005) 4 SCC 480 (para 23) and *Dinesh Chandra Pandey* v. *High Court of M.P.* (2010) 11 SCC 500 (para 24).

Arjun Syal, **Ms. Manju Dasgupta**, **Shreyan Das**, **Akhyil Wahal** and **Saai Shudharsan**, Advs. *for the Appellant.* **Abhishek Anand** and **Viren Sharma**, Advs. *for the Respondent.*

† Arising out of orders passed by NCLT, Hyderabad in *L. Ramalakshmamma* v. *State Bank of India* (2021) 133 taxmann.com 341 and *L. Madhusudhan Rao* v. *State Bank of India* (2021) 132 taxmann.com 309 (NCLT - Hyd.)

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 342 (NCLAT - Chennai)



(2021) 133 taxmann.com 344 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Drip Capital Inc. *v.* Concord Creations (India) (P.) Ltd.

M. VENUGOPAL, JUDICIAL MEMBER

AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT)(CH) (INS.) NO. 167 OF 2021

NOVEMBER 8, 2021

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Whether initiation of CIRP does not amount to recovery proceedings and 'Adjudicating Authority' at time of determination as to whether to admit or reject an application under section 7 is not to take into account reasons for corporate debtor's default - Held, yes - Appellant-financial creditor had granted an export finance facility to respondent-corporate debtor, which corporate debtor had failed to repay - Corporate debtor failed to reply to demand notice sent by financial creditor - Financial creditor filed application under section 7 for initiation of corporate insolvency resolution process against corporate debtor - Adjudicating Authority by impugned order rejected said application observing that respondent was not an 'insolvent company' and that respondent should be given some more time to repay debt - Whether corporate debtor was in default of its admitted liability to pay as per terms of 'Receivables Purchase Agreement' - Held, yes - Whether Adjudicating Authority had exceeded its jurisdiction by taking defence of corporate debtor, especially in absence of any reply or objection projected by corporate debtor - Held, yes - Whether since order of Adjudicating Authority suffered from patent legal infirmities, impugned order was to be set aside and Adjudicating Authority was to be directed to admit application filed under section 7 - Held, yes (Paras 14, 27 and 29)

FACTS

- The Appellant/Financial Creditor had granted an export finance facility to respondent/Corporate debtor as per (I) the receivables purchase factoring agreement (RPA) duly authorized by the corporate debtor through its board resolution. An irrevocable Undertaking for Recourse against corporate debtor had also provided a Demand Promissory Note in favour of financial creditor.
- Financial creditor issued Letter of Demand to corporate debtor in respect of repayment of unpaid Financial debt, after repeated reminders issued to corporate debtor, corporate debtor failed to reply to demand notice or to

repay Financial Debt, consequently financial creditor filed application under section 7 for initiation of corporate insolvency resolution process against corporate debtor.

- Adjudicating Authority by impugned order rejected application observing that respondent was not an 'insolvent Company' and that respondent should be given some more time to repay the debt. It was held that Code cannot be used to jeopardise the financial health of an otherwise solvent company by pushing it into insolvency, which would be against the objects of the Code. It directed respondent to repay debt within period of six months failing which appellant would be at liberty to file a fresh petition for admission.

- On Appeal :

HELD

- The 'Adjudicating Authority' is not a 'Court of Law' and that 'CIRP' is not a litigation. As a matter of fact, if the 'Adjudicating Authority' is subjectively satisfied as to the existence of default and arrive at a conclusion that the application is a complete one and further that no disciplinary proceedings are pending against the proposed 'Resolution Professional' it is incumbent upon it to admit the application. In reality, no other 'yardstick' is required to look into any other requirement for admission of the application. (Para 13)

- It cannot be gainsaid that an initiation of CIRP does not amount to recovery proceedings and that the 'Adjudicating Authority' at the time of determination as to whether to admit or reject an application under section 7 is not to take into account the reasons for the corporate debtor's default. (Para 14)

- The appellant/financial creditor had granted an export finance facility to respondent/(corporate debtor) as per (i) the Receivables Purchase Factoring Agreement (RPA) dated 12-12-2018 duly authorised by the corporate debtor through its Board Resolution dated 12-12-2018 (*ii*) An irrevocable Undertaking for Recourse against corporate debtor 12-12-2018 (Undertaking) and in addition to the above documents, the corporate debtor had also provided a Demand Promissory Note in favour of financial creditor which was dated 12-12-2018. (Para 17)

- The plea of the appellant is that under the terms of 'Receivables Purchase Factoring Agreement' read with Undertaking, the corporate debtor had requested the appellant/financial creditor to purchase and assigned in favour of the financial creditor, the receivables under the three invoices on with recourse basis. As a matter of fact, the said goods shipped under the invoices were primarily purchased by Aquarius USA Inc. each invoice mentioned that it was assigned to financial

creditor by stating 'This Invoice has been sold and assigned to the appellant'. (Para 18)

- In this connection, it is pointed out on behalf of the appellant that the appellant/financial creditor had remitted payment to corporate debtor in respect of the purchase and consequential assignment of said three invoices. Further, the 'Receivables' under the Invoices' were assigned by the corporate debtor to the financial creditor on with recourse basis under the Undertaking against the payment of aforesaid aggregate amount etc. (Para 19)

- The appellant/financial creditor points out that the appellant had reminded Aquarius USA Inc. of its obligations to make payments towards the 'Invoices' directly to the financial creditor on Repayment Due Dates. But, the Aquarius USA Inc. had informed the appellant/financial creditor through e-mail dated 12-9-2019 that the said invoices are disputed and as such, the payments cannot be made. Besides this, Aquarius USA Inc. had also advised the financial creditor to get in touch with the corporate debtor for its payment. (Para 20)

- It is the version of the appellant/financial creditor that it approached the corporate debtor seeking details of the commercial dispute and requesting the payments to be made under the 'Recourse Undertaking' but the corporate debtor had failed to reply or arrange payment under the three invoices assigned to financial creditor. Hence, the financial creditor had exercised recourse against the corporate debtor based on the Undertaking, by claiming amounts paid by the financial creditor in respect of the invoices. (Para 21)

- Financial creditor on 14-10-2019 issued a Letter of Demand to the corporate debtor by exercising recourse on the corporate debtor, in terms of the 'Receivables Purchasing Agreement' read with duly executed undertaking in respect of repayment of the unpaid aggregate 'Outstanding Receivables'/Financial Debt. However, even after repeated reminders issued to the corporate debtor, in regard to the non-payment of Invoices on repayment due date, the corporate debtor had failed to reply to the Demand Notice or repay the financial debt. (Para 22)

- Financial creditor points out that since the corporate debtor had defaulted in its payment obligations to the financial creditor and is in default of its admitted liability to pay as per the terms of 'Receivables Purchasing Agreement' read with Undertaking and the Demand, the 'CIRP' be initiated against it in accordance with section 7. (Para 23)

- In the instant case, because of the fact that the advances made by the appellant/financial creditor to

the corporate debtor was supported by the `Irrevocable Undertaking for Recourse' and as such, it is within its ambit to demand the repayment from the `corporate debtor' etc. added further, it cannot be forgotten that the invoices purchased and assigned to the appellant/financial creditor/ petitioner were with `Recourse' and that the said advances will squarely come within the definition of section 5(8)(e). (Para 25)

- Before the `Adjudicating Authority' the respondent/corporate debtor had entered appearance but had not filed its Reply to the application. In this connection, on behalf of the financial creditor it is pointed out before the Tribunal that during the pendency of section 7 application before the adjudicating authority, the financial creditor had agreed for one time settlement to receive only the principal sum/debt of USD 36,532/- by 10-3-2020 and further that this settlement was not honoured by the corporate debtor, thereby financial creditor was constrained to pursue the section 7 application before the `Adjudicating Authority'. (Para 26)

- As regards the non-payment of invoices on repayment due date, inspite of repeated reminders, the corporate debtor had failed to reply to the `Demand Notice' or repay the `Financial Debt'. Also that in the instant case, the corporate debtor is in default of its admitted liability to pay as per the terms of `Receivables Purchase Agreement'. (Para 27)

- It is to be pointed out that the `Adjudicating Authority' in the impugned order had observed that the respondent was not an `Insolvent Company' and that it was of the considered view that respondent should be given some more time to repay the debt etc. had directed the respondent/Corporate debtor to repay the balance debt or the amount as settled with the appellant within a period of six months failing which the appellant would be at liberty to file a fresh petition for admission. Therefore, the Adjudicating Authority had exceeded its jurisdiction by taking the defense of the corporate debtor, especially in the absence of any `Reply' or objections projected by the corporate debtor. Consequently, the Tribunal interferes with the impugned order, since it suffers from patent legal infirmities. The instant appeal succeeds.

- Thus, the company appeal is allowed. Resultantly, the impugned order dated 28-5-2021 passed by the Adjudicating Authority (National Company Law Tribunal) is set aside. The Adjudicating Authority is directed by the Tribunal to restore CP to its file. `Admit' the same and to proceed further in accordance with law. (Para 29)

CASE REVIEW

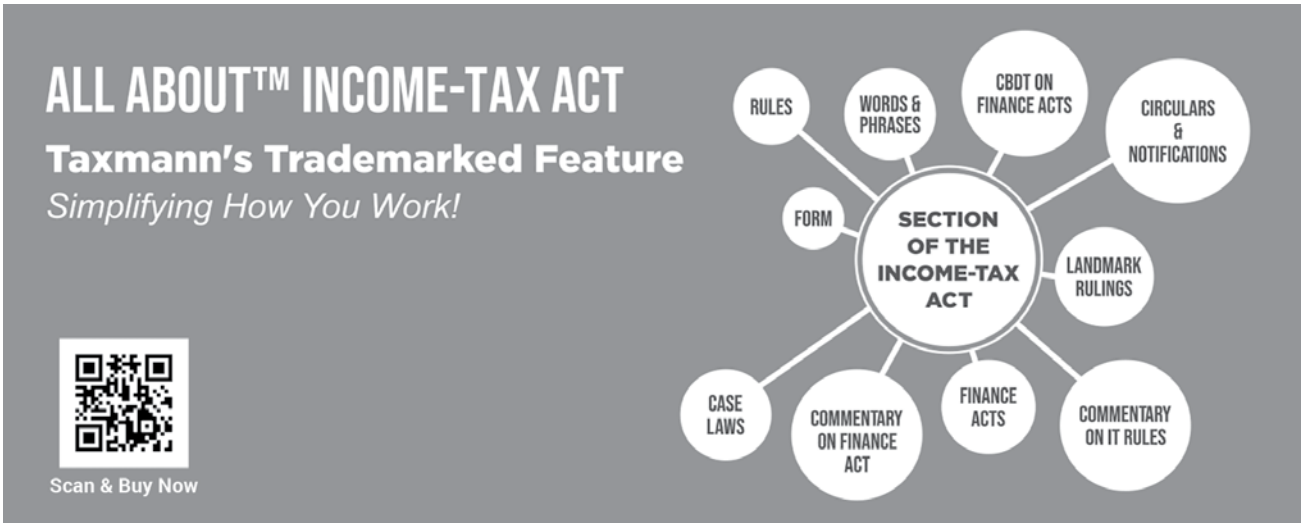
Drip Capital Inc. v. *Concord Creations (India) (P.) Ltd.* (2021) 133 taxmann.com 343 (NCLT - Bengaluru) (para 29) *reversed* (***See Annex***).

