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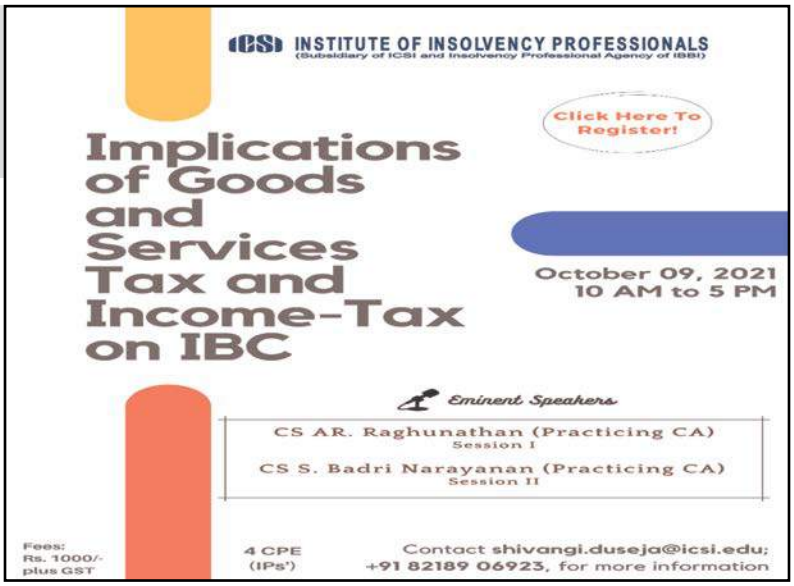
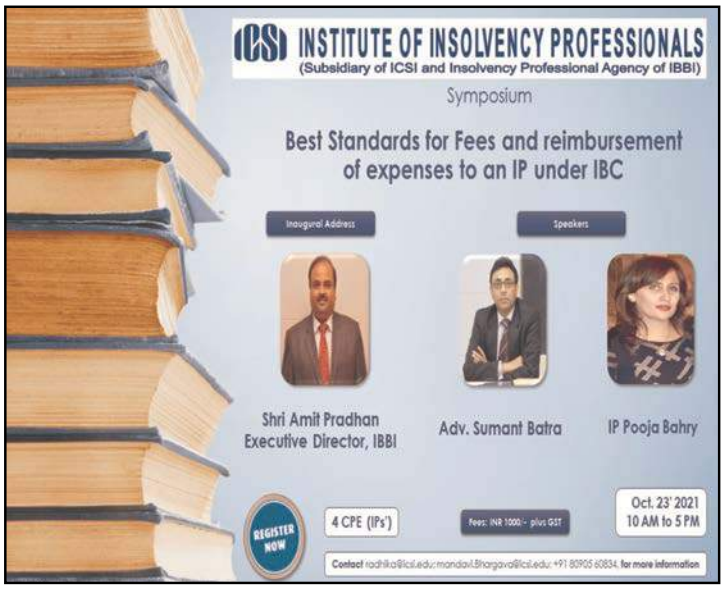
NEWS FROM THE INSTITUTE

◆ Workshop on Implications of Goods and Services Tax and Income-tax on IBC



On 4th September, 2021, ICSI IIP organized a full day workshop on **'Implications of Goods and Services Tax and Income-tax on IBC**. It was attended by 73 professional members. The workshop was addressed by the eminent speakers namely CS AR. Raghunathan and CS S. Badri Narayanan.

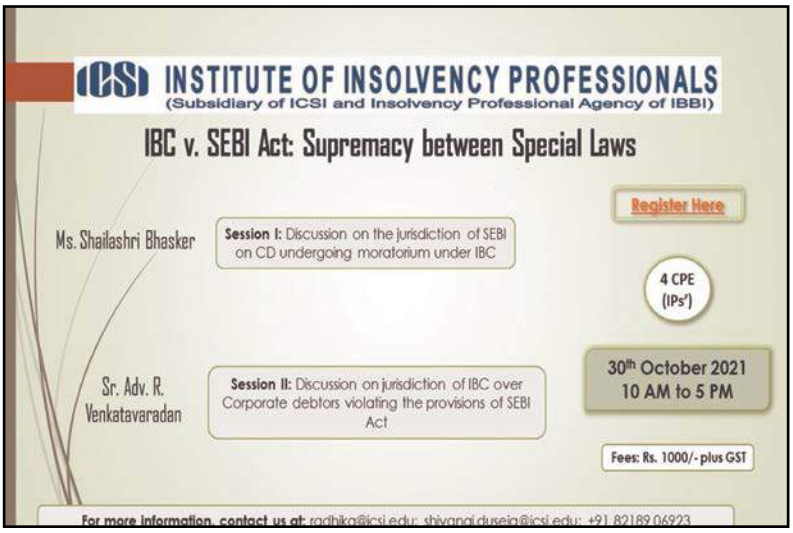


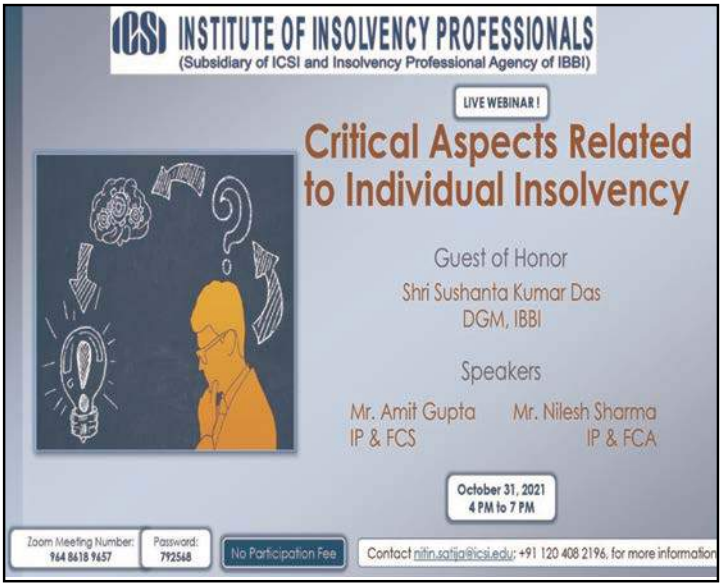
◆ Symposium on Best Standards for Fees and reimbursement of expenses to an IP under IBC'

On 23rd October, 2021, ICSI IIP organized a full day **Symposium on Best Standards for Fees and reimbursement of expenses to an IP under IBC'**. It was attended by 79 professional members. The Guest of Honour for the Symposium was Shri. Dilip Khandale, Deputy General Manager, IBBI. The workshop was addressed by the eminent speakers namely, Adv. Sumant Batra and IP Pooja Bahry.

◆ Workshop on "IBC v. SEBI Act: Supremacy between Special Laws"

On 30th September, 2021, 2021, ICSI IIP organized a full day workshop on `**IBC v. SEBI Act: Supremacy between Special Laws**'. It was attended by 80 professional members. The workshop was addressed by the eminent speakers namely, Ms. Shailashri Bhasker Sr. Adv. R. Venkatavaradan.





◆ Webinar on "Critical aspects related to individual insolvency"

ICSI IIP conducted 3-hour free workshop focussed on some very critical aspects related to the subject of "*Insolvency of Personal Guarantors to Corporate Debtors*". " on October 31, 2021 from 4 PM to 7 PM. Inaugural address was given by Shri Dilip Khandale, Deputy General Manager, IBBI and the session was addressed by the experts namely **IP & FCS (Mr.) Amit Gupta and IP & FCA (Mr.) Nilesh Sharma**.

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At a Glance

No. 10 | Pg. 1-100 | October 2021

Section 61 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Appeals and Appellate Authority - Corporate debtor was undergoing

liquidation wherein appellant was appointed as liquidator - NCLT by an impugned order dated 31-10-2019 had dismissed appellant's miscellaneous application seeking interim relief against invocation of bank guarantee by respondent against corporate debtor - Appellant was present before NCLT when interim relief was denied - Appellant however, demonstrated no effort on his part to secure a certified copy of said order and had waited till uploading of order on website - Meanwhile, period of limitation for filing appeal against order of NCLT expired on 30-1-2020 and any scope for a condonation of delay had also expired on 14-2-2020 - Whether thus, NCLAT had correctly dismissed appeal filed by appellant on 8-6-2020 being barred by limitation - Held, yes (Para 23)

- **Adisri Commercial (P.) Ltd. v. Reserve Bank of India**
  (2021) 133 taxmann.com 181 (Bombay) • P-386

Section 45-IE, Reserve Bank of India Act, 1934 - Supersession of Board of directors of non-banking financial company (other than Government Company) - SIFL was a Non-Banking Finance Company governed by provisions of RBI Act, 1934 - Statutory inspection of SIFL conducted by RBI revealed that SIFL had defaulted in its payment obligations in respect of bank borrowings and market borrowings, which revealed serious concerns about conduct of affairs of Company - Accordingly, by impugned order, RBI, in exercise of powers conferred by section 45-IE superseded Board of Directors of SIFL and appointed an administrator - Petitioner shareholder of SIFL submitted that statutory inspection of SIFL was carried out by RBI as far back on 31-3-2020, therefore, there was no proximate cause for taking such a drastic step as supersession of Board of Directors and appointment of administrator and thus sought quashing of impugned order - However, as a matter of fact there need not be any proximate cause for an action like impugned one - Further, despite opportunity granted by RBI to rectify governance issues and improve financial condition, SIFL had failed to do so, and accordingly it could not be said that RBI had acted without jurisdiction or in violation of principles of natural justice - These were matters of financial, economic and corporate decision making, which, statutory bodies like RBI were fully empowered and competent to do so - Whether therefore, said matters could not have been interfered with - Held, yes (Paras 12 and 13)

- **Reserve Bank of India v. Srei Infrastructure Finance Ltd.**
  (2021) 133 taxmann.com 180 (NCLT - Kolkata) • P-387

Section 227, read with sections 3(11), 4, 5(8) and 239, of the Insolvency and Bankruptcy Code, 2016 and rule 5 of the Insolvency & Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 - Central Government - Power to notify financial service providers, etc - SIFL was a financial service provider registered under Companies Act - On basis of credit information available to it, RBI found that SIFL had committed defaults of significant amount in relation to financial debt availed by it from financial creditors - RBI had also superseded Board of Directors of SIFL and appointed an Administrator - An application was filed by RBI under section 227 for initiation of CIRP against SIFL - Total amount in default was more than minimum amount as stipulated under section 4(1) and present petition was also not hit by limitation - Further petition made by RBI was complete in all respects as required by law - Whether therefore, since debt in question qualified as financial debt under section 5(8), read with section 3(11) and default stood established, there was no reason to deny admission of petition - Held, yes - Whether therefore present petition for initiating proceedings under section 227, read with rule 5 was to be admitted - Held, yes (Para 15)

- **Amanat Randhawa Hotels (P.) Ltd. v. Shashi Kant Nemani (Resolution Professional of Aryavir Buildcon (P.) Ltd.)**
  (2021) 133 taxmann.com 153 (NCLAT-New Delhi) • P-388

Section 30, read with section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Submission of - In corporate insolvency resolution process (CIRP) of corporate debtor, Resolution Professional invited Expression of Interest (EoI) - Last date for submission of EoI's was 6-3-2021 - Appellant sent e-mail expressing its interest in participating in CIRP on 13-6-2021 but same was not accepted by Resolution Professional - Adjudicating Officer rejected appellant's application seeking directions to consider EoI on ground that Resolution Plan was already approved - Whether since resolution plan was accepted by 100 per cent voting share in CoC meeting and appellant had never participated in EoI, any reliefs granted in contra to timelines would be ultra vires to scope and objective of Code and, therefore, appeal was to be dismissed - Held, yes (Paras 19 and 20)

- **Harish Raghavji Patel v. Shapoorji Pallonji Finance (P.) Ltd.**
  (2021) 133 taxmann.com 183 (NCLAT-New Delhi) • P-392

Section 12A of the Insolvency and Bankruptcy Code, 2016, read with rule 11 of the National Company Law Tribunal Rules, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Adjudicating Authority by impugned order admitted petition against appellant corporate debtor filed by financial creditor under section 7 - Appellant filed appeal against impugned order and submitted that before constitution of CoC, settlement had been arrived at between parties and therefore, prayed that terms of settlement may be taken on record - It was further submitted that Appellate Tribunal exercising inherent power under rule 11 of NCLAT, Rules, 2016 could set aside impugned order and quash CIRP against corporate debtor in terms of settlement - Whether inherent power can be exercised only when no other remedy is available to litigant and nowhere a specific remedy is provided by statute - Held, yes - Whether since procedure for withdrawal of petition under sections 7, 9 or 10 of the IBC before and after Constitution of CoC had been provided in section 12A, there was no justification to invoke inherent power of this Appellate Tribunal and to take on record terms of settlement and pass order for withdrawal of petition under section 7 - Held, yes - Whether exercising inherent power under rule 11 would amount to abuse of process of Appellate Tribunal, hence, could not have been allowed - Held, yes (Paras 11 to 14)

- **Damodar Valley Corporation v. Cosmic Ferro Alloys Ltd.**
  (2021) 133 taxmann.com 156 (NCLAT-New Delhi) • P-394

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Pursuant to an application filed by financial creditor, CIRP proceedings were initiated against corporate debtor - Appellant-operational creditor had supplied power to corporate debtor - Power supply was disconnected due to outstanding electricity dues - Successful resolution applicant requested for increase in contract demand from 10 MVA to 20 MVA and asked for reconnection of electricity supply with waiver of security deposit - Appellant rejected request for restoration of connection as no security deposit was given - Adjudicating Authority by impugned order approved resolution plan without any specific order of waiver of security deposit and directed appellant to reconnect electricity supply to corporate debtor without insisting any payment of deposit - Whether in absence of any specific orders by Adjudicating Authority while approving resolution plan, appellant was not obliged to grant any waiver of payment of security deposit over next five years for increase in contract demand or supply of electricity by a 132 KV supply line - Held, yes - Whether any statutory or legitimate dues which might be demanded from Successful Resolution Applicant (SRA) for supply of any services should be paid by SRA and no waiver for any period of time for future was permissible - Held, yes - Whether dues of electricity supplied to corporate debtor during CIRP if not paid, should be paid out of CIRP costs and same should be ensured by Resolution Professional - Held, yes - Whether therefore, impugned order

was to be set aside with a direction that any security deposit or other charges for requested increase in contract demand and enhanced supply line for electricity would have to be paid to appellant - Held, yes (Paras 22, 23, 24 and 25)