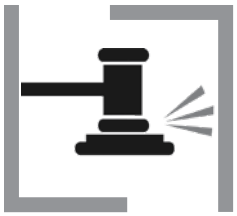
CASE REFERRED TO

Innoventive Industries Ltd. v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 29).

Chandrashekhar Chakalabbi and **Dharmaprabhas**, Advs. *for the Appellant.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 344 (NCLAT - Chennai)





(2021) 133 taxmann.com 346 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Shailendra Singh *v.* Nisha Malpani (Resolution Professional)

M. VENUGOPAL, JUDICIAL MEMBER V.P. SINGH AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS) NO. 945 OF 2020†

NOVEMBER 22, 2021

Section 5(1) of the Insolvency and Bankruptcy Code, 2016, read with sections 425 and 408 of Companies Act, 2013 - Corporate Insolvency Resolution Process - Adjudicating authority - Whether ingredients of section 425 of Companies Act, 2013 do not mention that provisions of power under Contempt of Courts Act, 1971 are applicable only in respect of proceedings before 'Tribunal' confined in respect of provisions of Companies Act, 2013 - Held, yes - Whether under I&B Code, 2016, Adjudicating Authority (NCLT) adjudicates all proceedings before it and renders its decision, just because I&B Code does not specifically mention about contempt provisions, it cannot be said that 'Adjudicating Authority' has no powers of contempt - Held, yes - Whether 'Contempt proceedings' can be exercised by 'National Company Law Tribunal', being 'Adjudicating Authority' as per section 5(1) - Held, yes - Whether a conjoined reading of sections 408 and 425 of Companies Act, 2013 will unerringly point out that power to punish for 'Contempt' is vested with 'Tribunal' shall be while adjudicating on matter not only confined to Companies Act, 2013 but also to matters relating to I&B Code, 2016 - Held, yes (Paras 39, 40 and 41)

FACTS

- The appellant was an advocate who was appointed by the respondent Resolution Professional as a counsel for the corporate debtor and fixed fees per appearance with clerkage, and fees for drafting, Photostat, court fee and other miscellaneous expenses was to be paid as per the invoices raised by the appellant.
- According to appellant, he had very diligently performed his duties as a Counsel while representing his client and duly raised the bills towards legal fees and the payment for the bills were duly made from time-to-time. However, bills remained pending as the IRP was replaced by the CoC.
- The appellant filed an application before NCLT to clear professional dues along with litigation cost and the RP on 7-11-2019 assured to take necessary steps to pay arrears of fees and Tribunal directed him to make payment within two days.
- The appellant stated that RP did nothing even after lapse of 3.5

months of passing order of 7-11-2019 to make payment within two days.

- The appellant filed a contempt application under section 425 of the Companies Act, 2013 read with section 12 of the Contempt of Courts Act, 1971 and rule 11 of NCLT Rules, before the Tribunal for initiating contempt proceedings against the respondent RP for wilful disobedience of the Order dated 7-11-2019 and for issuance of appropriate directions to the respondent for clearing the Bills.

- The Adjudicating Authority by impugned order on 23-9-2020 dismissed the contempt application filed by the appellant on ground that 'IBC' is devoid of 'contempt jurisdiction', and left it open to the appellant to seek remedy through recourses available.

- On appeal :

HELD

- The 'Tribunal' relevantly points out that the 'Adjudicating Authority' (National Company Law Tribunal) in Contempt Application seeking to initiate the contempt proceedings against the respondent for wilful disobedience of the Order dated 7-11-2019 passed by the Tribunal in Contempt Application on 23-9-2020, had finally dismissed the application by observing that 'IBC' is devoid of 'contempt jurisdiction', leaving it open to the Appellant/ Applicant to seek remedy through recourses available. (Para 27)

- In the Contempt Application, the Applicant had mentioned that the Adjudicating Authority on 7-11-2019 had issued directions to the respondent to take appropriate action to release the arrears of fees within two days. (Para 28)

- The appellant because of the non-compliance of the order dated 7-11-2019 in regard to the wilful breach of undertaking furnished by the respondent through counsel, had filed Contempt Application praying for initiation of contempt proceedings against the respondent. (Para 29)

- The plea respondent took before the Tribunal is that the powers of contempt vested with National Company Law Tribunal pertains to powers relating to the matters under the Companies Act and not with regard to the I&B Code. Further that the respondent was unable to make payment of the bills since they were not approved by the Members of the Committee of Creditors and the payment of bills were subject to the approval of the Members of the Committee of Creditors. Furthermore, the bills were without any 'proof' that the appellant had carried out any work. Besides this the CIRP of the corporate debtor was completed and Resolution Plan of the corporate debtor was approved by the Adjudicating Authority on 26-11-2020. (Para 30)

- The definition of section 5(1) means the 'Adjudicating Authority' for the purpose of this Part as 'National Company Law Tribunal'

constituted under section 408 of the Companies Act, 2013. Section 408 of the Companies Act, 2013 provides for the constitution of 'National Company Law Tribunal'. section 410 of the Companies Act, 2013 pertains to 'constitution' of the 'Appellate Tribunal'. (Para 31)

- The 'Tribunal' and the 'Appellate Tribunal' shall be guided by the principles of natural justice while disposing of any proceedings before it and also it can regulate its procedure as it deems fit and proper as per section 424 of the Companies Act, 2013. (Para 32)

- From the Object and Reasons of Insolvency & Bankruptcy Code, 2016 it is quite clear that the National Company Law Tribunal is to act as an Adjudicating Authority for the purpose of matters pertaining to the I&B Code. (Para 33)

- Section 424(3) of the Companies Act, 2013 enjoins that any order made by the Tribunal may be enforced in the same manner as if it was a 'decree' made by Civil Court in 'suit' before it, and the 'Tribunal' may either enforce order itself or may send it for execution to the Court within a local limits of whose jurisdiction the registered office of the company is situated in case the order is against the company, or (b) the person concerned voluntarily resides or carries on business, in case the order is against any such person. (Para 38)

- Section 425 of the Companies Act, 2013 confers powers on the 'Tribunal' (National Company Law Tribunal) to punish for 'Contempt'. The language employed in section 425 of the Companies Act, 2013 are that the power of the Contempt of Courts Act, 1971 are vested with the National Company Law Tribunal while adjudicating all the proceedings that come before it. In this connection, the Tribunal significantly points out that the ingredients of section 425 of the Companies Act, 2013 do not mention that the provisions of power under the Contempt of Courts Act, 1971 are applicable only in respect of proceedings before 'Tribunal' confining in respect of the provisions of Companies Act, 2013. (Para 39)

- Under the I&B Code, 2016 the Adjudicating Authority (National Company Law Tribunal) adjudicates all proceedings before it and renders its decision. Just because the I&B Code does not specifically mention about the contempt provisions, it cannot be said that the 'Adjudicating Authority' (National Company Law Tribunal) has no powers of contempt. If one is to give such a restricted interpretation that the Adjudicating Authority (National Company Law Tribunal) has no jurisdiction of contempt, then its orders cannot be implemented and in fact, the I&B Code will remain in 'Black Letters' without a teeth to bite, in the considered opinion of the Tribunal. (Para 40)

- As per section 425 of the Companies Act, 2013 it is clear that the

'Contempt proceedings' can be exercised by the 'National Company Law Tribunal', being the 'Adjudicating Authority' as per section 5(1) of the I&B Code. Also that a conjoined reading of sections 408 and 425 of the Companies Act, 2013 will unerringly point out that the power to punish for 'Contempt' is vested with the 'Tribunal' shall be while adjudicating on matter not only confine to the Companies Act, 2013 but also to matters relating to the I&B Code, 2016. (Para 41)

- A mere perusal of section 429(1) of the Companies Act, 2013 will indicate that it was amended to extend the power of 'Tribunal' to seek the help of Chief Metropolitan Magistrate, Chief Judicial Magistrate or District Collector within whose jurisdiction any property, books of account or other documents of such company under this Act or of Corporate Person under the said Code are situated or found, to take possession thereof. In fact, the amendment to section 429(1) of the Companies Act, 2013 was made to remove 'sick companies' and extend its scope of application to the Insolvency and Bankruptcy Code. (Para 42)

- It is to be remembered that article 323A and article 323B of the Constitution of India merely authorise the certified Legislature to make laws to set-up such 'Tribunals' and to include therein ancillary provisions. Also that word 'adjudication' in articles 323A(1) and 323B(1) indicates that the 'jurisdiction of the Tribunal' set-up under both the articles shall be confined to adjudication of *quasi judicial* issues relating to administrative matters as the case maybe. (Para 45)

- National Company Law Tribunal Rules, 2016, Part IV, General Procedure, rule 34(1) under the caption 'General Procedure' enjoins that in a situation not provided for in these Rules, the 'Tribunal', may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice. No wonder, the 'Tribunal' as per rule 51 of the National Company Law Tribunal Rules, 2016 has the power to regulate its own procedure in accordance with the Rules of natural justice and equity, for the purpose of discharging its functions under the Act. Furthermore, rule 59 of the National Company Law Tribunal Rules, 2016 pertains to the 'procedure' for imposition of penalty under the 'Act'. As a matter of fact, rule 59(1) of the National Company Law Tribunal Rules, 2016 states that a reasonable opportunity to represent his or her or its case before the Bench or any other officer authorised in this behalf before passing an order or direction imposing penalty under the Companies Act is to be given. (Para 46)

- Rule 59(2) of National Company Law Tribunal Rules, 2016 points out that 15 days' time for submission of explanation in writing, is to be

given to any person or company or a party to the proceedings in the event of 'Bench' deciding to issue the 'show cause notice'. As per rule 59(3) of National Company Law Tribunal Rules, 2016 the 'Bench', shall on receipt of explanation and after oral hearing if granted, is to proceed in deciding the matter of imposition of penalty on the circumstances of the case. (Para 47)

- It cannot be gainsaid that the 'Tribunals' are created under a relevant 'Statute' to decide upon the disputes arising under the said 'Statute' or dispose of a particular category. But the fact of the matter is that 'Courts' which are established by the 'State' concerned are entrusted with the 'State' inherent judicial powers for 'Administration of Justice' in general. Moreover, the Tribunal can regulate their own procedure. As per section 430 of the Companies Act, 2013, the 'National Company Law Tribunal' has the exclusive jurisdiction to deal with the disputes arising under the Act, thereby meaning that the jurisdiction of the Civil Court is ousted. (Para 48)

- The purpose of 'punishment' under 'Contempt jurisdiction' is not only curative but also 'corrective' and in fact one cannot be permitted to bring disrepute to the 'Majesty and Supremacy of Law' and the image of 'Temple of Justice'. It will be a travesty of justice if the 'Tribunals' are to permit 'gross contempt of court' to go 'unpunished', if there are no mitigating factors. In the instant case, the 'Adjudicating Authority' on 7-11-2019 had granted two days time to respondent to pay the arrears of 'Fee' to the appellant because of the non-compliance of the said order dated 7-11-2019, the appellant had filed the Contempt Application and that was dismissed by the 'Tribunal' holding that IBC is devoid of contempt jurisdiction. (Para 49)

- Although section 5(1) defines 'Adjudicating Authority' for the purpose of Part II (Insolvency Resolution and Liquidation for Corporate Persons, Chapter I preliminary means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 and further that the BLRC Report coupled with Statement and Objects and Reasons of the IBC 2016 visualise the 'National Company Law Tribunal' to act as 'Adjudicating Authority' for the purpose of matters pertaining to I&B Code, as per section 425 of the Companies Act, 2013. The 'Tribunal' (*i.e.* NCLT) and the 'Appellate Tribunal' (*i.e.* NCLAT) have the same 'jurisdiction', 'powers' and 'Authority' in respect of contempt of it as the 'High Court' viewed in that perspective, the conclusions arrived at by the Adjudicating Authority (National Company Law Tribunal) in the impugned order by making it clear that the IBC is devoid of contempt of jurisdiction and thereby dismissing the application, leaving it open to the appellant to seek remedy through recourses available, are clearly unsustainable in the eye of Law and the same

is interfered with by the 'Tribunal' in furtherance substantial cause of justice, sitting in 'Appellate Jurisdiction'. Consequently, the appeal succeeds. (Para 50)

- Thus, the Comp.App is allowed. The impugned order dated 23-9-2020 is set aside. (Para 51)
- The Adjudicating Authority is directed to restore the Contempt Application to its file and dispose of the same on merits as expeditiously as possible in a fair, just and dispassionate manner by providing due opportunity to both sides, of course, untrammelled and uninfluenced with any of the observations made by the Tribunal in instant Appeal. Liberty is granted to the respective parties to raise all factual and legal pleas before the Adjudicating Authority (National Company Law Tribunal) who shall take into accounts of the same at the time of passing fresh order in subject matter in issue. (Para 52)

CASE REVIEW

Alchemist Asset Reconstruction Co. (P.) Ltd. v. *NIIL Infrastructure (P.) Ltd.* (2021) 133 taxmann.com 345 (NCLT - New Delhi) (para 51) *reversed* (***See Annex***).

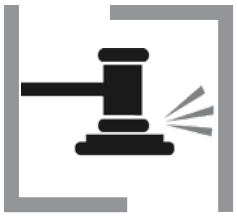
CASES REFERRED TO

McDonald India (P.) Ltd. v. *Union of India* (2018) 89 taxmann.com 221/146 SCL 455 (Delhi) (para 14), *Gireesh Kumar Sanghi* v. *Ravi Sanghi* (Company Appeal (AT) Nos. 156-167 of 2019, dated 2-9-2019) (para 15), *Manoj K. Daga* v. *ISGEC Heavy Engineering Ltd.* (2020) 117 taxmann.com 249/161 SCL 437 (NCLAT-New Delhi) (para 16), *Innoventive Industries* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 18), *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 24), *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 25), *Ashok Paper Kamgar* v. *Dharam Godha* (2003) 11 SCC 1 (para 34), *Noorali Babul Thanewala* v. *K.M.M. Shetty* (1990) 1 SCC 259 (para 35), *T. Sudhakar Prasad* v. *Govt. of A.P.* (2001) 1 SCC 516 (para 36), *Committee of Creditors of Amtek Auto Ltd.* v. *Dinkar T. Venkatasubramanian* (2021) 124 taxmann.com 481/165 SCL 511 (SC) (para 37) and *Seford Court Estates Ltd.* v. *Asher* (1949) 2 KB 481 (CA) (para 44).

Ms. Muskan Garg, **Ms. Prerna Robin**, **Dhruv Goel**, Advs., and **Shailendra Singh**, Party in Person *for the Appellant*. **Asish Makhija**, **Deep Bisht**, **Ms. Saahila Lamba**, Advs. and **Ms. Nisha Malpani**, RP *for the Respondent*.

† Arising out of Order of NCLT, New Delhi in *Alchemist Asset Reconstruction Co. (P.) Ltd.* v. *NIIL Infrastructure (P.) Ltd.* (2021) 133 taxmann.com 345.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 346 (NCLAT - New Delhi)



(2021) 133 taxmann.com 347 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Central Board of Indirect Taxes and Customs *v.* Sundaresh Bhatt

M. VENUGOPAL, JUDICIAL MEMBER V.P. SINGH AND DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 236 OF 2021†

NOVEMBER 22, 2021

Section 238, read with sections 53 and 60, of the Insolvency and Bankruptcy Code, 2016 - Overriding effect of Code - Tribunal ordered for liquidation of corporate debtor company and appellant was appointed as liquidator - Appellant sought release of material/goods of corporate debtor lying at customs bonded warehouse - However, Customs officials refused to release material without payment of customs duty - Appellant submitted that payment of Custom Authority in priority to other debts would be contrary to mechanism provided under section 53 and obtaining a release of material was imperative for discharge of his duty, hence it be allowed to release materials from Custom Bonded warehouse without payment of customs duty at this stage - Accordingly, Adjudicating Authority issued directions to appellant to allow removal of materials lying in Customs Bonded Warehouses without payment of Customs Duty under section 60(5) - However, it was found that goods imported for home consumption could not have been removed from custody of customs without payment of import duty and corporate debtor had abandoned imported goods in customs warehouses for several years and failed to pay import duty and other charges and had not taken any steps to take possession of those goods for several years - Whether therefore, assets lying in customs bonded warehouses could not be considered assets of corporate debtor as corporate debtor itself had relinquished its claim and abandoned goods and thus, liquidator would also have no power to take possession of goods except by payment of customs duty - Held, yes - Whether even before initiating CIRP, corporate debtor could not have secured possession of goods except by paying customs duty - Held, yes - Whether therefore, it was to be held that Adjudicating Authority committed an error in directing release of goods without paying customs duty and other applicable charges - Held, yes (Paras 7.14, 7.16, 7.23 and 7.24)

FACTS

- By an order dated 25-4-2019, instant Tribunal ordered for Liquidation of the corporate debtor company, under section 33(2) of IBC and appointed the present appellant as Liquidator of the corporate debtor company.
- Certain Materials imported by the corporate debtor Company to be

used for construction and building the ships, were presently lying in customs bonded warehouses at certain locations.

- Hence, the appellant filed an application before the Adjudicating Authority. seeking necessary directions from the Tribunal to direct the respondent to lodge their claims with the appellant for the amounts due and payable to them under various statutes, instead of demanding for priority for payment and allow the appellant to release the Materials from the Customs Bonded warehouse without payment of customs duty at this stage.

- The Adjudicating Authority disposed of the Application, filed by Liquidator of the corporate debtor, with the following order/directions :

  (*i*) The respondents are directed to allow the appellant-liquidator to remove the material, which is lying in the Customs Bonded Warehouses without any condition, demur and/or payment of Customs Duty.

  (*ii*) The respondents are at liberty to lodge its claim with the appellant-Liquidator with regard to the Customs Duty charges payable on the release of material, which form part of the assets of the corporate debtor company in Liquidation, before the Liquidator under the provisions of Insolvency and Bankruptcy Code, 2016 and in accordance with law.

  (*iii*) The Customs Department shall allow removal of goods/ material within two weeks, from the date of receipt of an authentic copy of this Order from the Liquidator.

  (*iv*) Meanwhile, the respondents shall not proceed for auctioning, selling or appropriating the materials owned by the corporate debtor company, for the purpose of recovery of its Customs Duty, which may tantamount to violation of the I&B Code and put the appellant/liquidator of the corporate debtor company (under Liquidation) in disadvantageous position.

- On appeal :

HELD

- The Adjudicating Authority has passed the impugned Order on the premise that Insolvency and Bankruptcy Code, 2016 is a special law that provides a *non obstante* clause under section 238 of the Code with overriding effect over other prevailing law and statute, time being in force. Further, relying on the case law of Supreme Court in the case of *Solidaire India Ltd.* v. *Fairgrowth Financial Services Ltd.* (2001) 30 SCL 59, it is argued that if there are two

special statutes, which contain non obstante provisions, the later statute must prevail. Therefore, by virtue of section 238 being a subsequent law, the proceeding contained therein shall have an overriding effect on the other proceedings of the Customs and Central Excise Act. (Para 7.1)

- Based on the above, the Adjudicating Authority held that provisions of section 53 of the Code prescribe the Order of priority for distribution of proceeds from the sale of liquidation assets, which shall prevail over the provisions of section 11(*e*) of the Central Excise Act and other provisions of the Customs Act. (Para 7.2)

- Therefore, the Respondent Department cannot legally withhold the releasing of the material/goods, which are the property of the corporate debtor Company (in Liquidation) and impose a pre-requisite condition for making payment of the customs duty by the Liquidator of the corporate debtor company (under Liquidation) because the claims of the Respondent's Department have to be treated as a Government Dues and needs to be dealt with under the waterfall mechanism provided under section 53 of the Code. (Para 7.3)

- It is essential to mention that the goods lying in the Customs bonded warehouses are not the corporate debtor's assets since it never claimed them after importing them. Although the containers were imported between 2012 to 2015, the corporate debtor entered the liquidation process on 25-4-2019. In this long span of about four years, the corporate debtor never cleared the bills of entry for some of the said goods. (Para 7.4)

- Given the definition of 'imported goods' under section 1(25) of the Customs Act, 1962, goods brought into India from a place outside India but do not include goods cleared for home consumption. In the present case, the goods lying in various CFS imported by corporate debtors are not cleared for home consumption. The Customs Act, 1962, provides a procedure to import goods into India. However, section 45 states that all imported goods shall remain in the port area unless cleared for import. (Para 7.5)

- Admittedly, in the instant case, the containers were not cleared after import. Section 46(3) mandates the importer to present a bill of entry within 30 days of the arrival of the goods at the Port. Admittedly, for 15 containers, no bill of entry has been filed to date. Section 48 provides that imported goods for which no bill of entry has been filed or cleared for import can be sold by the custodian of those goods. Therefore, the importer has relinquished his title to the imported goods by not filing a bill of entry for several years and not removing the imported goods. (Para 7.6)

- It is essential to mention that section 35(1)(*b*) of the Insolvency and Bankruptcy Code, 2016 empowers the Liquidator to take control of the corporate debtor's assets and properties. Therefore, the Liquidator has first to ascertain that the assets for which custody has been sought belong to the corporate debtor. (Para 7.7)

- By not filing the bill of entry for several years and not paying the Customs Duty and other charges, and taking clearance for home consumption about the imported goods, the importer deemed to have lost his title to the imported goods, in terms of section 48 & section 72 of the Customs Act. Thus the Custom Authorities are empowered to sell the goods and to recover the government dues. But, on the other hand, the Liquidator had no power to take into possession of those goods in respect of which the corporate debtor itself had relinquished its claim and left it abundant without taking any steps for clearance of the goods for home consumption by paying the customs duty and other applicable charges. (Para 7.8)

- The Liquidator intends to possess the uncleared goods from the customs warehouses without upfront payment of custom duty is flawed. In the context of identifying the goods or properties of the company, `imported goods', subject to levy of Customs, stand on a different footing. The customs duty is more a consequence of importing the goods than the importer's liability to pay it. Even before initiating the Corporate Insolvency Resolution Process, the corporate debtor company could not have secured the possession of the imported goods except by paying the Customs duty. The Resolution Professional/Liquidator who virtually represents the Company cannot stand better than the corporate debtor. (Para 7.9)