- **Bijoy Prabhakaran Pulipra (Resolution Professional, PVS Memorial Hospital (P.) Ltd.) v. State Tax Officer (Works Contract)**
  (2021) 133 taxmann.com 144 (NCLAT - Chennai) • P-399

Section 25, read with section 14, of the Insolvency and Bankruptcy Code, 2016 and regulation 14 of the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - Corporate Insolvency Resolution Process (CIRP) against corporate debtor was initiated and appellant was appointed as Resolution Professional (RP) - Respondent-GST department submitted its claim, which was revised by Resolution Professional - Adjudicating Officer allowed respondent›s claim in full and directed appellant to file an appeal before Joint Commissioner, State Sales Tax Department for a reassessment of GST amount payable - However, appellant, instead of complying with order of NCLT to file an appeal under provisions of GST Act against assessment order, being proper remedy, preferred clarification petition, which was dismissed by impugned order - Whether exercise of revision of GST assessment order was beyond jurisdiction of RP as RP was not having adjudicatory power given by GST Act and regulation 14 of CIRP Regulations only authorises IRP/RP to exercise power where claim is not precise due to any contingency or other reasons - Held, yes - Whether Adjudicating Authority had rightly considered statutory provision and suggested filing an appeal before appropriate forum and, therefore, act of Resolution Professional, exercising powers of GST authorities was without jurisdiction and not sustainable in law - Held, yes - Whether thus, Resolution Professional committed an error in exercising his power and exercised powers of GST Authorities under pretext of Regulation 14, which was not sustainable - Held, yes (Paras 20.10, 21 and 23)

Section 238 of the Insolvency and Bankruptcy Code, 2016, read with section 107 of the Central Goods and Services Tax Act, 2017 - Corporate insolvency resolution process - Overriding effect of Code - Whether GST amount is an amount of tax levied under assessment order as per Goods and Service Tax Act, 2017 and same cannot be edited or reduced by Resolution Professional himself and if Resolution Professional is aggrieved by GST assessment, he should file appeal under section 107 of CGST/SGST Act, 2017 - Held, yes - Whether any revision of assessment orders cannot be made under pretext of section 238, section 238 cannot be read as conferring any appellate or adjudicatory jurisdiction in respect of issues arising under other statutes - Held, yes (Para 20.4)

- **DBS Bank Ltd. v. Hindusthan National Glass & Industries Ltd.**
  (2021) 133 taxmann.com 179 (NCLT - Kolkata) • P-404

Section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Financial creditor had sanctioned ECB Loan Facility to corporate debtor on specific terms and conditions and compliance mentioned therein - Corporate debtor continued to be in distress both commercially and financially for few years and could not service its debt obligation towards its lenders, as a result of which gradually its loan accounts with all lenders became irregular and were hence declared and/or categorized as Non-Performing Asset (NPA) - Accordingly, an application was filed by financial creditor under section 7 seeking initiation of corporate insolvency resolution process against corporate debtor - Corporate debtor submitted that it had been in discussion with lenders in order to formulate an effective resolution plan to pay off outstanding dues phase-wise and said settlement plans were in accordance with schemes promulgated

by Reserve Bank of India, from time-to-time - However, corporate debtor had not been able to adhere to terms of settlement deed inspite of repeated opportunities granted by financial creditor - Whether therefore, application filed by financial creditor under section 7 for initiating CIRP against corporate debtor was to be admitted - Held, yes (Paras 36 and 37)

- **Vidyasagar Prasad v. UCO Bank**
  (2021) 133 taxmann.com 105 (NCLAT-New Delhi) • P-408

Section 238A, read with section 5(8), of the Insolvency and Bankruptcy Code, 2016 and section 18 of Limitation Act, 1963 - Corporate insolvency resolution process - Limitation period - Whether an application filed under section 7 would not be barred by limitation on ground that it had been filed beyond a period of three years from date of classification of a loan account of corporate debtor as NPA if there was an acknowledgement of debt by corporate debtor before expiry of period of limitation of three years, in which case period of limitation would get extended by a further period of three years - Held, yes - Corporate debtor had availed credit facilities from financial creditor - However, corporate debtor failed to pay interest and principle amount as agreed and its account was classified as NPA (Non-Performing Assets) on 5-11-2014 - Financial creditor filed an application under section 7 on 13-2-2019 - NCLT by impugned order admitted said application - Corporate debtor challenged said order on ground that application filed under section 7 was time barred - Whether since corporate debtor had issued a letter to financial creditor on 7-6-2016 wherein it had given one time settlement proposal, said letter amounted to acknowledgement of liability by corporate debtor - Held, yes - Whether therefore, application filed under section 7 on 13-2-2019 was not time barred - Held, yes (Paras 8, 11.10 and 11.11)

P.K. MALHOTRA

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

From Chairman's Desk

Give it a try and do the impossible;
Don't give up; you can do it!

Dear Professional Members,

October is the month when we celebrate the establishment of our very versatile and dynamic regulator, the IBBI. This year, the IBBI completed 5 years of its successful functioning, standing on the backing of a well-established ecosystem around the legislation. On its 5th Annual Day celebrations, IBBI had the privilege of hosting several dignitaries (and eminent personalities) who obliged not only with their presence, but also enlightened us with their thoughts and views and vision. To name a few such personalities, Dr. Bibek Debroy (Chairman, Economic Advisory Council to Hon'ble Prime Minister) graced the occasion as the Chief Guest; Shri Rajesh Verma (Secretary, Ministry of Corporate Affairs); and Dr. Krishnamurthy Subramanian (Chief Economic Adviser, Ministry of Finance) were the Guests of Honour. Dr. M.S. Sahoo, who was bestowed with the onerous responsibility to spearhead this reformatory legislation as IBBI's Chairperson, and under whose guidance, support and vision we have witnessed an almost spellbound period of change, graced the occasion as a special invitee. Dr. Bibek Debroy, who delivered the annual day lecture focussed on the theme `*From No Exit to Easy Exit - A Case Study of IBC'*, and identified IBC as a

work-in-progress. He lauded the IBBI for the progress that has been made in implementing IBC and making it easy for the entrepreneurs to exit, while emphasising that our endeavour has to be to make the processes still easier.

The transition from the previous legal regime to the current IBC has not come easy at all. But, with the strong determination by the stakeholders (and especially the IBBI), all the milestones were achieved and all stumbling blocks that were there on its way started disappearing and thereby paving our path of glory. When we switched over to the IBC legal framework from the previous non-working legal regime, the intent was clear, which is *to transform* and *not just to introduce a mere change*. Changes took place even before introduction of IBC, but those changes were incremental and did not graduate to *a transformation*. To elucidate the point, I would like to delve a bit into the distinction between a '*change*' and a '*transformation*'. A *change* essentially means that the residue or impressions of the past are still there. On the other hand, a *transformation* means that nothing of the past remains in the present. This is what was sought to be accomplished by the policy makers through the IBC.

As regards the journey ahead, I would say that while the past can certainly guide us as to how to avoid the pitfalls that we earlier got into, but past can certainly not guide us as to how to construct the road ahead. The road ahead has to be built, and as the saying goes, *we shall cross the bridge when we get to it,* in a similar way, new challenges are going to erupt on our way, and we have to keep ourselves focussed like *Arjuna* did in the epic *Mahabharata*. Arjuna came to be known for his focussed approach and concentration on the target; when he, along with others, were asked to shoot at a fish's eye which was strung high-up in the air and they all could only see fish's reflection in a bowl of water, it was *Arjuna* alone who succeeded in the task as he was the only one who saw nothing but the eye of the fish. This speaks volumes about the power of keeping oneself focussed towards the target.

In the year 2016, when this reform got initiated, and the stakeholders started performing their functions and discharging their responsibilities, the only objective was to make the legislation bring-in the much needed reform. As the legislation got implemented, newer challenges evolved, but it was on the strength of the

work carried out by the legislature, the Executive, the Judiciary, the IBBI and most importantly the Professional members who collaborated, that we got solutions to all the issues encountered on the way.

The trend of expounding the law, providing clarifications on true import of words and expressions employed in the IBC statute, as also laying bare certain finer nuances of the subject has continued in October, 2021 as well. This time, one of the subjects under consideration was about the time when the clock for calculating limitation period for filing an appeal before NCLAT (under the IBC) begins to run. The other important aspect dealt with concerned the requirement of annexing a certified copy of impugned order while filing an appeal. The case involved interpretation of not just IBC provisions, but also that of Limitation Act, 1963, Companies Act, 2013, NCLT Rules and NCLAT Rules. The three-judge bench of Hon'ble Apex Court disposing-off civil appeal titled as *V. Nagarajan* v. *SKS Ispat and Power Ltd. (2021) 131 taxmann.com 258*. Keeping in view important of this ruling, I wish to venture-in, and delve a bit in the facts of the case. The appellant in this case was the Liquidator appointed for the Corporate Debtor, and the genesis of this appeal pertains to an application filed by him before NCLT seeking an order for initiation of proceedings u/ss. 43 and 45 of IBC. The application came to be disallowed leading to filing of an appeal by the liquidator before the NCLAT. Since the appeal was filed belated, there were grounds on which appellant sought to justify the delay. The same were: (*a*) that while NCLT's order was pronounced on 31 December 2019, but a copy of the same was uploaded on NCLT's website on 12 March 2020; (*b*) furthermore, since the uploaded order had set out incorrect name of the judicial member who had passed the order, the corrected order got uploaded only on 20 March 2020; (*c*) thereafter, the appellant awaited issuance of a free copy of the order u/s. 420(3), Companies Act, 2013; (*d*) and then, owing to lockdown situation, appeal before the NCLAT got filed only on 8 June 2020 (along with an application seeking exemption from the requirement of filing a certified copy of the order as the same was never issued). In the impugned order, NCLAT had dismissed the appeal as barred by limitation, relying on the language of s. 61(2), IBC. NCLAT had noted that the statutory time limit of thirty days got expired, and that, in any

event, the proviso to s. 61(2) circumscribes the discretion to condone the delay up-to fifteen days only. Availing the legal recourse further, the appellant went on to file a civil appeal before Hon'ble SC by taking recourse to s. 62, IBC, and the SC, while disposing off the appeal, underlined the settled position of law that an appeal being a creature of the statute (IBC), the question of limitation has to be answered by construing IBC provisions itself (read with Limitation Act, 1963). The Court further held that since IBC is a complete code in itself and it prescribes a different period of limitation for filing appeals, therefore, as provided in s. 29, Limitation Act, the limitation period shall be governed by IBC itself. As regards the requirement of NCLT making its order available to the parties (reference to s. 420(3)) and the limitation period of 45 days provided for filing an appeal before NCLAT (reference to s. 421(3)) read with the relevant ratio of SC (*Sagufa Ahmed* v. *Upper Assam Plywood Products (P.) Ltd.(2020) 119 taxmann.com 231/(2021) 163 SCL 201*, as cited by the appellant), the Court clarified that this ratio would not apply once an application for a certified copy is made by the party in which case the limitation period would be computed from the date of receipt of the certified copy itself, irrespective of when the free certified copy is received u/s 420(3), Companies Act, 2013 (r/w Rule 50 of the NCLT Rules). The other important aspect of this judgment is that the Court clarified that s. 61 of IBC, which provides for a right of an aggrieved party to file an appeal before the NCLAT, begins with a *non-obstante* clause (*i.e., "notwithstanding anything to the contrary contained under the Companies Act, 2013"*), and thus, while providing for a right of an aggrieved party to file an appeal before the NCLAT, the same has to be filed within the stipulated period of limitation under the IBC itself.

The Court also pointed out that while the expression *"from the date on which a copy of the order of the Tribunal is made available to the person aggrieved"* is there in the Companies Act provision (s. 421(3)), the same is absent in the IBC provision (s. 61(2)) which makes it clear that adherence to strict timelines is the cardinal and the indispensable ingredient of IBC which is a watershed legislation that seeks to achieve by overhauling the previous bankruptcy regime which was afflicted by delays and indefinite legal proceedings. The Court also held that since adherence to strict timelines is the key to success of IBC, therefore,

applying the principle of *reading in vis-à-vis* the requirement of *"order being made available"* in the IBC would do violence to the special provisions of IBC. Accordingly, the right to file an appeal, if considered expedient by an aggrieved party, should be exercised forthwith without waiting for a free copy in terms of s. 420(3), Companies Act, 2013 (r/w Rule 50 of the NCLT Rules). Substantiating on this aspect of the law, the Court held that while Rule 22(2) (NCLAT Rules) mandates a certified copy of the impugned order to be annexed with every appeal, the right to receive a free copy (s. 420(3), Companies Act) does not eliminate the appellant's obligation to seek a certified copy of the order. Therefore, answering the issues before it.

Therefore, the question posed before the Court, as to when does the clock starts ticking for the purposes of calculating limitation for filing an appeal under the IBC came to be answered as: appellant has to file its appeal within a period of thirty days, which period can be extended for a further period of fifteen days only, and that the extension can be granted only upon showing sufficient cause thereof. Further, on the second question, as to whether the requirement of annexing a certified copy of impugned order a mandatory requirement for filing an appeal with the NCLAT, and cannot be done away with in any circumstances, the Court held that the tribunals and even the SC may exempt parties from complying with this procedural requirement in the interest of substantial justice, the discretionary waiver does not act as an automatic exception where litigants make no efforts to pursue a timely resolution of their grievance. In the present appeal matter, since the appellant had failed to apply for a certified copy, the same rendered the appeal (before the NCLAT) as barred by limitation. Therefore, it is beyond any shade of doubt that the obligation to apply for and obtain a certified copy for filing an appeal before the NCLAT is a *sine qua non* for exercise of the right.

I can clearly see that the stakeholders are now gearing up to also work on the law pertaining to Cross-border insolvency under the IBC legal framework, and I wish a big success to all the stakeholders.