- The Liquidator could take possession of only the Company's assets, which the Company itself could have obtained. The liquidation proceedings do not change the rights in this regard, and Customs Duty needs to be paid for the release of the goods by the importer. In the circumstances as stated above, the materials lying in the customs bonded warehouses cannot be treated as `assets of the corporate debtor'. Thus, the Liquidator cannot claim goods without payment of Customs dues to settle claims of the secured creditors. Section 142 of the Customs Act deals with the provision to settle the claims of Customs by proceeding against the materials lying uncleared/unclaimed in the warehouses since liabilities under the Customs Act are the first charge under section 142A of the Customs Act. (Para 7.10)

- Before taking a decision, it is also necessary to go through the relevant provisions of Customs Act, 1962. (Para 7.11)

- It is pertinent to mention that the Customs Act, 1962 is a complete Code in itself. It provides that goods that are once warehoused cannot be released from the warehouse unless and until the import duties are paid. (Para 7.12)

- Further, section 45 of the Customs Act lays down restrictions on custody and removal of imported goods. It provides that all imported goods unloaded in the customs area shall remain in the custody of such person as the Commissioner of Customs may approve until they are cleared for home consumption or warehoused or transhipped. Section 47 of the Customs Act provides that if any goods are entered for home consumption and the importer has paid the import duty, if any assessed thereon and any charges payable in respect of the same, then only the proper officer may make an order permitting clearance of the goods for home consumption. Section 48 of the Customs Act lays down the provision if goods are not cleared, warehoused, or transhipped within 30 days after unloading. It provides that if goods are not cleared for home consumption or warehoused or transhipped within 30 days from the date of unloading thereof at the customs station, or within such other time, as the proper officer may allow, such goods may after notice to the importer and with the permission of the proper officer, be sold by the person having the custody thereof. Finally, section 71 lays down the restriction that no goods shall be taken out of the warehouse except provided under the Act. (Para 7.13)

- Based on the statutory provisions of the Customs Act, 1962, it is clear that the goods imported for home consumption cannot be removed from the custody of the customs without paying the import duty and the charges thereon under the provisions of the Act. (Para 7.14)

- Thus, it is clear that NCLT and NCLAT cannot usurp the legitimate jurisdiction of other Courts, Tribunals and fora when the dispute does not arise solely from or relating to the Insolvency of the corporate debtor. In the instant case, the corporate debtor had abandoned the imported goods in the Customs warehouses for several years and failed to pay the import duty and other charges and had not taken any steps to take possession of those goods for several years. Therefore, the importer had lost his right to the imported goods. Consequently, the Customs Authorities are fully empowered under section 72 to sell those goods to recover the government dues. The Liquidator has no right to take into possession over those goods for which the corporate debtor's title is deemed relinquished by implication of law. Even before initiating the Corporate Insolvency Resolution Process, the corporate debtor company could not have secured the possession of the

imported goods except by paying the customs duty. The Resolution Professional/Liquidator, who virtually represents the company, cannot stand on a better footing than the corporate debtor itself. (Para 7.16)

- The respondent Liquidator submits that 'Form C' filed by the appellant is about the corporate debtor's warehoused goods, which were warehoused by filing bills of entries for Warehousing. Claim Form C itself identifies 2531 bills of entries for Warehousing. It is further argued that the corporate debtor has not lost ownership of the goods is also evident from the fact that the appellant has filed its claim about the Warehoused goods in 'Form C' before the Liquidator. It is also said that by filing the claim before the Liquidator, the appellant admits the ownership of the corporate debtor and accepts the authority of the Liquidator to decide the claim about the Government Dues, which shall be decided in terms of section 53 of the Code. (Para 7.18)

- It is essential to mention that by filing the claim before the Liquidator, it cannot be said that the appellant had relinquished its right over the warehoused goods and submitted it to the jurisdiction of the Liquidator. (Para 7.19)

- In the instant case, the appellant has filed its Claim before the Liquidator in response to the notice issued by the Liquidator. Given the law laid down by the Supreme Court in *ICICI Bank Ltd.* v. *SIDCO Leathers Ltd.* (2006) 67 SCL 383, it is clear that by submission of claim in response to the notice issued by the Liquidator, it cannot be presumed that the appellant had relinquished its right over the property and submitted to the jurisdiction of the Liquidator. The claim is filed in an effort to realise its dues. Still, it will not amount to relinquishment of its right over the Warehoused goods under its custody for which appellant has every right to sell those goods for the realisation of the Government dues. (Para 7.20)

- The respondent further emphasised section 238 of the Code, which provides that it shall have an overriding effect notwithstanding any law inconsistent with the Code. The appellant's contention is not sustainable on the ground that sections 48, 72, 142 and 142A of the Customs Act is inconsistent with sections 14 and 33 of the I&B Code. Because it allows the appellant to initiate recovery proceedings against the corporate debtor by selling the assets of the corporate debtor in the custody of the appellant, it is in contravention of the provisions of the Code, which bars initiation or continuation of any such proceeding under sections 14 and 33 of the Code, which does not provide any priority to the appellant under section 53 of the Code. (Para 7.21)

- It is further said that when two special statutes contain non obstante provisions, the later statute must prevail. Thus the appellant cannot bypass the mandatory and special provisions of the Code by unlawfully resorting to provisions of the Customs Act. (Para 7.22)
- The argument advanced by the respondent is not convincing because the goods imported by the corporate debtor were imported much before the initiation of the Corporate Insolvency Resolution Process, and the corporate debtor never claimed them after import. Undisputedly the containers were imported between 2012 to 2015. The CIRP was initiated against the corporate debtor in 2017, and the liquidation order was passed on 25-4-2019. (Para 7.23)
- Therefore, the corporate debtor's assets because the corporate debtor never made any effort for clearing the goods by paying Customs Duty and other applicable charges before the initiation of Liquidation proceeding after importing them. Undisputedly the containers were imported between 2012 to 2015. The CIRP was initiated against the corporate debtor in 2017, and the liquidation order was passed on April 25, 2019. Therefore, the assets lying in the Customs bonded warehouses cannot be considered assets of the corporate debtor. The Liquidator intends to possess the uncleared goods from the customs warehouses without upfront payment of Customs duty, which is against the statutory provisions of the Customs Act, 1962. Therefore, the imported goods subject to levy of Customs stand on a different footing than the goods/assets, not in the corporate debtor's possession. Therefore, the assets lying in the Customs bonded warehouses cannot be considered assets of the corporate debtor. (Para 7.24)
- Based on the above discussion, the Adjudicating Authority committed an error in directing the release of goods without paying customs duty and other applicable charges. Thus appeal deserves to be allowed. Accordingly, the Impugned Order passed by the Adjudicating Authority/NCLT, Ahmedabad Bench, whereby the Adjudicating Authority had directed removal of the materials lying in the Customs Bonded Warehouses without payment of Customs Duty under section 60(5) of the Insolvency and Bankruptcy Code, 2016 is modified to the extent that goods can be released or disposed of as per Applicable Provisions of Customs Act by the Proper Officer. (Para 7.25)

CASE REVIEW

Sundaresh Bhatt v. *Central Board of Indirect Taxes & Customs* (2020) 117 taxmann.com 688 (NCLT - Ahd.) (para 7.25) *modified*.

ICICI Bank Ltd. v. *SIDCO Leathers Ltd.* (2006) 67 SCL 383 (SC) (para 7.20) *followed*.

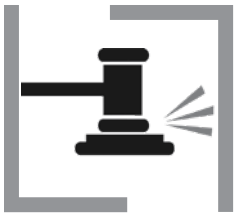
CASES REFERRED TO

Collector of Customs v. *Dytron (India) Ltd.* 1999 (108) ELT 342 (Cal.) (para 4.4), *CIT* v. *Rasiklal Maneklal (HUF)* (1989) 43 Taxman 259/177 ITR 198 (SC) (para 5.2), *ICICI Bank Ltd.* v. *SIDCO Leathers Ltd.* (2006) 67 SCL 383 (SC) (para 5.2), *Encore Asset Reconstruction Co. (P.) Ltd.* v. *Ms. Charu Sandeep Desai* (2019) 107 taxmann.com 100/154 SCL 382 (NCLAT - New Delhi) (para 5.2), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 5.2), *Perpetual Trustee Co Ltd.* v. *BNY Corporate Trustee Services Ltd.* (2009) EWHC 1912 (Ch.) (para 5.2), *State of Maharashtra* v. *Laljit Rajshi Shah* (2000) 2 SCC 699 (para 5.2), *Meghraj Biscuits Industries Ltd.* v. *CCE* (2007) 7 STT 270 (SC) (para 5.2), *Commissioner of Customs (Preventive)* v. *Ram Swarup Industries Ltd.* (2019) 108 taxmann.com 315/155 SCL 547 (NCLAT - New Delhi) (para 5.2), *Kaledonia Jute & Fibres (P.) Ltd.* v. *Axis Nirman & Industries Ltd.* (2020) 121 taxmann.com 228/(2021) 164 SCL 1 (SC) (para 5.3), *Deepak Cochhar* v. *Indusind Bank Ltd.* 2006 SCC Online Bom. 368 (para 5.3), *Unilever Industries (P.) Ltd.* v. *Kwality Ltd.* 2018 SCC Online Cal. 5978 (para 5.3), *Governor-General in Council* v. *Shiromani Sugar Mills Ltd.* 1946 SCC Online FC 5 (para 5.3), *Ludovico Sagrado Govela* v. *Cirila Rosa Maria Pinto* (2016) 76 taxmann.com 293/(2017) 139 SCL 190 (SC) (para 5.3), *CIT* v. *Monnet Ispat and Energy Ltd.* 2018 SCC Online SC 3465 (para 5.3), *National Plywood Industries Ltd.* v. *Union of India* 2020 (3) GLT 345 (para 5.3), *Dishnet Wireless Ltd.* v. *Dy. CIT* 2013 SCC Online Mad. 3701 (para 5.3), *Leo Edibles & Fats Ltd.* v. *Tax Recovery Officer* (2018) 99 taxmann.com 226/259 Taxman 387/407 ITR 369 (AP & Telangana) (para 5.4), *Technology Development Board* v. *Anil Goel* (Company Appeal (AT) (Insolvency) No. 731 of 2020) (para 5.4), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 5.4), *Duncans Industries Ltd.* v. *A.J. Agrochem* (2019) 110 taxmann.com 131/156 SCL 478 (SC) (para 5.5), *Om Prakash Agrawal* v. *Chief CIT* (2021) 124 taxmann.com 305 (NCLAT - New Delhi) (para 5.5), *Solidaire India Ltd.* v. *Fairgrowth Financial Services Ltd.* (2001) 30 SCL 59 (SC) (para 5.5), *Maruti Udyog Ltd.* v. *Ram Lal* (2005) 2 SCC 638 (para 5.5), *Union of India* v. *India Fisheries (P.) Ltd.* (1965) 3 SCR 679 (para 5.5) and *Embassy Properties Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 6.1).

Abhishek Rana and **Ajit Sharma**, Advs. *for the Appellant.* **Abhishek Sharma**, **Ms. Anjali Sharma** and **Ms. Ashly Cherian**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT, Ahmedabad in *Sundaresh Bhatt* v. *Central Board of Indirect Taxes & Customs* (2020) 117 taxmann.com 688 (NCLT - Ahd.).