●●●

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

Managing Director's Message

Be the change you wish to see in the world

...**Mahatma Gandhi**

Dear Professional Members,

We are on the verge of completing a major journey of 5 years of our togetherness ever since we started walking together onto the glorious path of implementing the transformational change called the Insolvency and Bankruptcy Code (IBC). The Institute (ICSI IIP) shall be completing 5 years of its existence on 25th November 2021, and keeping that in view, I wish to thank all the professional members for their support as well as guidance to us. The support has come in many forms. It is only with your support that we have been able to discharge our functions efficiently. The Training Programmes, the periodic learning activities (workshops, round-table discussions etc.) that we have been able to organise have succeeded only on the strength of your support and a sense of involvement. Your willingness to share your knowledge and experience has

indeed helped us to pursue our common objectives. Be that as it may, I also look to strengthen our bond and also receive your valuable suggestions to us on different ways by which we can make our services to our members more helpful.

In his quote above, the Father of our nation (Mahatma Gandhi) has shown us the way by which we can bring any transformation in the world. The way thereof is, that we must first bring that change in ourselves. The 'world', in reality, is simply a word. If there is no transformation in us (you and me), if there is no change in the way we think, perceive, feel, experience and act in this world, the wish to change the world (or the system) can only be a false dream! Our capacity to bring a change in the world is dependent on the commitment that we show and display through our actions. When this commitment starts displaying itself out (through our actions), incredible things start happening. In other words, changes and transformations have happened simply out of commitment. This can be very well seen in the functioning of IBBI which has shown utmost conviction to the change that is envisioned and envisaged in the IBC.

As IBBI completes 5 years of its very successful existence, the developments that have taken place in this brief period are only to be admired. There are several nations now who are looking to study the Indian case (IBC) and explore options of introducing a similar law and the way it has been worked out. There cannot be a better acknowledgement of the success that IBC law has made.

The developments in the law and the trend of clarifications and finer nuances being explained by rulings of Hon'ble Supreme Court has continued in the month of October, 2021 as well. This time, the subject under consideration was about *calculation of limitation period* vis-à-vis *exercise of right to file appeal before NCLAT*, as also *the requirement of filing certified copy* (*of impugned order*) *with the appeal*. The decision came from a judgment delivered by a 3-judge Bench of Hon'ble SC, who not only dealt with the true interpretation of IBC provisions, but also other read the provisions of Limitation Act, 1963, Companies Act, 2013 along with the subordinate legislations like the NCLT Rules and NCLAT Rules. The judgment came to be delivered in the matter of *V. Nagarajan v. SKS Ispat and Power Ltd. (2021) 131 taxmann.com 258 (SC)*. This ruling being a major judicial development, I wish to delve a bit on the facts of the case

apart from highlighting the crucial questions of law settled through the judgment.

The facts of the case (in brief) are that a Liquidator (Appellant before Hon'ble SC) had filed an application before NCLT seeking initiation of proceedings u/ss. 43 and 45, IBC. The application, however, came to be disallowed. This resulted in filing of an appeal before NCLAT, but with a dely. An application seeking condonation of delay was filed on different grounds, such as, while NCLT order was pronounced on 31st December 2019, but a copy thereof was uploaded on NCLT's website only on 12th March 2020; in the uploaded order the name of Judicial member was not correct, and so, with correction, the order got uploaded only on 20 March 2020; thereafter, Appellant waited for a free copy of the order (citing language of s. 420(3), Companies Act, 2013), and then owing to the lockdown situation, the appellant could file appeal before NCLAT only on 8th June 2020. In his appeal, the appeal sought an exemption from filing certified copy since he never received the free copy. The NCLAT while dismissing the appeal as time barred had relied on the language of s. 61(2), IBC stating that the statutory time limit of thirty days (30 days) got expired, and that under the proviso to s. 61(2) NCLAT's discretion to condone the is circumscribed to fifteen (15) days delay only. In the appeal proceedings before Hon'ble SC, the settled position of law that the appeal is a creature of the statute (IBC) and that any question of limitation has thus to be answered by construing IBC provisions along with the Limitation Act, was accepted. The existence of a *non-obstante* clause (s. 238) in IBC was also taken cognizance of. Furthermore, going by the language of s. 29 of Limitation Act, 1963, it was held that period of limitation prescribed under IBC is to be deemed to be the period prescribed u/s. 3, Limitation Act, 1963.

On the question of free supply of NCLT's order (as argued by the appellant), Hon'ble SC referred to the language of relevant provisions (s. 420(3), and s. 421(3) Companies Act, 2013 (*supra*)), which not only prescribes a period of limitation for filing appeal before NCLAT, but also specifies that computation of time shall be made from the date when NCLT's order is *made available to the person aggrieved*. Rule 50 of NCLT Rules was also adverted to in this regard since it operationalises s. 421(3) (*supra*) and mandates NCLT's Registry to share a free certified copy of the order with the parties. Beside the relevant statutory provisions,

the certain authorities on the subject were also referred to which includes a 3-Judge bench judgment delivered in the matter of *Sagufa Ahmed* v. *Upper Assam Plywood Products Pvt. Ltd. (2020) 119 taxmann.com 231/(2021) 163 SCL 201 (SC)*. In this case, the Court, while interpreting s. 421(3) (*supra*), had dealt with the issue as to whether the limitation period would start running only after a free certified copy is made available to the aggrieved party (*sans* an application for the same), and had concluded that the aggrieved party could wait till it received a free copy, and that it is not obligated to file an application for obtaining a certified copy thereof. The SC, in *V Nagarajan* (*supra*), however, clarified that this principle would not apply in case an application for a certified copy is made by the party. In such a case, the limitation period has to be computed from the date of receipt of the certified copy, irrespective of when the free copy of the order is received. The Court accordingly noted that s. 61 (*supra*) not only provides a right to appeal, but also lays down the limitation period thereof. The difference in the language of the provision in Companies Act and s. 61(2), IBC was underlined to emphasize that the wordings *"from the date on which a copy of the order of the Tribunal is made available to the person aggrieved"* though present in the Companies Act provision, it is missing in s. 61(2). On this basis, it was concluded that the legislature has deliberately chosen adherence to strict timelines since IBC. Thus, it was held that an unnecessarily *reading in* the requirement of an *"order being made available"* under a general enactment (Companies Act) would do violence to the special provisions of the IBC and an appeal has to be filed without waiting for a free copy in terms of s. 420(3).

The Court also took cognizance of the language of Rule 22(2) (NCLAT Rules) which mandates that an appeal must be filed with a certified copy of the impugned order, and held that the obligation to apply for and obtain a certified copy for filing an appeal before the NCLAT remains a *sine qua non* and the right to receive a free copy u/s 420(3) of the Companies Act does not in any manner eliminate appellant's obligation to seek a certified copy through an application. The Court also referred to the language of s. 12, Limitation Act, 1963 and held that it imposes a responsibility of applying for a certified copy, since a person who wishes to file an appeal is expected to file an application for a certified copy before expiry of limitation period. On the issue of condonation of delay, I can recall that NCLAT

had in its previous judgment (*National Spot Exchange Ltd. v. Mr. Anil Kohli RP of Dunar Foods Ltd. (2019) 109 taxmann.com 268*), had made it clear that s. 61(2) renders NCLAT with a power to condone a delay only upto a maximum of 15 days (and not beyond). The other important legal issue that that got settled pertains to the NCLAT's power (under rule 14 of NCLAT Rules) to exempt (in the interest of substantial justice) any party from compliance with requirement(s) under any of the rules. On this, the SC held that though a waiver from filing a certified copy is often granted for the purposes of judicial determination, but such waiver cannot be taken to confer any automatic right on the appellant to seek exemption from the requirement.

Concerning the timelines under the IBC, Hon'ble SC has, time and again, sent a very clear message that the legislation requires all actions to be taken with utmost sincerity, conviction and without undue delay. In other words, time is a very crucial aspect of any insolvency resolution process. It is not just the initiation and completion of the proceedings, but also the right to appeal which has to be exercised with utmost diligence and within prescribed time limits. Timely invocation of IBC helps in not only maximizing value of CD's assets, but the chances of it getting back to its feet also get enhanced. The aforementioned decision rightly emphasises that if a party is aggrieved by an order of NCLT and wishes to appeal against it, it must be diligent in exercising its right and not sleep over it. I am reminded of a well-known legal maxim which says that *Delay Defeats Equity*!

Please take a good care of yourself and your family members.

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INTERVIEW

USHA BALASUBRAMANIAN

Insolvency Professional
Partner, ARUB & Associates, Chennai.

1. 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?

As an Insolvency Professional its been a journey of learning and each case is different which has taught me not only technicalities but also people management, how to handle different situations. As an IP you have to step into the shoes of the Board and manage the affairs of the Corporate Debtor which requires understanding Corporate Debtor's business, overall operations, reasons for its current state of affairs and finding a way to turnaround. As a Practising Company Secretary and legal professional I am trained to perceive things in a certain way but as an IP, I have changed my perception and handling different cases has given me very enriching experience.

Its been almost 5 years since the law has been implemented and has evolved. Under the IBC Committee of Creditors backed by financial creditors take control of the Corporate Debtor where the CoC has transformed the consideration of resolution plan into pure bidding process and, as a result, the creditors' committee is concerned with the highest bid rather than the viability of the Corporate Debtor which enables it to recover its loan rather than reorganize the Corporate Debtor.

Changes in the law required enable the viable Corporate Debtor to be reorganized and grow.

Secondly, Section 29 A of IBC prevents certain category of persons from submitting resolution plan. These exclusions significantly narrow down the ability of debtors to retake control of their company. This has led to the liquidation of many companies under IBC rather than reorganization. The IBC has to be modified to increase incentives for reorganization, and to allow debtors better opportunities to restructure debts within the IBC while still retaining control of their companies.

The main point which needs to be addressed is that the delay in insolvency process because of shortfall in the judicial capacity within NCLT, due to shortage of personnel and nature of IBC process. Many corporate debtors go into liquidation and parallel litigation related to insolvency process take up more judicial time and also adds to the delay. Not only NCLT capacity is required to be augmented, this has to be supplemented by changes to the legal framework that reduce incentives to litigate.

2. Since you are also a Company Secretary by profession, whether your practice as an Insolvency Professional had any impact on your secretarial or legal domain?

Yes to an extent it has taken time to adjust and handle both secretarial practice and practice as insolvency professional. Handling insolvency process requires lots of time and attention in a time bound manner so I had to take support of additional staff, professional and associates. My Partner in my firm has been very supportive and has managed our secretarial firm when I was involved in insolvency process. Ultimately it's the team support and understanding which has enabled me to handle both areas of practice

3. 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 stakeholders under insolvency?

Idea behind identifying avoidable transactions and seeking appropriate relief from Adjudicating Authority is to achieve the basic objective of IBC *i.e.* maximization of the value of assets and equitable distribution of assets to all stakeholders and achieve resolution in a time bound manner.

4. Since you have handled liquidation assignments also, how different is the role of IP in CIRP assignments vis-a-vis Liquidation assignments?

I have handled role of IP in CIRP assignments and I am also handling Voluntary Liquidation. There are a number of similarities as well as differences between the roles of the resolution professional and that of the liquidator. It is pertinent to keep in mind however, that there is no overlap between the two. The resolution professional works towards reviving and restructuring the corporate debtor, after a failure of the same, the liquidator sells the liquidation assets, distributes the proceeds and makes an application for dissolution of the company.

5. What practical challenges are faced by an Insolvency Professional while carrying out the insolvency

process which regulators are not aware about?

Insolvency Professional faces many challenges while carrying out the insolvency process. Each case is unique in itself.

Among many practical challenges non-co-operation of Committee of Creditors (CoC) is a major challenge which IP faces. Sometimes IP does not receive his remuneration and expenses and continue to perform his duties. Filing of application before NCLT for payment of remuneration and expenses may put IP on a tight spot as he has to conduct CoC meetings and seek their approvals on various matter for the smooth closure of insolvency process.

Certain cases where IP is appointed as IRP of corporate debtor having factories with large pool of workers who have not been paid their salary and other statutory dues. Once CIRP commences IRP steps into the shoes of Board, workers sometimes do not understand the CIRP process and submission of claims and other procedures. They expect immediate payment of their dues and often get agitated and non-co-operative. RP has to handle the situation very tactfully.

6. Many Insolvency professionals are working as advisors/legal consultants within the IBC sphere but are reluctant in taking assignment. What are your views on it?

Many Insolvency Professional have rich experience in their core area of practice as Chartered Accountants, Company Secretaries, Cost Accountants and legal consultants and advisors and other areas. So legal consultancy and advisory services is the natural extension of their core area of practice. However, acting as Insolvency Professional requires lots of change in the perception and also requires a completely different approach to handling things. Besides Insolvency Professional is answerable to multiple agencies, such as Committee of Creditors, IBBI, Insolvency Professional Agency they are associated with, NCLT and also perform his duties in a time bound manner which is very challenging. Many Insolvency Professional take up couple of assignments in the beginning and later feel comfortable in offering advisory and legal consultancy and support services.

7. What is your take on implementation of framework for personal guarantors under Insolvency and Bankruptcy Code, 2016?

Supreme Court in *Lalit Kumar Jain v. Union of India (2021) 127 taxmann.com 368*, upheld the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (2019 Rules) notified by the Indian Government on 15 November 2019 (effective from 1 December 2019). This a welcome move from the point of view of creditors as they may recover their dues from both corporate debtor and the personal guarantor thereof under one forum simultaneously. However, by allowing the creditors to pursue against the personal guarantor for recovery of their dues without providing the corresponding right to the personal guarantor, IBC may become a tool for recovery benefitting the creditors. However, this implication will disincentivize individual personal guarantors from extending a guarantee to corporate debtors.

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

Now an allottee in a real estate project, including a home buyer is treated as Financial Creditor under the IBC and are treated at par with other Financial Creditors such as Banks and financial institutions. Allottee is represented in CoC through an Authorized Representative in a class of creditors. Further by becoming a Financial creditor, a home buyer would have priority over Statutory Authorities and Other operational creditors. Allottee can initiate CIRP proceedings against defaulting promoters by filing application with NCLT on the occurrence of default. Default might be either non-delivery of home or not refunding the amount with interest.

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

IBC provides for two tier regulatory regime for Insolvency Professionals who are regulated by IBBI and IPA's which in turn is regulated by IBBI, while NCLT is the adjudicating authority. IBC lays down effective ecosystem for implementation of provisions of IBC which consists of four pillars *viz.* NCLT, IP's, IBBI an IPAs. IP is the fulcrum of the process and link between the NCLT and CoC as also other stakeholders.

IPAs promote professional development and lays down standard of professional and ethical conducts among IPs. ICSI IIP has been extremely co-operative in supporting IPs registered with them. Whenever I have faced certain difficulties in any assignment I have sought the guidance and advise from the ICSI IIP.

IBBI exercises regulatory oversight over IPs and IPAs. IBBI has passed various rules and regulations after taking into considerations the various practical difficulties faced during insolvency process, liquidation process, disciplinary aspects of IPs. In a way IBBI has played a key role in evolving IBC.

NCLT has played a key role in not only adjudicating but also through various judgments, NCLT has exercised its judicial wisdom in resolving practical and legal issues faced under IBC. IBC is still evolving and each pillar plays a pivotal role.

My only humble suggestion is that both IPAs and IBBI requires compliances of same requirement to be filed with both agencies in different formats which takes lots of time of IPs who are already working in a time bound manner. If some sort of single format reporting for both IPAs and IBBI can be worked out it will save lot of time which is spent on compliances and IPs can focus on the assignments in hand.

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

I am very positive about the evolution of the IBC over the next 5 years which will be based on Indian experience and ecosystem yet in line with International legal systems. Hopefully IBC plays a key role in reorganizing and turning around debtors who are debt ridden but have feasible and viable business and reducing the NPAs. This will boost investor confidence ad in achieving sustainable growth.

As an IP I hope to learn and unlearn from my experiences from handling different assignments and evolve as a seasoned professional.

Insight!

Air India Disinvestment: Can IBBI Adopt This Template?

MR. S. SHIVASWAMY

Ex-Banker

(Retired Top Executive Grade Officer Public Sector Bank)

The GOI's move to disinvest 100% equity holding in AIR INDIA was greeted with wide spread relief and jubilation from wide spectrum of population comprising industry, business, economic and legal fraternity besides general public. Though the idea of disinvestment was on the cards for almost 2 decades, there was always some dilly-dallying, hesitancy and half-hearted approach to somehow get rid of the problem without losing political leverage over the national Airline . After repeated failure to lure any bidders, last year the Government realised that with over Rs. 70,000 Crores ($10 Bn) accumulated losses and equity base completely eroded 2 times over, the forced option of the bidders having to pay for the cake without actually getting to eat didn't exist. That's when GOI decided to go for 100% disinvestment. Yes, it was sort of an arranged marriage no doubt but with win-win situation for both. Groom's side didn't insist on hefty dowry and bride's side didn't insist on mother-in-law accompanying the bride as excess baggage! For TATAs the buyer, it was a business mixed with emotion and nostalgia. In 1953, GOI, unilaterally took the decision to acquire AIR INDIA and paid Rs. 28 lacs compensation to JRD.

But let's discuss the financial nitty gritty of disinvestment plan to understand the complexity of the deal. Tata's have paid Rs. 18,000 Crores to the Government (Rs. 2,700 Crores in cash) to get back the Airlines, that was forcibly acquired from them in 1953 . In purely financial terms, TATA's have returned Rs. 28 lacs with over 18% interest compounded annually, a way higher than inflation index. In addition, GOI will be saving additional outgo of Rs. 7,300 Crores annually @ Rs. 20 Crores per day as the recurring cost of keeping Air India afloat. The Airlines was being crushed under the mountain of Rs. 61,652 Crores debt, of which Rs. 46,262 Crores was hived off to Air India Asset Holding Company (AIAHC). However, by way of saving recurring cost alone, GOI can repay the debt Rs. 46,262 to itself in under 7 yeaRs. Let's not discount Rs. 17,000 Crores of Non-Core Assets transferred to AIAHC by the GOI, before disinvestment. These assets include prime land, buildings and price less paintings collected over the yeaRs.

For TATAs also it is a moment of redemption. Their professional commitment to the Airline business, society and the nation remained intact all these yeaRs. Though there might be some rumblings in some quarter that it was a case of a single bidder dictating the terms, the reality can't be ignored that other players didn't have the necessary heft to even bid for the business leave alone their competence to turn around the sick airline crying for succour. TATAs have an unenviable task on hand to identify and weed out non-productive staff and bring more professionalism in its business outlook that was sorely missing and integrate with their other Airline services without attracting attention of Competition Corporation of India.

How is this deal different from other disinvestments undertaken in the past? Purely based on Balance Sheet approach, the liquidation value would have been either negative or negligible. The debt burden was like a millstone around the neck. However, Government decided to take Enterprise Value route that factors in Debt component as well besides equity. It was left to the bidders to decide on debt portion. In simple terms, Rs. 18,000 Crores Enterprise Value is the net discounted present value of the cash flow over the next 10 years so. The TATAs have accepted the loan liability of Rs. 15,300 Crores and paid the GOI Rs. 2,700 cash.

The EV approach will help Government evaluate other assets as well that are in the pipeline for disinvestment or monetisation. It would be interesting to study the whole case in the context of Insolvency and Bankruptcy Code, though IBC is not applicable to Government owned company. The Government can always find some ways to raise resources to keep the concern " going" though at huge cost to the exchequer and disastrous to the economy. Dr. Bibek Debroy in his key note address on the occasion of quinquennium of IBBI " has rightly emphasised the need for survival of the fittest and those not fit enough allowed to exit. Otherwise, it would result in survival of the fattest an oblique reference to gargantuan PSUs like Air India that continued to bleed the exchequer. The 2nd basic difference is the extra leverage that Government exercises over the other party by making the sale of assets in a Seller's market provided the product is attractive. The third and the most important difference is the method of Valuation.

The Valuation is a highly skilled and technical exercise that must be undertaken before effecting sale of any product/ unit. IBBI boasts of large number of highly experienced and qualified Valuers who have the final say on all important matters of Valuation related to Insolvency. The CoC's decision to accept or reject Resolution Plan is termed as a commercial wisdom not subject to scrutiny even by the Adjudicating Authority. Again the "Commercial Wisdom" is largely based on Valuation done by set of approved valueRs. Hence, it is the Valuation that plays key role in settlement/resolution of all IBC cases. Does it mean Valuation of an enterprise is some divine figure or universal constant that can't change? The answer is emphatic "No" because Valuation of a product or enterprise differs from time to time, based on the assumptions accepted, methodology adopted and their own perception of future growth. That is the reason the Valuation of asset has differed widely between 2 different Valuers, done at the same point of time.

Another difference is whereas piecemeal valuation of assets gives some conservative figure, consolidated value of the company will be much higher than the aggregate sum of the value of assets. Though details of accepted Resolutions Plans have been kept as closely guarded secret we have not come across any case of Valuation based on Enterprise Value, even when the unit was sold as a going concern. In most cases, the real estate value of land & building was added to the depreciated value of the machinery and discounted at 10% to 20% to arrive at Liquidation value. The valuation of other assets mostly Current Assets, that forms the bulk of security was either not considered or valued at negligible rate. Many qualified valuers of Fixed Assets, Machinery and Financial Assets are not clear where to categorise the stocks besides methods of valuation. The nature of stocks differs from industry to industry further divided into RM, Stock in Process & Finished goods. A medium & large sized company manufacturing machinery, auto parts or spares will have a stocks of engineering goods. A white good manufacturing company will have stock of electronic goods. The valuation of stocks on stand alone basis may result in it getting only scrap value but a stock of going concern will command more or less the same value as reflected in books. Unfortunately, with assets being valued separately by different set of valuers integrated approach to valuation takes back seat. The liquidation value of assets to be indicated separately, is also based on the premise that company is likely to be liquidated in near future. Such a probability automatically depresses the market and drives down the valuation. In my opinion we have been committing a cardinal sin by determining the liquidation value in advance during the CIRP and

even sharing it with other members of CoC "on the condition of strict confidentiality". Section 30(*b*)(*I*) of IBC "*provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than- the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53*". But does it really warrant determination of liquidation value in advance when our effort is first directed at Resolution and even during Liquidation, attempt is made to sell it as a going concern under Section 230 of Company Act?

Such a flawed approach has resulted in CoC virtually forced to approve Resolution Plans for ridiculously low amount- just above the liquidation Value, with a massive hair-cut. In the very first case of successful CIRP(?) in respect of *Edelweiss Asset Reconstruction Company Ltd. v. Synergies Dooray Automotive Ltd.* (2017) 85 taxmann.com 136 (NCLT - Hyd)., the Corporate Debtor exploiting loophole in the just enacted IBC and got the shares of Synergy Castings Limited, a related party, transferred to Millenium Finance Limited to facilitate its backdoor entry into CoC. Thereafter got the Resolution Plan submitted by Synergy Castings limited, approved by CoC with 94% haircut. It is a different matter that IBBI acted quickly to plug loophole in the Code by way of amendment to Section 29A. However, the list of such blatant abuse of IBC provision to palm of huge assets created out of public money only continued to grow. The same is the case with S Kumar Nationwide, Alok Industries Limited, Adhunik Metalikks /Zion Steel Industries.

In case of Alok Industries Ltd, Reliance & JMARC being the joint successful bidders, the resolution amount fixed was Rs. 6,252 crores of which financial creditors got Rs. 5,052 Crores against total debt of Rs. 22,075 Crores. In case of Amtech Auto, the resolution amount by the successful bidders DVL was allowed to be reduced from Rs. 3,150 Crores to Rs. 2,700 Crores against the total liability of Rs. 14,074 Crores after the bid of Rs. 4,800 Crores by Liberty Group House fell through. However, the FC got only Rs. 500 Crores upfront with balance repayable in future from realisation of debt including Tax refund. The resolution terms of Electrosteel Steels Ltd., the one of the first dirty dozens to be resolved is slightly more balance with a haircut of 59%. In this case Vedanta Star Ltd., successful bidder subscribed for the share capital of Electrosteel for an aggregate amount of INR 1,805 Crores and provide additional funds aggregating of INR 3,515 Crores by way of debt. Upon implementation of the Resolution Plan, the Company will hold approximately 90% of the paid-up share capital of Electrosteel (the "Transaction"). The resolution plan of Adhunik Metaliks Ltd., presents a very bizarre case of NCLAT overruling the Liquidation of the Corporate Debtor due to the failure of Resolution Applicant, Liberty Group House to deposit the required resolution amount in time. NCLAT by invoking special provision under Rule 11 of NCLAT overruled the liquidation orders of Cuttak NCLT and restored the original resolution plan by imposing token penalty of Rs. 10 crores. The Corporate Debtor was owing more than 5000 crores debts to FC besides huge amounts to OCs including PSUs like Metal Scrap Trading Corporation. The resolution plan was approved for just Rs. 425 Crores. Incidentally, LGH is itself facing insolvency in London. Other big sized Corporate Debtors *viz.* Lanco Infratech Ltd. Rs. 44,478

Crores, ABG Shipyard Ltd. Rs. 6953 Crores, S.Kumar Nationwide Rs. 7970 slipped into liquidation. Jyoti Structures became the first company among the RBI "Dirty Dozen" list with approved Resolution plan, didn't give any immediate relief to the lenders with long repayment plans. As per the Resolution Plan approved, admitted claim against the Corporate Debtor is Rs. 7,010 crores, liquidation value is Rs. 1,112 crores. There was a haircut of 43% to the creditors of the Company. The amount approved for Resolution Plan was Rs. 3,965.06 crores with just Rs. 50 crores paid upfront, Rs. 75 crores to come in 1 year and remaining paid as staggered payments in a period of 12 yea Rs. The moot point that arises is whether such repayment plan couldn't have been approved outside IBC?

The above list is only illustrative and not exhaustive as details of Resolution Plans are not shared even with other Creditors/ stakeholdeRs. The losses booked by FC itself is in the region of 50-90%. But the cost to the economy is much more as Operational Creditors consisting of thousands and thousands of MSME units have lost every penny invested in the ill-fated CDs. Barring 2 notable exceptions-Essar Steels and Bhushan Steels, outliers-the Resolution amount largely revolved around Liquidation value.

In almost all most cases, Liquidation value was determined which got " leaked" to the prospective bidders, to facilitate submission of Resolution Plans around that figure. The Valuers have generally played safe by arriving at highly conservative value of the assets or ignoring the value of current assets comprising stocks and receivables from reckoning. No attempt was made to determine EV of the CD even when sold as a going concern. The net result was throwing away of the Company at dirt cheap rate with hair cut exceeding 80% to 95% after spending precious time and resources at a largely meaningless exercise of insolvency process. The most glaring example of bidders taking advantage of such flawed approach recently came to notice during the resolution of Videocon group of Companies with total debt exceeding Rs. 65,000 crores. The successful bidder, Vedanta submitted resolution plan of Rs. 2,900 crores that was approved by NCLT Mumbai. The news sent shockwaves across the business and corporate circle. It can be safely assumed that VGC will any day have unsold inventory many times more than the resolution amount.

The AIR INDIA disinvestment when view from IBC angle can be termed as a highly successful resolution. The move signalled the intention of the Government, in no uncertain terms, of its resolve to get out business from the area that are strictly not its business. But even while taking such a path breaking step, besides correcting historic wrong, it has sent a message that it knows its business well. Govt. can justifiably pat itself on the back for striking a historic deal at a very reasonable cost. Air India disinvestment has added new dimension to the method of Valuation, Bidding and Resolution process and stands on a different footing compared to other IBC cases. It is high time IBBI takes a leaf out of Air India case, for regulating the business of insolvency resolution by, introducing necessary amendments and plugging loopholes from the Code.

Reforming the Insolvency Laws in India

ASHWINI MEHRA

Retd. Dy. MD, SBI

ABSTRACT

As the IBC, 2016 enters its fifth year of existence, it remains an evolving law. The regulator, IBBI, has displayed alacrity in making changes/additions along the way, based on experience and issues which emerged during implementation. The results so far have not been on expected lines as when the Code was promulgated primarily due to some infrastructural issues which remain to be fixed even today, particularly in the area of judicial setup. Also, during implementation, the agencies involved have often lost sight of the fact that the Code is a commercial law and needs to be implemented accordingly with the necessary flexibility, imagination and foresight required by such a law. Given the forgettable experience of the non-judicial measures mandated by RBI earlier on *viz.* CDR, SDR, S$A, etc., we cannot afford to let IBC slip into irrelevance and continue to strive hard for improvements along the journey of evolution.