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 347 (NCLAT - New Delhi)



(2021) 133 taxmann.com 349 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Committee of Creditors of Educomp Solutions Ltd. *v.* Mahender Kumar Khandelwal

ANANT BIJAY SINGH, JUDICIAL MEMBER AND MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 587 OF 2020†

NOVEMBER 12, 2021

Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Adjudicating Authority dismissed application filed by Resolution Professional under section 30(6), seeking approval of Resolution Plan filed by Resolution Applicant ESPL, as infructuous, on ground that application filed by Resolution Applicant seeking withdrawal of Resolution Plan had been allowed - Committee of creditors/appellants challenged withdrawal order which was allowed and withdrawal order passed by Adjudicating Authority was set aside - Appellant contended that order impugned in present case which rendered Plan Approval Application as infructuous, had been passed only on basis of withdrawal order, which had already been set aside, hence, as main order had already been set aside, present Appeal ought to be allowed with direction to Adjudicating Authority to dispose of Plan Approval Application on merits - Whether a submitted Resolution Plan is binding and irrevocable as between CoC and Successful Resolution Applicant in terms of provisions of IBC and CIRP Regulations - Held, yes - Whether therefore, impugned order was to be set aside and Adjudicating Authority shall proceed in accordance with law and decide application under section 30(6) as expeditiously as practicable and resolution applicant shall be bound by Plan - Held, yes (Paras 8 and 9)

CASE REVIEW

Educomp Solutions Ltd., In re (2021) 133 taxmann.com 348 (NCLT - New Delhi) (para 9) *set aside* (***See Annex***).

Ebix Singapore Pte. Ltd. v. *Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208 (SC) (para 8) *followed*.

CASES REFERRED TO

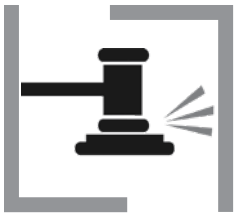
Committee of Creditors of Educomp Solutions Ltd. v. *Ebix Singapore Pte. Ltd.* (2020) 119 taxmann.com 184 (NCLT - New Delhi) (para 2) and *Ebix Singapore (P.) Ltd.* v. *Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208 (SC) (para 3).

Arun Kathpalia, Sr. Adv., **Siddhant Kant**, **Ms. Moulshree Shukla**, **Ms. Diksha Gupta** and **Ishani Mookherjee**, Advs. *for*

the Appellant. **Nakul Dewan**, Sr. Adv., **Ms. Neelu Mohan**, **Abhishek Sharma**, **Ms. Anisha Mahajan**, **Ms. Ashly Cherian**, Adv., **Ritin Rai**, Sr. Adv., **Gautam Swarup**, **Ms. Gunjan Jindal**, **Kartikeya Jaiswal**, **Rajat Sehgal**, **Aditya Swarup** and **Ms. Gunjan Mathur**, Advs. *for the Respondent.*

† Arising out of Order passed by NCLT, New Delhi, *Educomp Solutions Ltd.*, In re (2021) 133 taxmann.com 348.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 349 (NCLAT - New Delhi)



(2021) 133 taxmann.com 351 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Hemanshu Jamnadas Domadia Shareholder & Director of Silver Proteins (P.) Ltd. *v.* Central Bank of India

JARAT KUMAR JAIN, JUDICIAL MEMBER

AND V.P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 623 OF 2020†

NOVEMBER 10, 2021

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 19 of the Limitation Act, 1963 - Corporate insolvency resolution process - Limitation period - Corporate Debtor had availed credit facilities from financial creditor-bank - However, corporate debtor had defaulted to repay loan amount and its account was classified as Non-Performing Asset (NPA) on 1-7-2015 - Financial creditor filed an application under section 7 on 22-10-2018 - Adjudicating Authority by impugned order admitted said application - Corporate debtor claimed that application was time barred as application was filed after prescribed limitation period of three years - Whether since an amount was credited to corporate debtor's account on 31-12-2015 and balance sheet proved that on 31-3-2016 there was a term loan of financial creditor-bank, there was a clear acknowledgement that an amount was due and payable to financial creditor and, therefore, Adjudicating Authority rightly admitted application filed under section 7 - Held, yes (Paras 5.11 and 5.12)

Section 5(7), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial creditor - Whether where principal officer of financial creditor-bank had been given authorization through General Power of Attorney to grant loan, execute documents for and on behalf of bank, recover loans, if necessary and further, entitled to initiate proceedings under Insolvency and Bankruptcy Code, application filed under section 7 by said officer on behalf of financial creditor was maintainable - Held, yes (Paras 4.2 and 4.3)

CASE REVIEW

Central Bank of India v. *Silver Proteins (P.) Ltd.* (2021) 133 taxmann.com 350 (NCLT - Ahd.) (para 5.12) *affirmed* (***See Annex***).

Rajendra Narottamdas Sheth v. *Chandra Prakash Jain* (2021) 131 taxmann.com 2/168 SCL 466 (SC) (para 4.3) and *Sant Lal Mahton* v. *Kamla Prasad* AIR 1951 SC 477 (para 5.4) *followed.*

CASES REFERRED TO

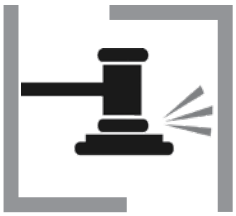
Jagdish Prasad Sarada v. *Allahabad Bank* (2020) 119 taxmann.com 244 (NCL - AT) (para 3.3), *Hiralal Chhotalal Shah* v. *Central Bank of India* 1980 SCC Online Guj 53 (para 3.3), *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 118 taxmann.com 323 (SC) (para 3.4), *V. Padamkumar* v. *Stressed Assets Stabilisation*

Fund (2021) 123 taxmann.com 331 (NCL - AT) (para 3.4), *Bishal Jaiswal* v. *Asset Reconstruction Co. (India) Ltd.* (2021) 123 taxmann.com 390/164 SCL 429 (NCL - AT) (para 3.4), *Rajendra Narottamdas Sheth* v. *Chandra Prakash Jain* (2021) 131 taxmann.com 2/168 SCL 466 (SC) (para 4.1), *Sant Lal Mahton* v. *Kamla Prasad* AIR 1951 SC 477 (para 5.4) and *Dena Bank* v. *C. Shiva Kumar Reddy* (2021) 129 taxmann.com 60 (SC) (para 5.8).

Keith Varghese and **Mohit Gupta**, Advs. *for the Appellant.* **Kunal Tandon** and **Ms. Richa Sandilya**, Advs., *for the Respondent.*

† Arising out of Order of NCLT, Ahmedabad in *Central Bank of India* v. *Silver Proteins (P.) Ltd.* (2021) 133 taxmann.com 350.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 351 (NCLAT- New Delhi)



(2021) 133 taxmann.com 353 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Committee of Creditors of Meenakshi Energy Ltd. *v.* Consortium of Prudent ARC Limited & Vizag Minerals and Logistics (P.) Ltd.

M. VENUGOPAL, ACTG. CHAIRPERSON AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH)(INSOLVENCY) NOS. 166 & 174 OF 2021†

OCTOBER 25, 2021

Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Corporate Insolvency Resolution Process (CIRP) was initiated against corporate debtor and Resolution Professional (RP) was appointed - In CoC meeting, resolution plan furnished by respondent/resolution applicant was presented and lengthly discussed - Since, CIRP period was about to expire, RP sought extension of CIRP period for 90 days which was allowed - Subsequently, said extend period was also expired - RP filed an application before Adjudicating Authority to further extend period of CIRP - No extension of CIRP period was granted by Adjudicating Authority, although an application was pending determination before Adjudicating Authority - Meanwhile, Committee of Creditors had received/ considered an resolution plan after expiry of CIRP period - Whether on facts, order of Adjudicating Authority whereby it directed Committee of Creditors and RP to only consider resolution plan received before expiry of CIRP period and forego resolution plans received subsequently was to be upheld - Held, yes (Para 117)

CASE REVIEW

State Bank of India v. *Meenakshi Energy Ltd.* (2021) 133 taxmann.com 352 (NCLT - Hyd.) (para 117) *affirmed* (***See annex***).

CASES REFERRED TO

Arcelormittal India (P.) Ltd. v. *Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL 354 (SC) (para 6), *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.* (2021) 125 taxmann.com 194/166 SCL 583 (SC) (para 9), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 19), *Pioneer Rubchem (P.) Ltd.* v. *Vivek Raheja* (Company Appeal (AT) (Insolvency) No. 706 of 2020, dated 25-8-2020) (para 24), *Kalinga Allied Industries India (P.) Ltd.* v. *Hindustan Coils Ltd.* (2021) 125 taxmann.com 202/164 SCL 565 (NCLAT - New Delhi) (para 24), *Unicon Buildtech* v. *Aishwarya Mohan Gahrana* (Company Appeal (AT) (Ins.) No. 517 of 2021, dated 12-8-2021) (para 28), *Riddhi Siddhi Gluco Biols Ltd.* v. *Sumit Binani* (CP (IB) No. 497/07/HDB/2019, dated 23-9-2021) (para 29), *K. Shashidhar* v. *Indian Overseas*

Bank (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 33), *Ashish Chaturvedi* v. *Inox Leisure Ltd.* (2020) 119 taxmann.com 85/162 SCL 863 (NCLAT - New Delhi) (para 41), *Binani Industries Ltd.* v. *Bank of Baroda* (2018) 99 taxmann.com 164/150 SCL 703 (NCLAT - New Delhi) (para 45), *Tata Steel Ltd.* v. *Liberty House Group Pte. Ltd.* (2019) 102 taxmann.com 103/152 SCL 575 (NCLAT - New Delhi) (para 51), *Ebix Singapore (P.) Ltd.* v. *Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208 (SC) (para 54), *Dwarkadhish Sakhar Karkhana Ltd.* v. *Pankaj Joshi* (Company Appeal (AT) (Ins.) Nos. 233 & 333 of 2021, dated 28-6-2021) (para 55), *Amit Gupta* v. *Yogesh Gupta* (2020) 114 taxmann.com 50 (NCLAT - New Delhi) (para 56), *First Global Finance (P.) Ltd.* v. *IVRCL Ltd.* (2020) 117 taxmann.com 83/162 SCL 13 (NCLAT - New Delhi) (para 57) and *Standard Chartered Bank Ltd.* v. *Walker* (1982) 1 WLR 1410 (para 109).

Ramji Srinivasan, Sr. Adv. and **Edward James**, Adv. *for the Appellant*. **Joy Saha**, **P.H. Arvindh Pandian**, Sr. Advs., **Ms. Rubaina Khatoon**, **H.S. Hredai**, **Sumant Batra**, **Aditi Deshpande**, **Jash Shah** and **Ravishankar Devara Konda**, Advs. *for the Respondent*.

† Arising out of Order of NCLT, Hyderabad in *State Bank of India* v. *Meenakshi Energy Ltd.* (2021) 133 taxmann.com 352.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 353 (NCLAT - Chennai)

Disciplinary Mechanism of IBBI

Background

An Insolvency Professional is the most important component of Insolvency and Bankruptcy Code who has been entrusted with a wide range of functions so as to effectively strive to maximise the value of assets of debtor during the resolution process. Be it Corporate Insolvency Resolution Process (CIRP) or Liquidation, both the process are largely executed through Insolvency Professionals. He is the fulcrum of the process and link between the Adjudicating Authorities (AA) and Committee of Creditors (CoC) as also other stakeholders.