Almost 5 years ago the Insolvency & Bankruptcy Code, 2016 (IBC) was introduced as an umbrella legislation with the objective of providing a predictable, equitable and transparent allocation of business risk for all stakeholder groups as also to provide an exit route to 'inefficient' promoters. Since then, the laws have undergone a No. of iterations and modifications addressing legal and practical issues as they emerged during implementation. Consequently, IBC has been given epithets like 'evolving law', 'well intentioned law, badly implemented' etc.

IBC came on the heels of various, non-judicial, RBI monitored mechanisms like CDR (rescheduling debt repayments of Corporate Debtor (CD) based on subdued, revised business projections), SDR (debt reschedulement of large loans in excess of Rs. 500 crs coupled with pledge of part of promoters' equity in favour of lenders), S4A (like SDR with proviso that atleast 50% of debt is serviceable by CD within the residual repayment tenor) and 5:20 (liberal debt restructuring over maximum of 25 years with refinancing option every 5 years). All of them, without exception, threw up significantly suboptimal results

for the creditors, primarily benefitting the promoters who succeeded in procrastination *viz.* kicking the can down the road. The financial institutions were also cosy with this arrangement as it provided them an avenue to artificially maintain an improved quality of their asset portfolio. For instance, as per RBI, out of the Rs. 1.85 lac crs. of debt covered under CDR till March 2017, approx. Rs. 1.20 lac crs. of reschedulement failed. In the case of SDR and S4A, the promoters were averse to providing their personal guarantees and also for pledging their equity in favour of lenders. Again, in 5:20, the refinancing risk was not suitably addressed which resulted in the lenders not warming up to the Scheme on anticipated lines. These failed evergreening measures which were mostly bereft of any root cause analysis have been aptly nicknamed the `extend & pretend regime' by Arvind Subramaniam, former CEA. The introduction of the Asset Quality Review by RBI for all high value loans in excess of Rs. 500 crs. from 2014 onwards put paid to this `creative' accounting and the real rot in the banking system started getting gradually exposed. The crying need for India to be a significantly more attractive investment destination forced the regulators and the govt. to jettison RBI's non-judicial mechanisms and consider a more stringent, time bound judicial mechanism to address the asset quality problem and improve the balance sheets of banks. As a consequence of the efforts, we had the advent of the IBC in Dec.2016 soon followed by withdrawal of the various aforementioned RBI mandated restructuring mechanisms. For once, the RBI & GoI were on the same page with a common `clean up' goal. IBC is therefore, expected to address the decay in the country's financial system in a time bound manner. The results so far are however mixed, but on balance, less than satisfactory. The major issues being grappled with by the practitioners are:

Misuse of time between application and admittance

During the time interval (sometimes significantly long) between the application for initiation and approval of the insolvency proceedings by NCLT, the interests of the corporate debtor and the stakeholders are very often exposed to high risk of value erosion due to deviant pre-planned actions of the incumbent management.

Unimpressive performance statistics (Source: IBBI website and IPA journals)

While the IBC had the laudable objective of value maximization through resolution, the process has degenerated into an auction of the co. to the highest bidder rather than a viable reorganization of its business. As per statistics available on IBBI website, the median recovery for lenders is around 20% and over half the admitted cases are still pending with NCLT. The average time taken is a high 384 days, against specified timelines of 180-330 days (earlier 270 days); 80% of the cases are beyond the stipulated limit of 330 days. Again, as per IBBI statistics, of the concluded cases, only 13% have closed on approval of a Resolution Plan and almost half the cases have gone for liquidation, the others being either withdrawn or closed on appeal/settlement. Since PSBs are major creditors in most cases, inclusion of specific provisions in the CVC code aimed at encouraging greater flexibility in decision making in the context of IBC can help lenders take a more imaginative stance in resolution proceedings.

Travails of the Insolvency Professional

The insolvency professionals (IPs), who mostly have no prior hands on experience of running cos., are parachuted into what is akin to an alligator pond. They have to right away grapple with numerous overwhelming issues ranging from an unco-operative and devious management, deserting employees, demanding creditors looking for quick results, debtors avoiding payment commitments, business levels precipitously slipping, overly cautious auditors, clients becoming overbearing and cautious, etc. In most cases, the lenders have put the tag of 'wilful defaulter' on the Co. and its promoters. Consequently, the IP has to handle the humongous information demands from banks as well as investigative agencies like CBI, ED, SFIO, Taxmen, etc. Amidst all this, the IP is also expected to run the co. as a 'going concern' to preserve value. However, herein lies another serious problem. The existing vendors are highly averse to supporting RP's efforts when not being paid their pre-CIRP dues. New alternate vendors are difficult to come by for obvious reasons of dealing with a co. having uncertain prospects and cash flows. The clients also become inflexible in their dealings due to the enhanced risk perception, very often pressuring the IP for continuing with the existing vendors to ensure maintenance of quality standards. The IBC is not very helpful in addressing these operational issues with the required flexibility. Departures from the norm in such cases mostly invite a frown from the regulators with commensurate reprimands/ punishments. A re-look by a committee at the respective Regulations with this mindset would be helpful.

Poor judicial infrastructure

The IP encounters serious delays in the judicial process. Not only is the existing infrastructure of NCLTs inadequate to handle the burgeoning case load, but there are also serious delays in issuance of orders. A common experience of many RPs has been that a Section 19(2) application requesting that the directors be directed to provide the information critical to obtaining best possible Resolution Plans is heard and adjudicated upon after significant time lapse, often even more than 6 months. Again, the approval of the Resolution Plan, at times, takes almost a year post CoC consent. A substantive hearing on the Avoidance petition remains pending for very long, sometimes over 2 years; it is felt that the NCLT benches do not have the requisite time (and, possibly, expertise) required to dwell upon and take a judicious view on the body of suspicious transactions as also on the intricate financial engineering resorted to by the erstwhile management of the CD to divert funds from the CD.

Further, there are 23 existing vacancies on the NCLT benches which is over 40% of the total approved positions. Replacements for retiring members are interminably held up in red tape. Recently, in this backdrop, eminent legal luminaries had (in vain) approached the Supreme Court for continuance of the retiring members till their replacements were identified to prevent a further deterioration in an already difficult position. The GoI counsel's assurance that the appointments would be done 'soon' remains largely unfulfilled, despite SC directions.

These delays prove costly, placing avoidable high costs on lenders and often jeopardising the prospects of recovery/resolution. It is a known fact that financially weak Cos. lose value very rapidly unless decisions for resolution are taken within reasonable

time. In fact, for the lenders, the CIRP costs are increasingly become a cause for concern. While IBBI maintains that that the costs in the pre-IBC era were approx. 19% of the debts involved and IBC has helped bring down these costs to much below 1% (0.38% in case of resolutions and 0.75% in liquidation cases), the higher visibility of CIRP costs now as against unsystematic tracking & accounting earlier have negatively influenced the thinking of the FCs.

Excessive Controls

The IP is also subject to multiple and increasing controls *viz.* from financial creditors, NCLT, IBBI as also the Insolvency Professional Agency (IPA) with whom he is registered. More often than not, a review of the caseload with these institutions will reveal generally a fault finding, punitive approach rather than a supportive stance in acknowledgement of the complexity of the RP's role. There is hardly any instance where the RPs have heard back from the regulators in their respective cases for any suggestions/corrective actions based on their findings in the reports filed by the RPs.

Group Consolidation

It is a common practice and perfectly reasonable for commercial ventures to operate through groups of entities and for each entity in the group to have a separate legal personality. Separate entities are set up in order to dissociate specific assets from general liabilities, the purpose being to raise funding under more favourable conditions.

When these businesses are solvent and operational, general perception is typically that they function as a unified group in the eyes of customers, suppliers, creditors, etc. Lenders often seek guarantee or credit support from ultimate parent and the principal individual promoters. Formal divisions are ignored under the impression that they are dealing with the group as a whole.

However, the use of the group structure presents opportunities for manipulating the corporate form, evading regulations and responsibilities. Annual reports can be manipulated by concealing losses using intra-group transactions designed to create profits. Assets can be transferred around the enterprise with no proper bookkeeping; intra-group claims are unascertainable, etc. The result is significant confusion as to inter se liabilities as well as asset ownership.

It is perfectly reasonable for commercial ventures to operate through groups of different legal entities. Separate entities are generally set up in order to dissociate specific assets from general liabilities. However, the group structure is often manipulated, evading regulations and responsibilities. As such, IBC needs specific provisions for unequivocally permitting consolidation of entities. The work of Adv. Sumant Batra in the Videocon Group case is helpful in providing pointers for clear cut directions in the Code.

Other Emerging areas

It is must be acknowledged that the IBBI has moved quickly on all issues demanding an improvement in the IBC based on the experience. In this light, the regulator is currently looking at viable laws in the areas of pre-packs and cross border insolvency.

(**a**) **Pre-packs -** Today, insolvency and bankruptcy resolution in India also needs an informal dispute resolution mechanism that can be triggered much before any crisis precipitates into formal action. The introduction of regulations for pre-pack solutions for insolvency seek to address this requirement. There are several benefits of pre-packs: (1) they ease the burden on the judicial system; (2) drastically reduce the time for the resolution process; (3) there is minimal disruption of the debtor's business, as the debtor is in possession throughout the process; (4) there is also lower operational risk and higher employee retention in pre-pack insolvency as compared to the conventional CIRP; and (5) transaction and administrative costs are relatively low as compared to the traditional CIRP.

(**b**) **Cross border insolvency -** For the purpose of facilitating a uniform approach, the United Nations Commission on International Trade Law proposed the UNCITRAL Model Law in 1997 on Cross-Border Insolvency. The Model Law has been accepted in 44 countries, including the USA and the UK. Further, in the light of the growing incidence of cross-border insolvencies, the International Monetary Fund (IMF) has shown itself to be in favour of States adopting the Model Law as it advocates an effective mechanism for recognition of foreign proceedings and co-operation among different courts and administrators. The Model Law seeks to provide a uniform approach to cross-border insolvency proceedings by exploring the feasibility of harmonizing national insolvency laws dealing with it. It allows the States to draft their national laws in consonance with the Model Law after modifications, as deemed necessary by them. The October 2018 report of the 2nd Insolvency Law Committee recommended that a comprehensive law should enshrine, *inter alia*, four basic principles *viz.* (a) ease of access to legal agencies, (b) recognition of legal proceedings on foreign shores, (c) co-operation between domestic and foreign courts, (d) co-ordination for concurrent proceedings.

It is still early days for results in both the above cases. Let us hope that the sandbox experiment in the pre-packs domain with MSMEs will be rewarding and the regulations will be upscaled and made available to larger corporates. Also, the formal introduction of cross border insolvency regulations is eagerly awaited. The IBBI will, as earlier, surely tweak the laws/Code for greater effectiveness depending on the experience.

Conclusion

In a Report brought out by the 35th Parliamentary Standing Committee on Finance in early August this year, concern was expressed that the objectives of IBC remained to be achieved given the preponderance of huge haircuts taken by all stakeholders in cases where resolutions have happened. The Report also observed

that an overwhelming no. of cases are going for liquidation, with far less recoveries, almost as a routine, which goes against the grain of IBC. The Report unfortunately recommends an overhaul of the Code giving undue focus on levels of recovery of dues whereas the Code rightly suggests focus on value preservation and value maximization. Recoveries will always be market determined which is evidenced by the wide range of percentage recoveries seen in various cases since the advent Code. We have seen cases like Binani Cement where recoveries have been over 100% and at the same time some other high profile cases like Videocon Group, Jet Airways, Alok Industries where the percentage recoveries on NPV basis have been near or below the liquidation value. Fortunately, the Supreme Court has strongly adjudicated that the commercial wisdom of the CoC cannot be questioned and the NCLT needs to limit its examination of the recommended Resolution Plan on legal compliance issues only.

In nutshell, there needs to be a strong reiteration that the IBC is a commercial law and consequently all agencies involved in the implementation thereof need to ensure flexibility and imagination in their approach. It cannot be a `one size fits all' approach and nothing should hinder the free play of market forces to generate the optimal outcome each specific case. The tenets of the Bankruptcy Law Reforms Committee Report, 2015 very clearly lay out the areas which always need to be kept in mind for meaningful results in India's bankruptcy domain. However, this does not take away the urgent need to amend and make the IBC more meaningful, particularly in the following four areas *viz.* (i) align lenders' commitment to the revival process rather than focusing solely on recovery; (ii) strengthen the overall systemic support and training outreach to the Insolvency Professional, a most vital pillar in the entire ecosystem; iii) set well defined timelines for adjudication by NCLT judges and ensure that the wherewithal is available to them at all times for the purpose; (iv) build in specific, less onerous provisions (*e.g.* plan under Sec 12A requires 90% affirmation) for certain set of promoters to legitimately regain control of their businesses.

India can ill afford to see the IBC as one more failed effort to stem the rot and restore the health of the financial systems.

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INSIGHTS

Regulation of the Conduct of the Committee of Creditors: A Comparative Analysis between India and the USA

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Introduction

The whole edifice of the IBC is based on the underlying principle that since a firm gets its financing through equity and debt, if debt is being serviced, then the equity holders shall have complete control of the firm, and when the firm fails to service the debt, IBC requires a shift of control of the firm to the Creditors for the purposes of resolving insolvency of the firm. The Code moved the legal regime from 'debtor-in-possession' model to 'creditor-in-control' model. Thus, it can very well be seen observed from the provisions of IBC that the creditors have been given a paramount distinctive role during the Corporate Insolvency Resolution Process (CIRP) period. The resolution of the company gets formulated as per the directions and commercial wisdom of the financial creditors, who constitute the Committee of Creditors (CoC). The CoC was fashioned as one of the steering bodies driving the insolvency process under the IBC.[1] The **CoC** is the supreme decision-making body in a **CIRP**. Based on a majority vote of its members, decisions regarding the administration of the Corporate Debtor (CD) are taken at the meetings of this CoC.

This article analyses and highlights various judgments and provisions wherein supremacy of CoC has been upheld. There happened a paradigm shift in the view of Courts and IBBI due to the sweeping in of continuous unfair practices which led to IBBI releasing a discussion paper suggesting a Code of Conduct for Committee of Creditors (CoC), excerpts of which are also discussed in this article. Furthermore, the article draws a comparison between USA and India on the position of CoC.

Supremacy of the Committee of Creditors in India

There are various provisions under the IBC that bestow enormous decision-making powers on the CoC. For instance, all major actions of the RP related to everyday business of the CD during the CIRP can go without obtaining a nod from the CoC. The IBC lays down a particular set of actions for the IRP/RP which cannot be performed without obtaining a prior approval from the CoC, for instance, `the creation of security interest over the corporate debtors' assets.'[2] There is a mandate that, `*The CoC must approve the proposed resolution plan by at least 66% majority after considering its feasibility and viability.*'[3] There are other such provisions as well, and furthermore, the IBC does not subject the resolution plan *per se* to judicial analysis and the limits of judicial review have been circumscribed to the parameters in Section 30(2) and Section 61(3) of the IBC.[4]

It is not just in the provisions of IBC that the supremacy of CoC gets reflected. There has been a plethora of judgments wherein the Courts have spoken highly of the powers and wisdom of the CoC. The Hon'ble Supreme Court held in the case of *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta:-*,[5]

> *"……the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code."*

The Supreme Court deliberated on the aspect of approval/rejection of resolution plan by CoC in the case of *K. Sashidhar* v. *Indian Overseas Bank*,[6] and made it clear that under section 33(1) of the IBC, AA has nothing more to do than to order for liquidation if it receives a rejected Resolution Plan. Then, in the case of *Karad Urban Co-operative Bank Ltd.* v. *Swwapnil Bhingardevay*,[7] the Apex Court pointed out that the `IBC has clearly delineated the powers of judicial review vested with the NCLT. The decision held that the decision of the CoC was non-justiciable, in that, Section 31 of the IBC only bestowed the NCLT with the power to reject a resolution plan when the conditions in Section 30(2) had not been adequately met.' The Bench upheld the views of the Supreme Court in earlier precedents wherein the Court had regarded the role of CoC to be of the most significant nature which cannot be interfered with.

In a very recent judgment of *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.*,[8] the Supreme Court reaffirmed its earlier dicta and reiterated that the `commercial wisdom of CoC is of paramount status.'

Shift In the views of the Indian Courts

The IBBI Discussion Paper throws light on a myriad of cases wherein the conduct of the CoC was questionable, the worst of all being in the resolution process of Bhushan Steel. In this particular case, RP allied with the CoC only to violate the circular of IBBI dated 12-6-2018[9] and paid a fee of INR 120 million to the legal counsel who rendered certain services during the CIRP. The IBBI had then observed that "clearly the RP and CoC deliberately planned for contravening the law." The

NCLT also remarked that, the act of CoC in the matter of *M/s. Andhra Bank v. Sterling Biotech Ltd. (2019) 106 taxmann.com 227/154 SCL 46 (NCLT-Mum.)*, wherein absconding and section 29A ineligible promoters made an attempt to take over the company through a One Time Settlement (OTS) with approval of 90.32% vote share of CoC, can never be called as commercial wisdom.

In the case of *Jindal Saxena Financial Services Pvt. Ltd.* v. *Mayfair Capital Private Limited*,[10] it so happened that the CoC did not approve appointment of IRP as RP since two of the four financial creditors attending the first meeting, having aggregate voting rights of 77.97% required internal approvals from their competent authorities. The AA had opined:-*"We deprecate this practice. The Financial Creditors/Banks must send only those representatives who are competent to take decisions on the spot. The wastage of time causes delay and allows depletion of value which is sought to be contained. The IRP/RP must in the communication addressed to the Banks/Financial Creditors require that only competent members are authorized to take decisions should be nominated to the CoC. Likewise, Insolvency and Bankruptcy Board of India shall take a call on this issue and frame appropriate Regulations."*

Furthermore, in the case of *Rajnish Jain* v. *Manoj Kumar Singh I.R.P.*,[11] the Hon'ble NCLAT had the following observation :-,*"... it appears that the Resolution Professional has failed to perform his obligation/duty to observe the Code, the Rules and Regulations as enumerated in the Code and CIRP Regulations while conducting CIRP for the reason of taking up such an Agenda of Meeting and leading to illegal Resolution of ousting the BVN Traders from the 'Committee of Creditors'. Therefore, we are of the considered opinion that the Committee of Creditors was not empowered to adjudicate the issue that has cropped up in the present case, i.e., M/s BVN Traders' is a 'Financial' or 'Operational' Creditor. Such adjudication is beyond the scope of consideration of the Committee of Creditors. Further, the Resolution Professional erred to reclassifying the status of a creditor from 'Financial' to 'Operational Creditor', based on the alleged expert opinion despite that the Adjudicating Authority took a contrary view."*

Committee of creditors vis-a-vis the USA

Much like its Indian counterpart, the Creditors' Committee in the USA is formed under statutory provisions of the Bankruptcy Code,[12] wherein we also find the powers, duties and the responsibilities of said creditors' committee.[13] The creditors' committee can be of two types - either secured or unsecured. However, the Bankruptcy Code, under Chapter 11 specifically mentions that the committee shall consist of unsecured creditors only.

Further, in the event wherein a particular class of creditors or certain equity shareholders feel under-represented, it is common practice for the *US Trustee* to put together such committee, upon receiving an order from the concerned Court(s)[14], pursuant to a request made by any party having an interest in the bankruptcy proceedings.

Once the petition for Chapter 11 Bankruptcy proceedings is filed, the US Trustee, sends out a notice to the unsecured creditors, holding the 20 largest claims against the debtor, inviting them to become a part of the official creditors' committee which ultimately is constituted of the 7 largest creditors.[15]

Difference in the positions of the committee in India and the USA

There are telling differences between the body of creditors in India and USA. Firstly, the strength of the committees in terms of their constituent numbers is different. Whereas in India, all the financial creditors, whether secured or unsecured, form a part of the official 'Committee of Creditors' after the Interim Resolution Professional (IRP)[16] has verified their respective claims against the debtor. It is only in exceptional cases where the debtor has no financial debt/ debtor, that the operational creditors (if any), make it to the official Committee of Creditors. On the other hand, only the unsecured creditors representing the 7 largest claims, make up the 'Creditors' Committee' under the Bankruptcy Code in the U.S.

Another point of difference that we see on a plain reading of both the Codes, is the role of the Resolution Professional when compared with the U.S. Trustee. In India, the Interim Resolution Professional is responsible for putting together the Committee of Creditors, after which the ultimate authority to take major decisions with respect to the Insolvency Proceedings rests with the Committee (CoC). The Committee of Creditors recommends the AA on the IP to be appointed as the Resolution Professional[17]. On the flip side, we see that the U.S. Trustee has the ultimate authority in making the pertinent decisions with respect the bankruptcy proceedings against the debtor.

However, as discussed above, though the Committee of Creditors in India has been endowed with such extraordinary powers, but, there is always a caveat, underlying the act of conferment of power, which is, that such a power may be put to misuse. Keeping the same in view and a series of decisions by the Hon'ble Supreme Court of India, NCLAT and the NCLTs, the IBBI had issued a discussion paper proposing a Code of Conduct to regulate the working of the Committee of Creditors. In the next section, we will see how the functioning of the Creditors' Committee is regulated in the USA.

Regulation of the Creditors' Committee in the USA

The importance of Creditors' Committee in respect of Chapter 11 Bankruptcies has increased significantly, since the inception of the Code. Earlier Acts and Statutes made no mention of the Creditors' Committees[18] and so the Code burdens the Committee with the responsibility of acting in the best interests of not only the creditors but also the debtor.[19]

For this very reason, the Courts in the United States of America, have elaborated upon what is called the "fiduciary duty" of the creditors' committee. These fiduciary duties have settled well into the American Bankruptcy Proceedings, which have become the yardstick against which the conduct of subsequent Committees shall be adjudicated.[20]

A committee, is a fiduciary body, owing fiduciary duties loyalty, impartial services in the interest of the creditors they represent and fidelity[21] not only to its constituent members but to all the stakeholders involved in the bankruptcy proceedings.[22] But there have been numerous instances where the committee has overstepped its bounds and abused the statutory powers conferred upon it and the same has been scrutinised by the Courts.

In the general sense, it is expected of the individual members of the committee to not act in their self-interest. If there are any claims of such sort or breach of fiduciary duties in general against a member of the committee, it is for the member of the committee to show that their actions were conducted in good faith and that they were inherently fair.[23] Breach of the duties would attract hefty penalties[24] some of which could involve, lawsuits against the member of the committee, discontinuation as member of the committee, dilution of their claims or other such penalties.[25]

In pursuance of the same, it can be said, creditors on an official committee may act in their self-interests so long as they do not injure the other members of the Committee.[26] Preservation of confidentiality of the proceedings is absolutely in the interests of the debtor and all the creditors for achieving the goals set out under Chapter 11 of the Bankruptcy Code. In one case from Ohio, the Bankruptcy Court, ordered the removal of a committee member by stressing on the fact that the wife of said committee member was the vice-president with the debtor and would risk slipping out confidential information, which would result in the committee as a whole not representing the unsecured creditors.[27] Information pertaining to the discussions among the committee members and information relating to the debtors' business is to be kept confidential and that same is to not be misused by members of the committee in order to gain an unfair advantage over the other members of the committee. It is for this reason that a competitor was disallowed from becoming a part of the Official Creditors' Committee[28] by a court which stressed on the importance of protecting information that is confidential in respect of competition between two entities.

Further, the committee must be free from any conflicts of interests. With regard to the wide array of powers that have been vested in the committee, one such power is to appoint representatives to the committee, like attorney's accountants etc. to simplify the proceedings for the members of the committee. However, in one case[29], an attorney was denied the opportunity of representing unsecured creditors committee on account of also representing the secured creditors' committee which then would be a clear case of conflicting interests.

In another case[30], an attorney who was also the member of the committee brought a suit against the debtor on the request made by a private client. The Court held that such an act amounted to misuse of position and confidential information resulting the in the breach of fiduciary duties and levied a fine on the member to the tune $5000.

However, there have been limited judicial pronouncements on the subject of breach of fiduciary duties. One of the reasons

for that could be, that the Courts or the parties involved may not be able to establish the fact that the result would have been better in the absence of breach of fiduciary duties than as it was in case of the breach.[31]

Conclusion

There is no doubt that there needs to be a regulation on the conduct of the Committee of Creditors. The Hon'ble Supreme Court of India has on multiple occasions upheld the supremacy and the commercial wisdom of the Committee of Creditors. However, with such powers one can never rule out the possibility of misuse of powers.

Perhaps the most significant difference between the laws governing the bankruptcy proceedings in both the countries (India and USA) is the possibility of the conduct of the committee facing judicial scrutiny. As was held in the *K. Sashidhar* case by Hon'ble Supreme Court, commercial wisdom of the Committee of Creditors reigns supreme and is clear of any judicial intervention. While in the USA, Courts have intervened time and again and imposed sanctions of various kinds against the creditors who have failed to uphold the sanctity of the organisation that they are a part of.

Whether the CoC can evolve a Code of Conduct for itself such that the exercise of commercial wisdom is evident from its action or do we require judicial intervention/ wisdom to reign in case of misuse/abuse of powers conferred upon the CoC, remains the big question. The IBC was enacted with a simple objective/purpose of reducing the

time taken in insolvency resolution, and also giving the Financial Creditors (who are vested with commercial wisdom) the last word on the fate of the Corporate Debtor. In the pre-IBC regime the fact remains that insolvency proceeding on an average, took around 4 years to complete, and this took a heavy toll on the value of assets of the Company (CD). Proponents for judicial intervention may question why the legislature made no such provision to challenge or keep the actions and conduct of the Committee of Creditors, under check. The counter-argument for the same may be that, the IBC was enacted in order to streamline the Bankruptcy/liquidation proceedings and bring the timeline down to 270 days and that challenging the conduct of the committee of creditors would cause delay to the proceedings.

But the fact that there have been many such instances wherein the committee (CoC) has conducted itself (and the matters) in a questionable manner, is a cause for concern. Although, the IBBI has, in its discussion paper, proposed a

Code of Conduct for the Committee of Creditors to abide by, there remains a doubt over what the consequences would be in the event of failure to adhere to the proposed code of conduct. Another issue is the ambiguity with regard to whether the code of conduct would come as a part of separate regulation or form a part of the IBC, under an amendment by the legislature.

However, what could perhaps ameliorate the situation in India, is adoption of concept of fiduciary duty of the committee of creditors to each and every creditor and the law. Further, there could also be an introduction of judicial review for a breach of the code of conduct, as proposed by the IBBI.

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28. *In re Wilson Food Corp.* 31 Bankr. 272 (W.D. Okla. 1983).
29. *In Re Whitman In re*, 101 Bankr. 38.
30. *In re John Mansville Corp. In re*, 26 Bankr. 919 (Bankr. S.D.N.Y 1983).
31. Peter C. Blain & Diane H. O'Gawa, *Creditors' Committees Under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers, and Duties*, 73 Marquette Law Rev. 581, 614 (1990).

(2021) 131 taxmann.com 258 (SC)

SUPREME COURT OF INDIA

V. Nagarajan v. SKS Ispat and Power Ltd.

DR. DHANANJAYA Y. CHANDRACHUD, VIKRAM NATH AND B.V. NAGARATHNA, JJ.

CIVIL APPEAL NO. 3327 OF 2020†

OCTOBER 22, 2021

Section 61 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Appeals and Appellate Authority - Corporate debtor was undergoing liquidation wherein appellant was appointed as liquidator - NCLT by an impugned order dated 31-10-2019 had dismissed appellant's miscellaneous application seeking interim relief against invocation of bank guarantee by respondent against corporate debtor - Appellant was present before NCLT when interim relief was denied - Appellant however, demonstrated no effort on his part to secure a certified copy of said order and had waited till uploading of order on website - Meanwhile, period of limitation for filing appeal against order of NCLT expired on 30-1-2020 and any scope for a condonation of delay had also expired on 14-2-2020 - Whether thus, NCLAT had correctly dismissed appeal filed by appellant on 8-6-2020 being barred by limitation - Held, yes (Para 23)

FACTS

- Corporate debtor company 'C' was undergoing liquidation. The appellant was appointed as its Liquidator. Respondent allegedly sought to invoke certain bank guarantees issued by the corporate debtor for its failure to perform its engineering services. The appellant filed a Miscellaneous Application to resist the invocation of performance guarantee until the liquidation proceedings were concluded.