The role of Insolvency Professional under the Insolvency and Bankruptcy Code is crucial and critical to fulfil the objective of the Code. It is imperative that the Insolvency Professional functions and discharges his/her duties independently in a fair and transparent manner and facilitate fulfilment of the objectives of the Code. The deviant behaviour of Insolvency Professional shall derail the entire resolution process. Such an important Professional cannot be left unregulated, therefore it is necessary to have an objective, credible mechanism which does not spare any misconduct, while it does not penalize an honest conduct of an Insolvency Professional. We shall now discuss disciplinary mechanism of IBBI and the disciplinary actions taken against Insolvency Professionals so far.

Disciplinary Mechanism

The IBC consists of four pillers *viz.*,

- the Adjudicating Authorities (the National Company Law Tribunals and Debts Recovery Tribunals),
- Insolvency Professionals (IPs) and Information Utilities (IUs),
- Insolvency Professional Agencies (IPAs) and
- Insolvency and Bankruptcy Board of India (IBBI).

The IBBI exercises regulatory oversight over IPAs, IPs and IU. IPAs also regulate IPs. **Therefore, the IBC provides for a two-tier regulatory regime for the IPs, the IBBI and the IPAs which are regulated by the IBBI.**

Disciplinary Mechanism of IBBI

The process of Disciplining the IPs by IBBI is comprised in Sections 217, 218, 219, 220 of the Insolvency and Bankruptcy Code, 2016, IBBI (Inspection and Investigation) Regulations, 2017 and IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017.

Complaint against Insolvency Professional	•Any person aggried by the functioning of the Insolvency Professional may make complaint to the IBBI.
Inspection or Investigation	•Where IBBI, on receipt of a complaint or has reasonable grounds to believe that any Insolvency Professional has contravened any provisions of the Code or the rules or regulations made or directions issued by IBBI, it may direct any person to act as an investigating authority to conduct inspect or investigation of the Insolvency Professional. •A detailed report of inspection or investigation shall be submitted to the IBBI by the Investigating Authority
Show Cause Notice	•On the basis of report submitted by Investigating Authority or other evidences available on record, IBBI may issue show cause notice to the Insolvency Professional.
Discplinary Committee	•Disciplinary Commitee consitituted by IBBI considers the report of the Investigating Authority, reply of show cause notice submitted by Insolvency Professional and other evidences available on record. DC shall endeavour to dispose off show cause notice within six months.
Adherence to Principle of Audi Alteratum Partem	•The discretion given to Disciplinary Committee is wide, however any decision is taken by the Disciplinary Committee after giving opportunity to the Insolvency Professional to present his case .
Discplinary Action	•If the Disciplinay Committee is satisfied that sufficient cause exist it may: •Suspend or cancel the registration of the Insolvency Professional. •Impose penalty of three times the amount of loss caused or likely to have been caused or three times of the unlawfull gain made on account of such contravention, whichever is higher. Where loss is not quantifiable, the amount of penalty imposed shall not exceed one crore rupees •Direct the person who has made unlawfull gain or averted loss to disgorge to amount equivalent to such unlawful gain or aversion of loss.

Can IBBI suo motu take cognisanse of contraventions of provisions by the IP?

In a matter before IBBI it was submitted that IBBI cannot *suo motu* take cognisance without a complaint made under sections 217 and 218 of the Code against an IP. The Disciplinary committee noted that section 218 allows IBBI to order inspection or investigation either on receipt of a complaint or when it has reasonable ground to believe that an IP has contravened any provision of the law. Thus, the Board can take cognisance of a contravention *suo motu* and order an inspection. The Disciplinary Committee further noted that IBBI is not a Court which takes cognisance of a matter based on a complaint and decides the matter through an adversarial proceeding. It is a regulator having quasi-legislative, executive and quasi-judicial functions to ensure that the regulated entities conduct themselves in accordance with the law.

Can IBBI issue show cause notice without conducting Inspection or Investigation?

A regulatory authority is expected to immediately intervene in any market manipulation and thwart any attempt of IP which can derail entire CIRP. Therefore it is illogical to conduct inspection or investigation when IBBI has evidences on record that the IP has contravened the provisions of Law. Also, Regulation 11(1) of the IBBI (IP) Regulations, 2016 provides that "*Based on the findings of an inspection or investigation, or on material otherwise available on record, if the Board is of the prima facie opinion that sufficient cause exists to take actions permissible under section 220, it shall issue a show-cause notice to the insolvency professional.*"

Consequences of Commencement of Disciplinary Proceeding by IBBI

An IP may be appointed as interim resolution professional, resolution professional, liquidator, or a bankruptcy trustee if no disciplinary proceeding is pending against him. However the term 'disciplinary proceeding' is not defined under the Code. Therefore, IBBI issued a circular dated 23rd April, 2018 wherein it is clarified that a disciplinary proceeding is considered as pending against an IP from the time he has been issued a show cause notice by the IBBI till its disposal by the disciplinary committee.

It further clarified that an IP who has been issued a show cause notice shall not accept any fresh assignment as interim resolution professional, resolution professional, liquidator, or a bankruptcy trustee under the Code.

Disciplinary Actions taken by IBBI

The Disciplinary Committee of IBBI passed various orders since the inception of the Insolvency and Bankruptcy Code. These orders are reasoned and contain detailed contraventions against IP, submissions made by IP, legal provisions as well as analysis and findings of the Disciplinary Committee. The role of Insolvency Professionals is also discussed in detail in these orders. The following table shows the orders passed by IBBI during the year 2021 wherein disciplinary action was taken against the Insolvency Professional.

Date of Order DD/MM/YY	Case No.	Brief Findings	Action taken by IBBI
27/08/2021	IBBI/DC/76/2021	◆ The IP did not submit the documents sought by Inspecting Authority. ◆ The AA issued directives to follow principle in Nikhil Mehta's judgment. In Nikhil Mehta & Sons (HUF)'s case, the AA observed that: *'We are of the view that in the case of Real Estate (Commercial & Residential) comprising 100 per cent voting share in CoC the aforesaid provision must be read to mean that a resolution would be deemed to be passed if it is voted by highest number of financial creditors in the class of Real Estate (Commercial & Residential). It would make the court workable and would also advance the object of this progressive legislation rather than defeating it.'* In the 2nd CoC meeting IP followed principles laid down in Nikhil Mehta's judgment. However, in the 3rd CoC meeting, wherein resolution for replacement of IP was placed the IP applied principle of voting threshold of 66%. Total votes in favour of resolution was 54.61% but the resolution was noted as defeated. ◆ The IP did not mention name of the CD, the place, if any, time and the date on which the meeting of CoC was scheduled, resulting in contravention of regulation 20(2) of the CIRP Regulations and section 208(2)(*a*) of the Code.	◆ Directed the IP to not seek or accept any process or assignment or render any services under the Code for a period of six months from the date of coming into force of the Order.
09/08/2021	IBBI/DC/75/2021	The invoice of fee charged by IP was in the name of partnership firm where she was partner and the same was credited to the account of partnership firm rather than her own bank account despite the clarification provided in the Circular dated 16th January, 2018.	Directed the IP to undergo pre-registration educational course and pay penalty equal to ten per cent of the fee received.

Date of Order DD/MM/YY	Case No.	Brief Findings	Action taken by IBBI
22/07/2021	IBBI/DC/74/2021	◆ The IP included expression of interest after the last date and therefore contravened regulation 36A of the CIRP Regulations, Regulation 7(2)(*h*) of IP Regulations and clauses 1, 2, 3, 12, 13 and 14 of the Code of Conduct. ◆ One of the prospective resolution applicant (PRA) was also looking after compliance of TDS and GST requirements of Corporate Debtor. The IP did not terminate the services of professional immediately when he submitted his resolution plan and became a PRA. ◆ The IP did not take reasonable care and exercise diligence while making the disclosures as per IBBI Circular No. IP/005/2018, dated 16-1-2018.	Directed the IP to: ◆ not seek or accept any process or assignment or render any services under the Code for a period of twelve months from the date of coming into force of the Order; ◆ pay a penalty equal to the fee paid to concerned professional.
08/07/2021	IBBI/DC/72/2021	The IP accepted the claim of a creditor (say 'Mr. X') as financial creditor. Then he erred to reclassifying the status of Mr. X from 'Financial' to 'Operational Creditor'. The Adjudicating Authority *vide* its order declared Mr. X as financial creditor. Despite the order of Adjudicating Authority, the IP allowed voting on agenda for not considering Mr. X as financial creditor. The same was approved. Then in the next meeting the other CoC members ousted Mr. X from the CoC, as it was the only CoC member holding them back from successfully passing a withdrawal of CIRP resolution under section 12A of the Code. The resolution for withdrawal was passed with 100% voting share. Thus, the IP disregarded the order of the Adjudicating Authority.	Directed the IP to not seek or accept any process or assignment or render any services under the Code for a period of one year from the date of coming into force of the Order.

Date of Order DD/ MM/YY	Case No.	Brief Findings	Action taken by IBBI
15/03/2021	IBBI/ DC/69/2021	The IP inflated CIRP costs by not seeking approval or ratification of the appointment as well as the fee of valuers by CoC and by including the same in the cost disclosures made to the IPA. He obtained the approval of valuers fee from the Stakeholders' Consultation Committee during liquidation process and not from CoC during CIRP process.	Directed the IP to not seek or accept any process or assignment or render any services under the Code for a period of two months from the date of coming into force of the Order.
05/03/2021	IBBI/ DC/68/2021	◆ The IP did not perform his duty of preparing Information Memorandum and outsourced the same to outside professionals. ◆ The IP by allowing the use of his name by the consulting firm in correspondences, not only allowed the firm to misrepresent itself as an IP but also become party to the misrepresentation. ◆ The IP did not take reasonable care and exercise diligence while issuing POAs without the approval of CoC under section 28(1)(h) of the Code. ◆ The IP was guided by one of the members of CoC while appointing professional services and did not act independently nor did he discharge his duty of undertaking due diligence before appointing any professional. ◆ The IP by conducting CoC meetings only by audio mode on 13 occasions, out of total 15 meetings did not provide facility to CoC members for effective participation. ◆ The IP raised invoices in the name of his firm while acting as the IRP/ RP.	Directed the IP to not seek or accept any process or assignment or render any services under the Code for a period of three months from the date of coming into force of the Order.

Date of Order DD/MM/YY	Case No.	Brief Findings	Action taken by IBBI
05/01/2021	IBBI/DC/63/2021	The IP did not provide copies of certain records to the Inspecting Authority.	Directed the IP to not accept any new assignment under the Code for a period of two months from the date of coming into force of the order.

Can Adjudicating Authority quash Disciplinary Proceedings initiated by IBBI?