- On 31-12-2019, the NCLT held that the performance guarantees were not a part of 'Security Interest', as defined under section 3(31) and refused to grant an injunction against the invocation of the bank guarantee until the liquidation proceedings were complete.
- The NCLAT's impugned order dated 13-7-2020, relied on section 61(2) which mandates a limitation period for appeals to be thirty days, extendable by fifteen days, to hold that the appeal filed under section 61(1) was barred by limitation. It noted that the statutory time limit of thirty days had expired and an application for condonation of delay had not been filed. Rule 22 of the National Company Law Appellate Tribunal Rules provides that every appeal must be accompanied with a certified copy of the impugned order, which had not been annexed in instant case. The NCLAT observed that the appellant had not provided any evidence to prove that a certified or free copy had not been issued to him. In any event, the IBC circumscribes the discretion to condone delays up to fifteen days, which had elapsed in this case. Further, it noted that even on merits, there were no grounds for interference since a performance guarantee was explicitly excluded from the ambit of a 'Security interest' which was subject to a moratorium under section 14. The appellant filed a Civil Appeal against the order of the NCLAT on the question of limitation.
- It was a case of appellant that order was passed by the NCLT on 31-12-2019, but copy of the order was not uploaded until 11 or 12-3-2020. Even on 12-3-2020, a defective copy of the order was uploaded with the incorrect bench composition. The corrected copy was uploaded only on 20-3-2020. The appellant requested the NCLT registry for a free copy on 23-3-2020. The NCLAT was shut on account of the COVID-19 pandemic from 24-3-2020 and an SOP for commencement of virtual hearings was issued on 30-5-2020. The appellant immediately filed an appeal on 8-6-2020 with a downloaded copy, relying on this Court's *suo motu* order dated 15-3-2020 extending limitation and the lack of receipt of a free certified copy.

HELD

- Section 61(2) specifically provides for a limitation period of thirty days, which can be extended by a maximum of fifteen days on the demonstration of sufficient cause for the delay. The determination of the present appeal would hinge on two issues: (i) when will the clock for calculating the limitation period run for appeals filed under the IBC; and (ii) is the annexing of a certified copy mandatory for an appeal to the NCLAT against an order passed under the IBC. (Para 11)

- It is important to note that instant Court had only extended the period of limitation applicable in the proceedings, only in cases where such period had not ended before 15-3-2020. In this case, owing to the specific language of section 61(1) and 61(2), it is evident that limitation commenced once the order was pronounced and the time taken by the Court to provide the appellant with a certified copy would have been excluded, as clarified in section 12(2) of the Limitation Act, if the appellant had applied for a certified copy within the prescribed period of limitation under section 61(2). The construction of the law does not import the absurdity the appellant alleges of an impossible act of filing an appeal against an order which was uploaded on 12-3-2020. However, the mandate of the law is to impose an obligation on the appellant to apply for a certified copy once the order was pronounced by the NCLT on 31-12-2019, by virtue of section 61(2) read with rule 22(2) of the NCLAT Rules. In the event the appellant was correct in his assertion that a correct copy of the order was not available until 20-3-2020, the appellant would not have received a certified copy in spite of the application till such date and accordingly received the benefit of the *suo motu* order of instant Court which came into effect on 15-3-2020. However, in the absence of an application for a certified copy, the appeal was barred by limitation much prior to the *suo motu* direction of this court, even after factoring in a permissible fifteen days of condonation under section 61(2). (Para 20)

- When will the clock for calculating the limitation period run for proceedings under the IBC; and (ii) is the annexation of a certified copy mandatory for an appeal to the NCLAT against an order passed under the IBC - must be based on a harmonious interpretation of the applicable legal regime, given that the IBC is a Code in itself and has overriding effect. Section 61(1) and (2) of the IBC consciously omit the requirement of limitation being computed from when the `order is made available to the aggrieved party', in contradistinction to section 421(3) of the Companies Act. Owing to the special nature of the IBC, the aggrieved party is expected to exercise due diligence and apply for a certified copy upon pronouncement of the order it seeks to assail, in consonance with the requirements of rule 22(2) of the NCLAT Rules. Section 12(2) of the Limitation Act allows for an exclusion of the time requisite for obtaining a copy of the decree or order appealed against. It is not open to a person aggrieved by an order under the IBC to await the receipt of a free certified copy under section 420(3) of the Companies Act, 2013, read with rule 50 of the NCLT and prevent limitation from running. Accepting such a construction will upset the timely

framework of the IBC. The litigant has to file its appeal within thirty days, which can be extended up to a period of fifteen days, and no more, upon showing sufficient cause. A sleight of interpretation of procedural rules cannot be used to defeat the substantive objective of a legislation that has an impact on the economic health of a nation. (Para 21)

- On rule 22(2) of the NCLAT rules mandates the certified copy being annexed to an appeal, which continues to bind litigants under the IBC. While it is true that the tribunals, and even this Court, may choose to exempt parties from compliance with this procedural requirement in the interest of substantial justice, as reiterated in rule 14 of the NCLAT Rules, the discretionary waiver does not act as an automatic exception where litigants make no efforts to pursue a timely resolution of their grievance. The appellant having failed to apply for a certified copy, rendered the appeal filed before the NCLAT as clearly barred by limitation. (Para 22)

- The appellant was present before the NCLT on 31-12-2019 when interim relief was denied and the miscellaneous application was dismissed. The appellant has demonstrated no effort on his part to secure a certified copy of the said order and has relied on the date of the uploading of the order (12-3-2020) on the website. The period of limitation for filing an appeal under section 61(1) against the order of the NCLT dated 31-12-2019, expired on 30-1-2020 in view of the thirty-day period prescribed under section 61(2). Any scope for a condonation of delay expired on 14-2-2020, in view of the outer limit of fifteen days prescribed under the proviso to section 61(2). The lockdown from 23-3-2020 on account of the COVID-19 pandemic and the *suo motu* order of this Court has had no impact on the rights of the appellant to institute an appeal in this proceeding and the NCLAT has correctly dismissed the appeal on limitation. Accordingly, the present appeal under section 62 stands dismissed. (Para 23)

CASE REVIEW

V. Nagarajan, Resolution Professional v. *SKS Ispat and Power Ltd.* (2020) 119 taxmann.com 182 (para 23) (NCLAT - New Delhi) *affirmed*

CASES REFERRED TO

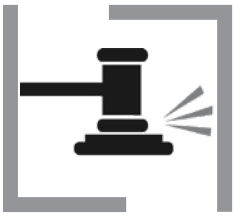
V. Nagarajan, Resolution Professional v. *SKS Ispat and Power Ltd.* (2020) 119 taxmann.com 182 (NCLAT - New Delhi) (para 1), *V. Nagarajan (RP) (Eithar Ltd.)* v. *SKS Ispat and Power Ltd.* (2020) 119 taxmann.com 181 (NCLT - Chennai) (para 1), *Cognizance for Extension of Limitation,* In re (2020) 117 taxmann.com 66 (SC) (para 5), *Sagufa Ahmed* v. *Upper Assam Plywood Products (P.) Ltd.* (2020) 119 taxmann.com 231/163 SCL 201 (SC) (para 5), *B K Educational Services (P.) Ltd* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 5), *Pr. Director General*

of Income-tax v. *Spartek Ceramics India Ltd.* (2018) 94 taxmann.com 1/148 SCL 450 (NCL - AT) (para 6), *Ebix Singapore (P.) Ltd* v. *Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208 (SC) (para 6), *Mobilox Innovations (P.) Ltd* v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/144 SCL 37 (SC) (para 6), *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.* (2021) 125 taxmann.com 194 (SC) (para 10), *Garikapati Veeraya* v. *Subbaiah Chaudhry* AIR 1957 SC 540 (para 11), *Ganga Bai* v. *Vijay Kumar,* (1974) 2 SCC 393 (para 11), *Anant Mills Co. Ltd.* v. *State of Gujarat* AIR 1975 SC 1234 (para 11), *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.*, (2017) 84 taxmann.com 320/143 SCL 625 (para 16), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 16), *Prowess International (P.) Ltd.* v. *Action Ispat & Power (P.) Ltd.* (2018) 93 taxmann.com 5 (NCL - AT) (para 20), *Union of India* v. *Popular Construction Co.* (2002) 37 SCL 622 (SC) (para 20), *Singh Enterprises* v. *CCE* (2008) 12 STT 21 (SC) (para 20), *Chhattisgarh State Electricity Board* v. *Central Electricity Regulatory Commission* (2010) 5 SCC 23 (para 20) and *Bengal Chemists & Druggists Association* v. *Kalyan Chowdhury* (2018) 90 taxmann.com 112/146 SCL 213 (SC) (para 20).

R. Subramanian, Adv. and **Vipin Kumar Jai**, AOR *for the Appellant.* **Neeraj Kishan Kaul**, Sr. Adv., **Atul Shanker Mathur**, **Ms Priya Singh**, **Amlaan Kumar**, **Neeraj Chaudhari**, Advs., **Ms. Pooja Dhar**, **Abhijit Sengupta** and **Ram Lal Roy**, AOR's *for the Respondent.*

† Arising out of *V. Nagarajan, Resolution Professional* v. *SKS Ispat and Power Ltd.* (2020) 119 taxmann.com 182 (NCLAT - New Delhi).

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 131 taxmann.com 258 (SC)



(2021) 133 taxmann.com 181 (Bombay)

HIGH COURT OF BOMBAY

Adisri Commercial (P.) Ltd. v. Reserve Bank of India

UJJAL BHUYAN AND MADHAV J. JAMDAR, JJ.

WRIT PETITION (L) NO.22872 OF 2021

OCTOBER 7, 2021

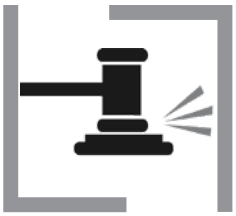
Section 45-IE, Reserve Bank of India Act, 1934 - Supersession of Board of directors of non-banking financial company (other than Government Company) - SIFL was a Non-Banking Finance Company governed by provisions of RBI Act, 1934 - Statutory inspection of SIFL conducted by RBI revealed that SIFL had defaulted in its payment obligations in respect of bank borrowings and market borrowings, which revealed serious concerns about conduct of affairs of Company - Accordingly, by impugned order, RBI, in exercise of powers conferred by section 45-IE superseded Board of Directors of SIFL and appointed an administrator - Petitioner shareholder of SIFL submitted that statutory inspection of SIFL was carried out by RBI as far back on 31-3-2020, therefore, there was no proximate cause for taking such a drastic step as supersession of Board of Directors and appointment of administrator and thus sought quashing of impugned order - However, as a matter of fact there need not be any proximate cause for an action like impugned one - Further, despite opportunity granted by RBI to rectify governance issues and improve financial condition, SIFL had failed to do so, and accordingly it could not be said that RBI had acted without jurisdiction or in violation of principles of natural justice - These were matters of financial, economic and corporate decision making, which, statutory bodies like RBI were fully empowered and competent to do so - Whether therefore, said matters could not have been interfered with - Held, yes (Paras 12 and 13)

CASES REFERRED TO

Peerless General Finance & Investment Co. Ltd. v. *Reserve Bank of India* (1992) 2 SCC 343 (para 7.1).

Janak Dwarkadas, Sr. Adv., **Ameet Naik**, **Chirag Kamdar**, **Abhishek Kale** and **Deepak Deshmukh** *for the Petitioner.* **Ravi Kadam**, **Venkatesh Dhond**, Sr. Advs., **Rohan Kadam**, **Prasad Shenoy**, **Ms. Aditi Phatak**, **Nilang Desai**, **Vivek Sheth**, **Nishant Upadhyay**, **Ms. Meraja Balkrishnan** and **Dhaval Vora** *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 181 (Bombay)



(2021) 133 taxmann.com 180 (NCLT - Kolkata)

NATIONAL COMPANY LAW TRIBUNAL, KOLKATA BENCH

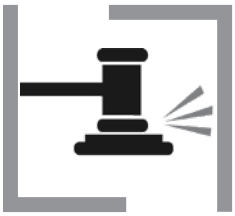
Reserve Bank of India v. Srei Infrastructure Finance Ltd.

RAJASEKHAR V.K., JUDICIAL MEMBER
AND HARISH CHANDER SURI, TECHNICAL MEMBER
CP (IB) NO. 295/KB/2021
OCTOBER 8, 2021

Section 227, read with sections 3(11), 4, 5(8) and 239, of the Insolvency and Bankruptcy Code, 2016 and rule 5 of the Insolvency & Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 - Central Government - Power to notify financial service providers, etc. - SIFL was a financial service provider registered under Companies Act - On basis of credit information available to it, RBI found that SIFL had committed defaults of significant amount in relation to financial debt availed by it from financial creditors - RBI had also superseded Board of Directors of SIFL and appointed an Administrator - An application was filed by RBI under section 227 for initiation of CIRP against SIFL - Total amount in default was more than minimum amount as stipulated under section 4(1) and present petition was also not hit by limitation - Further petition made by RBI was complete in all respects as required by law - Whether therefore, since debt in question qualified as financial debt under section 5(8), read with section 3(11) and default stood established, there was no reason to deny admission of petition - Held, yes - Whether therefore present petition for initiating proceedings under section 227, read with rule 5 was to be admitted - Held, yes (Para 15)

Sudipto Sarkar, Sr. Adv., Sanjay Ginodia, Nilang Desai, Suharsh Sinha, Vivek Shetty, Ms. Neeraja Balakrishnan, Nishant Upadhyay, Dhavan Bora, Umang Trivedi, Ms. Komal Khar, Sushovit Dutt Majumder, Ms. Pubali Sinha Choudhury, Shwetank Ginodia, Ms. Mini Agarwal and **Ms. Saloni Thakkar**, Advs. *for the Petitioner.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 180 (NCLT - Kolkata)



(2021) 133 taxmann.com 153 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Amanat Randhawa Hotels (P.) Ltd. v. Shashi Kant Nemani (Resolution Professional of Aryavir Buildcon (P.) Ltd.)