In the matter of "*Insolvency and Bankruptcy Board of India (IBBI)* v. *Shri Rishi Prakash Vats & Ors.*" Hon'ble NCLAT *set aside* the last portion of the impugned order passed by NCLT dated 5th February, 2019 relating to quashing of all disciplinary proceedings and held that **once a disciplinary proceeding is initiated by the IBBI on the basis of evidence on record, it is for the Disciplinary Authority, *i.e.*, IBBI to close the proceeding or pass appropriate orders in accordance with law.** Such power having been vested with IBBI and in absence of any power with the Adjudicating Authority/(National Company Law Tribunal), the Adjudicating Authority cannot quash the proceeding, even if proceeding is initiated at the instance and recommendation made by the Adjudicating Authority/National Company Law Tribunal.

THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE (BLRC)

The BLRC in its report dated November, 2015, emphasized on IP Regulatory Structure as follows: "*the Committee believes that a new model of "regulated self regulation" is optimal for the IP profession. This means creating a two tier structure of regulation. The Regulator will enable the creation of a competitive market for IP agencies under it. This is unlike the current structure of professional agencies which have a legal monopoly over their respective domains. The IP agencies under the Board will, within the regulatory framework defined, act as self-regulating professional bodies that will focus on developing the IP profession for their role under the Code. They will induct IPs as their members, develop professional standards and code of ethics under the Code, audit the functioning of their members, discipline them and take actions against them if necessary. These actions will be within the standards that the Board will define. The Board will have oversight on the functioning of these agencies and will monitor their performance as regulatory authorities for their members under the Code. If these agencies are found lacking in this role, the Board will take away their registration to act as IP agencies.*"

CONCLUSION

On perusal of the orders passed by IBBI, it has been observed that it has considered the fact that the insolvency regime in India is in its emerging phase and the profession

of Insolvency Professional is also at a nascent stage, therefore low impact & indeliberate violations of law are generally excused by the regulatory authorities by merely imposing some penalty. However, if certain actions are taken by IPs purposefully and it affects the profession, maximization of value of corporate debtor and violates the entire purpose of IBC, the Disciplinary Committee of IBBI took serious actions like cancellation or suspension of their registration as an Insolvency Professional.

It is clearly evident that IBBI and IPAs emphasize on 'Self Discipline'. Every function which an IP is required to perform as per IBC requires highest level of professional competence including financial engineering and value maximization management. Therefore, an IP is expected to comply with the provisions of the law and ensure utmost integrity, objectivity, independence and impartiality.

REFERENCES

- Sections 217, 218, 219, 220 of the Insolvency and Bankruptcy Code, 2016
- IBBI (Inspection and Investigation) Regulations, 2017
- IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017.
- https://www.ibbi.gov.in/orders/ibbi
- NCLAT order "*Insolvency and Bankruptcy Board of India (IBBI)* v. *Shri Rishi Prakash Vats & Ors.*"
- BLRC report dated November, 2015
- Insolvency and Bankruptcy Code A Miscellany of Perspectives

FAQs on Authorisation for Assignment (AFA)

1. Who is required to obtain AFA and what is the eligibility criterion for obtaining AFA?

An Insolvency Professional is required to hold a valid AFA before accepting or undertaking any assignment under the Insolvency and Bankruptcy Code.

Further, as per Regulation 2(1) of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, "assignment" means any assignment of an insolvency professional as interim resolution professional, resolution professional, liquidator, bankruptcy trustee, authorised representative or in any other role under the Code.

For the purpose of obtaining AFA, the Insolvency Professional Member has to submit application with his IPA in Form AA (online mode only) through IBBI portal and has to strictly adhere to the following eligibility requirements as on the date of application:

(*a*) He is registered with the Board as an IP;

(*b*) He is a fit and proper person in terms of the *Explanation* to clause (*g*) of regulation 4 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;

(*c*) He is not in any employment;

(*d*) He is not debarred by any direction or order of the Agency or the Board;

(*e*) He has not attained the age of seventy years;

(*f*) He has no disciplinary proceeding pending against him before the Agency or the Board;

(*g*) He complies with requirements with respect to-

- payment of fee to the Agency and the Board

- Annual membership fees to IPA
- Professional fees (.25% of the turnover of preceding FY) in Form E to IBBI
- Membership fees to Board (every 5 years)

- filings and disclosures to the Agency and the Board
  - Submission of half yearly returns to IPAs
  - Submission of CIRP forms to IBBI
  - Submission of disclosures to IPAs
  - Other forms/disclosures to IPAs/IBBI, as asked specifically
- continuous professional education;
- other requirements, as stipulated under the Code, regulations, circulars, directions or guidelines issued by the Agency and the Board, from time to time.

2. What is the validity period of AFA?

AFA shall be valid for a period of one year from the date of its issuance or till the date on which IP attain the age of 70 years, whichever is earlier.

Application for the renewal shall be made any time before the date of expiry of the authorisation, but not earlier than 45 days before the date of expiry of the authorisation.

3. Who has the authority to issue and renew AFA?

The Insolvency Professional Agencies (IPAs) have the authority to issue and renew AFA.

4. Can AFA be issued, if required forms and disclosures w.r.t. assignments handled not submitted?

The Insolvency professional Agencies verify all the mandatory compliances (IBBI & IPAs) w.r.t. assignments handled/being handled by the Insolvency professionals. Discrepancies in the compliances are generally communicated to the concerned IP and after successful completion of pendencies only AFA is issued.

No AFA will be issued to the IP without filing of required forms and disclosures.

5. What are the remedies available with the Insolvency Professionals whose AFA is rejected by the IPA?

The Insolvency Professional who is aggrieved by the rejection of AFA may submit an appeal within 15 days of the rejection to the membership committee of the concerned IPA.

The membership committee shall pass an order disposing of the appeal by a reasoned order, within 15 days of the date of receipt of appeal.

Otherwise, he may complete the discrepancies highlighted in the rejection order and after 7 days, fresh application may be filed.

6. Does the insolvency professional who has attained the age of 70 years is required to obtain AFA?

The Insolvency Professional who has attained

the age of 70 years is not allowed to undertake any assignment under the Insolvency and Bankruptcy Code of India. He can act as an advisor to the IP and no AFA is required to be obtained for such services.

7. Does the insolvency professional who is in employment is required to obtain AFA?

The Insolvency professional who is in employment is not required to obtain AFA. Only before taking up any assignment under the Code, AFA is required to be obtained.

8. What is the minimum requirement of obtaining CPE hours before issuance of AFA?

An IP shall undertake a minimum of 10 credit hours of CPE each calendar year and a minimum of 60 credit hours of CPE in each rolling block of three calendar years, provided an IP is not required to undertake any CPE in the calendar year in which he is registered.

Accordingly, an IP shall complete the required CPE hours before applying for the issuance/renewal of AFA.

However, IPAs reserve the right to grant exemption in availing CPE in a particular calendar year subject to the undertaking that required CPE will be completed in rolling block of three calendar years.

9. What are the eligibility criterion to be in the Panel of IPs for appointment as IRP, Liquidator, RP and BT issued by IBBI?

An IP will be eligible to be in the Panel of IPs, if -

(*a*) there is no disciplinary proceeding, whether initiated by the Board or the IPA of which he is a member, pending against him;

(*b*) he has not been convicted at any time in the last three years by a court of competent jurisdiction;

(*c*) he expresses his interest to be included in the Panel for the relevant period;

(*d*) he undertakes to discharge the responsibility as IRP, Liquidator, RP or BT, as he may be appointed by the AA;

(*e*) he holds an Authorisation for Assignment (AFA), which is valid till the validity of Panel. For example, the IP included in the Panel for appointments during January - June 30, 2022 should have AFA valid up to June 30, 2022.

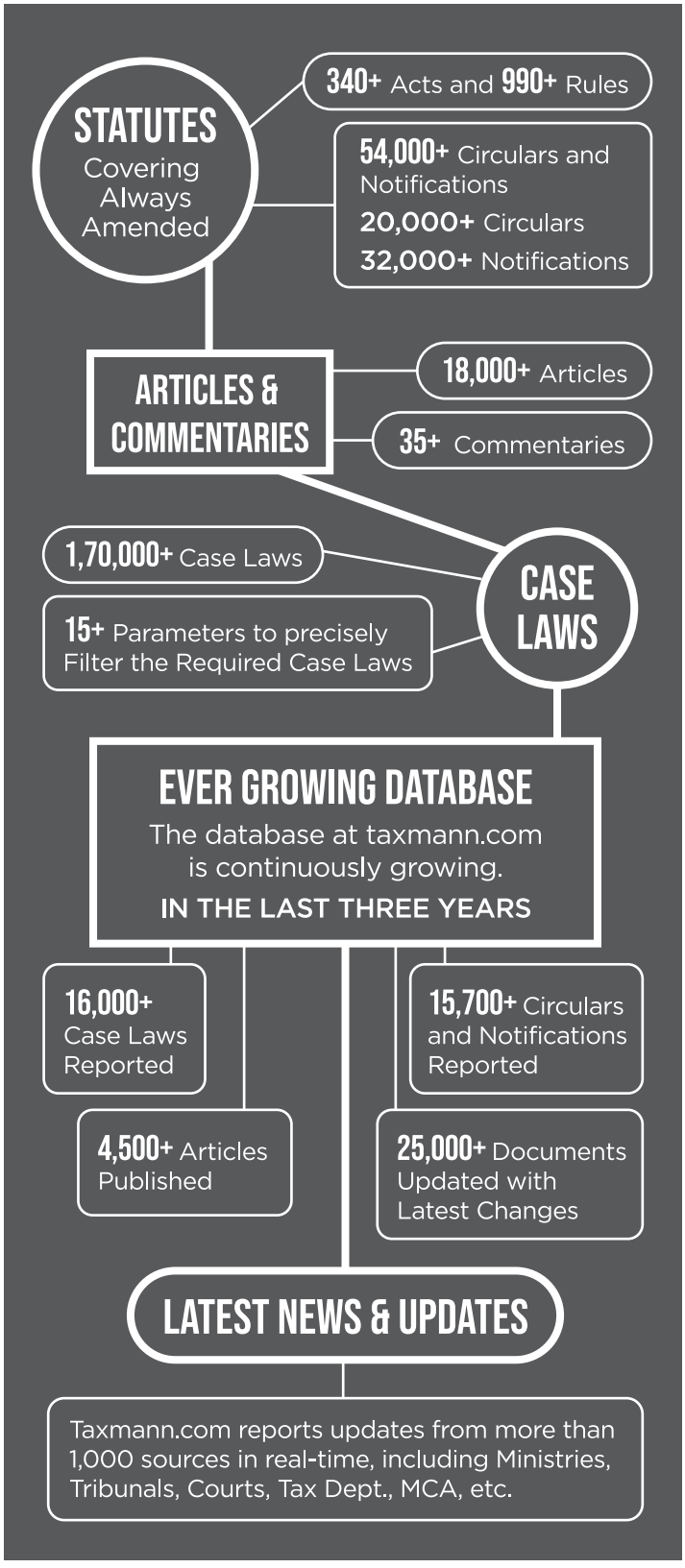
10. What are the consequences of not obtaining AFA before undertaking any assignment under the IBC?

If the Insolvency Professionals undertake assignments or give consent to undertake assignment without holding valid authorisation for assignment, disciplinary proceedings may be initiated by the IPA/ IBBI.

taxmann.com

Research

CONTENT & TECHNOLOGY TO SUPERCHARGE YOUR PRACTICE IN ONE OR TWO CLICKS



SCAN & SUBSCRIBE NOW

November 2021 (Regulatory updates)

- IBBI Circular dt. 15th Nov 2021 concerning Clarification regarding requirement of seeking No Objection Certificate or No Dues Certificate from the Income-tax Department during Voluntary Liquidation Process under the Insolvency and Bankruptcy Code, 2016 (Code).

  (**Circular can be accessed at https://ibbi.gov.in//uploads/legalframwork/c881169aad7ee239aea7954505a76ab.pdf**)

- IBBI Circular dt. 24th Nov 2021 concerning Filing of list of creditors under clause (ca) of sub-regulation (2) of regulation 13 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

  (**Circular can be accessed at https://ibbi.gov.in//uploads/legalframwork/3b47d76baab766da0d800edb4b2199e6.pdf**)

- IBBI Circular dt. 24th Nov 2021 concerning Filing of list of stakeholders under clause (*d*) of sub-regulation (5) of regulation 31 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

  (**Circular can be accessed at https://ibbi.gov.in//uploads/legalframwork/3ab0d547d310b77cb5716f57f45f1e9d.pdf**)

taxmann.com

2022 SUBSCRIPTION

IN-PRINT
WEEKLY JOURNALS »

	Journal Name	Price in ₹
☐	Goods & Services Tax Cases The GST Weekly	8,500
☐	Corporate Professionals Today A Weekly on GST | Income Tax | Company Law | Accounts & Audit	9,500
☐	SEBI & Corporate Laws An Insolvency & Company Laws Weekly	13,700
☐	TAXMAN The Tax Law Weekly	13,900
☐	Income-tax Tribunal Decisions Authorised Weekly of the ITAT	11,500

Introducing
0% NO COST EMI
AVAILABLE ONLY WHEN YOU SUBSCRIBE ONLINE

#TaxmannCares Initiative

- **FREE DELIVERY** through Registered Post/Courier
- **FREE ACCESS** to Taxmann's Virtual Journal
- **TAXMANN'S PREMIUM** News & Updates worth ₹3,500/- on a Complimentary Basis

VIRTUAL
WEEKLY JOURNALS »

Get Taxmann's Premium News & Updates worth ₹3,500/- on a Complimentary Basis when you subscribe to Virtual Weekly Journal

* GST @18% Extra

	Virtual Journal Name	Price in ₹*
☐	Goods & Services Tax Cases The GST Weekly	5,950
☐	Corporate Professionals Today A Weekly on GST | Income Tax | Company Law | Accounts & Audit	6,650
☐	SEBI & Corporate Laws An Insolvency & Company Laws Weekly	9,590
☐	TAXMAN The Tax Law Weekly	9,730
☐	Income-tax Tribunal Decisions Authorised Weekly of the ITAT	8,050

SUBSCRIBE NOW

LATEST NEWS
& UPDATES »

	e-Service Name	Price in ₹*
☐	Daily Tax & Corporate Laws Digest	3,500
☐	Taxmann Daily	
☐	GST Daily	
☐	Corporate Laws Daily	
☐	Accounts & Audit Daily	
☐	TAXMANN | This Week	

* GST @18% Extra

Treatment of Inter-company Loans and payment to outside creditors: U.S.A.

While Intercompany Claims generally are entitled to *pari passu* treatment with other claims, they often are separately classified and afforded different treatment under chapter 11 plans of corporate debtors, particularly those with complex corporate structures. In many cases, there are no distributions under a chapter 11 plan on account of Intercompany Claims between and among debtors in the same corporate family who are reorganising in jointly administered bankruptcy cases. **Instead, such claims are reinstated. The reinstatement of Intercompany Claims preserves a means for the reorganised corporate family to move cash between related entities on account of the repayment of Intercompany Claims after the company reorganises, which may be more efficient and cost-effective than transferring funds via dividends.**

Creditors may insist that Intercompany Claims be taken into account when calculating the recoveries of third-party creditors at different corporate entities. Even when Intercompany Claims are taken into account when calculating recoveries to third-party creditors, Intercompany Claims may still be reinstated as part of a chapter 11 plan so that they can be used by the reorganised company

to transfer efficiently value within the reorganised corporate enterprise.

A parent company may have the additional objective of wanting certain funds down-streamed as a loan rather than as equity for the purpose of protecting itself if the U.S. borrower is having or later encounters financial difficulty. However, intercompany advances to an undercapitalized U.S. borrower or that are not properly documented and structured as loans on commercially reasonable terms, not only run an increased risk of being re-characterized as equity for tax purposes, but also may be re-characterized as equity in a bankruptcy proceeding. **If an intercompany loan is re-characterized, not only would the parent's claim drop to the lowest priority in the bankruptcy of the U.S. borrower, but any repayment received by the parent on that "loan" would be a return of equity that could be attacked as a fraudulent transfer under section 548 of the U.S. Bankruptcy Code** (**no fraudulent intent required**) **and may have to be returned by the parent to the U.S. borrower's bankruptcy estate.** Unfortunately, establishing commercially reasonable terms for a loan may be easier said than done when the borrower is troubled or is incapable of obtaining a loan from a third party, which may result in an unavoidable risk of the loan being re-characterized as equity for both tax and bankruptcy purposes.

A way of improving the parent's position in the event of insolvency of the U.S. subsidiary is to **secure any intercompany loan with collateral**. Under **Section 547 of U.S. Bankruptcy Code, if the collateral to be granted by the U.S. subsidiary is not documented contemporaneously with the advancing of the funds by the parent or all perfection steps** (**filing of financing statements, recording of mortgages and the like**) **are not completed at the same time** (**or within 30 days thereafter**)**, the grant of collateral by the U.S. subsidiary may be subject to being avoided** (**that is, nullified**) **and any repayments received by the parent may have to be returned as "preferences" in any later bankruptcy of the U.S. subsidiary.** For an insider, like the parent, this preference risk will continue to exist for a one year period following the date that both the collateral documents have been signed and proper perfection steps have been taken (the "preference period") (for non-insiders the preference period is only 90 days). Therefore, when it comes to securing an intercompany loan, waiting until there is a problem is unwise.

Equitable Subordination: Section 510(*c*) of the Bankruptcy Code allows for possible "equitable subordination" of claims, ie **a judicial subordination of certain claims on equitable grounds that makes them lower in priority of payment to other claims.** A general unsecured Intercompany Claim might be subordinated in right of payment to other general unsecured claims if (*i*) the claimant engaged in some type of inequitable conduct, (*ii*) the misconduct resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant and (*iii*) equitable subordination of the claim is not inconsistent with the other provisions of the Bankruptcy Code. Claims for equitable subordination of Intercompany Claims may succeed when courts find that the party whose claim is to be subordinated is an insider, because the insider bears

the burden of proving good faith and inherent fairness of the transaction that the debtor is seeking to subordinate.

Contractual relationships, including the terms of loan documents that obligate numerous entities comprising a company, may oblige a parent entity or affiliate for the liabilities of a related business entity. Even in the absence of contractual relationships, statutory "control group" liability may make a parent or affiliate liable for the claims against and liabilities of a subsidiary. **A parent may be directly liable for its subsidiary's debts where the parent company enters into a joint contract with the subsidiary and a third party and agrees to be jointly liable with its subsidiary.** Many joint contracts will contain a clause that the insolvency of a party is a default under the contract: if the subsidiary becomes insolvent or fails to perform its duties, the parent can be held responsible for the remaining contractual liabilities.

US courts sometimes allow creditors of an insolvent subsidiary to seek payment from the parent entity to recover on the subsidiary's debts, but only in very limited circumstances. **Courts may grant this remedy, known as "piercing the corporate veil," when a parent and its subsidiary have not acted as distinct entities, and the two companies were operated as one. In such circumstances, equity may dictate that a parent should be responsible for claims against its subsidiary**. Courts, however, are generally reluctant to pierce the corporate veil. A creditor must demonstrate that a parent exercised control above and beyond the level of control a parent usually exercises over a subsidiary. Usually, **creditors seeking to pierce the corporate veil must demonstrate either that the subsidiary was the "alter ego" of the parent or, alternatively, that the subsidiary was acting as the parent company's agent.**

For the reasons stated above, deferring decisions on how to move funds through a corporate group, or delaying documenting intercompany loans, may affect the desired outcome for tax or credit purposes. Best practices therefore require the parties to:

- Make a decision upfront as to what extent funds will be advanced as a loan, and whether the repayment obligation will be secured by collateral.
- Evidence any intercompany loan by a promissory note or a loan agreement.
- Provide in the promissory note or loan agreement for interest at a reasonable, arm's length commercial rate.
- Establish a fixed maturity date, if feasible, rather than having the loan be payable on demand.
- Enter into any collateral documents at the same time as the loan is advanced.
- Make sure all necessary perfection steps under the law are taken at the time the collateral is documented and the loan is advanced.
- Cause the borrower to actually make the principal and interest payment on the schedule set out in the promissory note.

CASE STUDY:

Courts have found that *"(t)he 'paradigmatic' recharacterisation case involves a situation where 'the same individuals or entities (or affiliates of such) control both the transferor and the transferee, and inferences can be drawn that funds were put into an enterprise with little or no expectation that they would be paid back along with other creditor claims.'"* **Adelphia Commc'ns Corp. v. Bank of America, Inc. (In re Adelphia Commc'ns Corp.), 365 B.R. 24, 74 (Bankr. S.D.N.Y. 2007), aff'd in part, 390 B.R. 64 (S.D.N.Y. 2008).**

Courts evaluate numerous factors when determining whether an Intercompany Claim should be characterised as equity:

- the names given to the certificates evidencing the indebtedness;
- the presence or absence of a fixed maturity date and schedule of payments;
- the presence or absence of a fixed rate of interest and interest payments;
- the source of repayments;
- the adequacy or inadequacy of capitalisation;
- identity of interest between creditor and stockholder;
- the security, if any, for the advances;
- the corporation's ability to obtain financing from outside lending institutions;
- the extent to which the advances were subordinated to the claims of outside creditors;
- the extent to which the advance was used to acquire capital assets; and
- the presence or absence of a sinking fund to provide repayments.

No one factor is controlling and courts generally evaluate the particular circumstances of each case. If an Intercompany Claim is characterised as equity, it is likely that no value will be provided to the holder of the Intercompany Claim in a bankruptcy restructuring.

ORDER FORM

SPECIAL OFFER
ICSI IIP MEMBERS
On Special Rates Mentioned as under

Name of Products	Price : ₹
☐ **ICSI IIP (In Print Journal) -** Insolvency and Bankruptcy Journal (Resolve)	5500/-
☐ **COMBO** Company & SEBI Laws + Insolvency & Bankruptcy Laws FEMA/Banking & Insurance Laws + Competition Laws	20,900*/-
☐ **Company & SEBI Laws Module**	8,100*/-
☐ **Insolvency & Bankruptcy Code Module**	7,100*/-
☐ **FEMA/Banking & Insurance Laws**	7,300*/-
☐ **Competition Laws**	10,700*/-

*GST @18% extra

Pay by Cheque:

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

Pay by NEFT:

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

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

Contact Details

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

Name of the Firm/Organization .....

GSTIN .....

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

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

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

PLEASE FILL ALL THE FIELDS TO ACTIVATE YOUR SUBSCRIPTION

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

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

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