ANANT BIJAY SINGH, JUDICIAL MEMBER AND

MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NOS. 701 AND 785 OF 2021†

OCTOBER 7, 2021

Section 30, read with section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Submission of - In corporate insolvency resolution process (CIRP) of corporate debtor, Resolution Professional invited Expression of Interest (EoI) - Last date for submission of EoI's was 6-3-2021 - Appellant sent e-mail expressing its interest in participating in CIRP on 13-6-2021 but same was not accepted by Resolution Professional - Adjudicating Officer rejected appellant's application seeking directions to consider EoI on ground that Resolution Plan was already approved - Whether since resolution plan was accepted by 100 per cent voting share in CoC meeting and appellant had never participated in EoI, any reliefs granted in contra to timelines would be ultra vires to scope and objective of Code and, therefore, appeal was to be dismissed - Held, yes (Paras 19 and 20)

FACTS

- In corporate insolvency resolution process (CIRP) of the corporate debtor, Resolution Professional invited Expression of Interest (EoI) on 19-2-2021.
- The last date of submission of EoI was 6-3-2021. The appellant sent an e-mail to the Resolution Professional expressing its interest in participating in the CIRP on 13-6-2021 and on 15-6-2021 requesting the Resolution Professional to place the proposal of offer of Rs. 121 crores before the Committee of Creditors (CoC) for its consideration.
- The appellant preferred an application on 23-6-2021 before the Adjudicating Authority seeking direction to consider its EoI.
- The Adjudicating Authority *vide* impugned order dated 8-7-2021 dismissed the application preferred by the applicant on the ground that the application had been filed for consideration after the approval of the Resolution Plan by the CoC.
- The Resolution Professional preferred an application under section 30(6) seeking approval of the Resolution Plan submitted by one 'S'.

- The Adjudicating Officer *vide* impugned order dated 6-9-2021 observed that while considering the instant application, the unsuccessful Resolution applicant whose interim application was dismissed on 8-7-2021 had appeared before the Tribunal and submitted that it had preferred an appeal against the orders of the NCLT in the matter and the said matter was now posted to 23-9-2021 and prayed for deferring the finalization of the application filed by RP. The Tribunal directed appellant to pay Rs. 10 crores to the corporate debtor and posted matter to 28-9-2021.
- On appeal, the appellant contended that the impugned order dated 8-7-2021, passed by the Adjudicating Authority dismissing its application on the ground that the Resolution Plan was already approved, was erroneous and that the Adjudicating Authority ought not to have imposed any conditions while allowing it to file their claim before CoC and that the directions in the impugned order was akin to 'penalizing' the appellant.

HELD

- It is not in dispute that the IRP issued the Public Announcement under section 15 on 25-12-2020 in Form A in the 'Financial Express' (English) in Delhi and Chandigarh Editions apart from 'Jansatta' and 'Dainik Jagran', inviting claims from the Creditors of the corporate debtor. The record shows that after receiving the claims, the IRP collated the list of Creditors and constituted the CoC. In terms of the decision of the CoC in the 2nd meeting held on 15-2-2021, the RP carried out publication of Form G inviting 'Expression of Interest' in 'Economic Times' and All India Edition on 19-2-2021, the 'Business Standard' on 20-2-2021 and in 'Punjab Jagran', Amritsar. Hence, the contention of the appellant that vide publicity was not given while inviting EoI, is unsustainable. (Para 9)
- A total of 9 EoI's were received from the prospective Resolution Applicants by the last date of submissions and on account of the lockdown, the CoC decided to extend the last date for submission of Resolution Plans from 26-4-2021 to 10-5-2021. (Para 10)
- The members of the CoC with 98.03 per cent of votes passed a Resolution seeking extension of 90 days for completion of the CIRP and the same was allowed by the Adjudicating Authority vide Order dated 8-7-2021. In the meeting of the CoC, after examining the feasibility and viability, approved by 100 per cent voting share, the Resolution Plan of 'S' was approved and the Letter of Intent was issued. An application was preferred before the Adjudicating Authority for approval of the Resolution Plan under section 31. (Para 12)
- The appellant sought the indulgence of the RP to place its offer before the

CoC for consideration vide e-mails dated 15-6-2020 and 16-6-2021, which were placed before the CoC by the Resolution Professional, but as the last date for submission of EoI has expired, the CoC rejected the same. Admittedly, the last date for submission of EoI's was 6-3-2021 and the extended last date for submission of Resolution Plan was 10-5-2021 and it is pertinent to note that the e-mail sent by the appellant is dated 13-6-2021, which is much after the last date. (Para 13)

- Regulation 36A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, clearly stipulates that 'the Expression of Interest received after the time specified in the limitation under clause (b) of sub-Regulation (3) shall be rejected' (Para 14)

- Keeping in view the various decisions of the Supreme Court and also taking into consideration, the legislative intent of the statute together with the fact that in the instant case the Resolution Plan was accepted by 100 per cent of voting share in the CoC Meeting dated 21-6-2021 and having regard to the fact that the appellant had never participated in the EoI, it is held that any reliefs granted in contra to the timelines would be *ultra vires* to the scope and objective of the Code. The ratio of the Supreme Court in *Ebix Singapore (P.) Ltd.* v. *Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208 is squarely applicable to the facts of this case wherein it was observed by the Apex Court that once the Plan is approved by majority of the CoC as provided for under section 30 of the Code, then no fresh plans may come in intervention of an already approved Plan. (Para 19)

- Thus, the appeals are dismissed. (Para 20)

CASE REVIEW

Tourism Finance Corporation of India Ltd. v. *Arvavir Buildcon (P.) Ltd.* (2021) 133 taxmann.com 152 (NCLT - New Delhi) (para 20) *affirmed* (***See Annex***).

Committee of Creditors of Essar Steel India Ltd. v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC); *Ghanshyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Company Ltd.*(Civil Appeal No. 8129 of 2019); *Chhattisgarh Distilleries Ltd.* v. *Dushyant Dave* (Company Appeal (AT) (Insolvency) No. 461 of 2019) and *Ebix Singapore (P.) Ltd.* v. *Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208 (SC) (para 19) *followed.*

CASES REFERRED TO

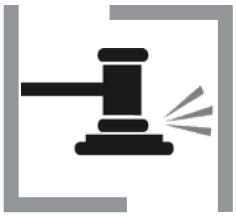
Committee of Creditors of Essar Steel India Ltd. v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 15), *Ghanshyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Company Ltd.* (Civil Appeal No. 8129 of 2019) (para 16), *Chhattisgarh Distilleries Ltd.* v. *Dushyant Dave* (Company Appeal (AT)

(Insolvency) No. 461 of 2019) (para 17) and *Ebix Singapore (P.) Ltd.* v. *Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208 (SC) (para 18).

Dhruba Mukherjee, Sr. Adv., **Pulkit Deora**, **Ms. Navya Khillon**, **Kumar Anurag Singh** and **Zain A. Khan**, Advs. *for the Appellant.* **Kanishk Khetan**, Sr. Adv., **Alok Dhir**, **Ms. Varsha Banerjee**, **Ms. Shashi Kant Nemani**, **Nitin Dahiya**, **Ms.Eshna Kumar**, **Aditya Maheshwari**, **Shailendra Singh**, **Ms. Muskaan Garg**, **Ms. Prerna Robin** and **Dhruv Goel**, Advs. *for the Respondent.*

† Arising out of order of NCLT, New Delhi in *Tourism Finance Corpn. of India Ltd.* v. *Arvavir Buildcon (P.) Ltd.* (2021) 133 taxmann.com 152.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 153 (NCLAT - New Delhi)



(2021) 133 taxmann.com 183 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Harish Raghavji Patel v. Shapoorji Pallonji Finance (P.) Ltd.

JARAT KUMAR JAIN, JUDICIAL MEMBER AND
DR. ALOK SRIVASTAVA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INS) NO. 391 OF 2021‡
OCTOBER 6, 2021

Section 12A of the Insolvency and Bankruptcy Code, 2016, read with rule 11 of the National Company Law Tribunal Rules, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Adjudicating Authority by impugned order admitted petition against appellant corporate debtor filed by financial creditor under section 7 - Appellant filed appeal against impugned order and submitted that before constitution of CoC, settlement had been arrived at between parties and therefore, prayed that terms of settlement may be taken on record - It was further submitted that Appellate Tribunal exercising inherent power under rule 11 of NCLAT, Rules, 2016 could set aside impugned order and quash CIRP against corporate debtor in terms of settlement - Whether inherent power can be exercised only when no other remedy is available to litigant and nowhere a specific remedy is provided by statute - Held, yes - Whether since procedure for withdrawal of petition under section 7, 9 or 10 of the IBC before and after Constitution of CoC had been provided in section 12A, there was no justification to invoke inherent power of this Appellate Tribunal and to take on record terms of settlement and pass order for withdrawal of petition under section 7 - Held, yes - Whether exercising inherent power under rule 11 would amount to abuse of process of Appellate Tribunal, hence, could not have been allowed - Held, yes (Paras 11 to 14)

CASE REVIEW

Shapoorji Pallonji Finance (P.) Ltd. v. *Rajesh Construction Company (P.) Ltd.* (2021) 133 taxmann.com 182 *affirmed* (***See Annex***).

Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 9), *Brilliant Alloys (P.) Ltd.* v. *S. Rajagopal* (Special Leave to Appeal (*c*) No. 31557 of 2018, dated 14-12-2018) (para 9) and *Kamal K Singh* v. *Dinesh Gupta* (Civil Appeal No. 4993 of 2021, 25-8-2021) (para 9) *distinguished*.

CASES REFERRED TO

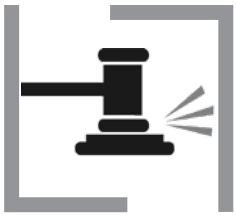
Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 3), *Brilliant Alloys (P.) Ltd.* v. *S. Rajagopal* (Special Leave to Appeal (*c*) No. (*s*). 31557 of 2018, dated 14-12-2018) (para 3), *Kamal K Singh* v. *Dinesh Gupta* (Civil Appeal No. 4993 of 2021, dated 25-8-

2021) (para 3) and *Anuj Tejpal* v. *Rakesh Yadav* (2021) 129 taxmann.com 296 (NCL - AT) (para 3).

Abhijeet Sinha, **Nitin Mishra**, **Ms. Mitali Gupta** and **Sumit Shukla**, Advs. *for the Appellant*. **Arun Kathpalia**, Sr. Adv., **Kunal Kanungo**, **Abhijit Ghokale**, **Amey Hadwale**, Advs., **Prakash Shah** and **Durgaprasad Poojari** *for the Respondent*.

† Arising out of order passed by NCLT Mumbai Bench in *Shapoorji Pallonji Finance (P.) Ltd.* v. *Rajesh Construction Co. (P.) Ltd.* (2021) 133 taxmann.com 182.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 183 (NCLAT - New Delhi)



(2021) 133 taxmann.com 156 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Damodar Valley Corporation v. Cosmic Ferro Alloys Ltd.

JARAT KUMAR JAIN, JUDICIAL MEMBER AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 110 OF 2020†

OCTOBER 1, 2021

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Pursuant to an application filed by financial creditor, CIRP proceedings were initiated against corporate debtor - Appellant-operational creditor had supplied power to corporate debtor - Power supply was disconnected due to outstanding electricity dues - Successful resolution applicant requested for increase in contract demand from 10 MVA to 20 MVA and asked for reconnection of electricity supply with waiver of security deposit - Appellant rejected request for restoration of connection as no security deposit was given - Adjudicating Authority by impugned order approved resolution plan without any specific order of waiver of security deposit and directed appellant to reconnect electricity supply to corporate debtor without insisting any payment of deposit - Whether in absence of any specific orders by Adjudicating Authority while approving resolution plan, appellant was not obliged to grant any waiver of payment of security deposit over next five years for increase in contract demand or supply of electricity by a 132 KV supply line - Held, yes - Whether any statutory or legitimate dues which might be demanded from Successful Resolution Applicant (SRA) for supply of any services should be paid by SRA and no waiver for any period of time for future was permissible - Held, yes - Whether dues of electricity supplied to corporate debtor during CIRP if not paid, should be paid out of CIRP costs and same should be ensured by Resolution Professional - Held, yes - Whether therefore, impugned order was to be set aside with a direction that any security deposit or other charges for requested increase in contract demand and enhanced supply line for electricity would have to be paid to appellant - Held, yes (Paras 22, 23, 24 and 25)

FACTS

- Pursuant to an application filed by financial creditor under section 7, CIRP proceedings were initiated against respondent-corporate debtor by order dated 16-1-2018.
- The appellant-operational creditor used to supply power to the corporate debtor.

- The appellant stated that the corporate debtor was in huge arrears in payment of electricity dues and there was delay in payment of charges and, consequently, power supply was disconnected by the operational creditor on 17-1-2018.
- It was claimed by the operational creditor that when the electricity supply was disconnected it was not aware of the initiation of Corporate Insolvency Resolution Process of the corporate debtor.
- The appellant stated that a letter was given by the corporate debtor for reconnection of electricity with a promise to pay arrears of electricity dues in instalments. In the meanwhile resolution plan was approved by the Adjudicating Authority *vide* order dated 11-10-2018.
- The successful resolution applicant, requested for increase in the contract demand from 10 MVA to 20 MVA and, asked for reconnection of electricity supply with waiver of security deposit. In response, appellant sought security deposit for increasing the contract demand.
- The corporate debtor sought increase of contract demand from 10 MVA to 45 MVA over next five years without any security deposit and installation of 132 KV powerline to supply power to its manufacturing unit without taking any security deposit over the next five years.
- The corporate debtor agreed to clear dues which was in share of operational creditor in the approved resolution plan. Operational creditor disconnected the electricity supply since no security deposit was forthcoming from the corporate debtor. Operational creditor also claimed that electricity supply to the corporate debtor was governed by Power Purchase Agreement, entered into between them, and both the parties had to abide by the terms and conditions contained therein.
- The Adjudicating Authority by impugned order approved resolution plan. It directed appellant to reconnect electricity supply to the corporate debtor and to continue the same without insisting any payment of deposit, arrear, security deposit as had been stated in approved plan. The dues payable for electricity charges including the amount payable towards security deposit were waived off by way of approval of resolution plan.

HELD

- The Approved Resolution Plan contains provision regarding accrued/contingent liabilities claimed by appellant-operational creditor and other demands relating to security deposit. (Para 9)
- The proposed Resolution Plan is approved by the Adjudicating Authority under section 31(1), but there is no specific or explicit approval of the waivers requested

by the Successful Resolution Applicant of various charges including Security Deposit charges. (Para 11)

- The accrued/contingent liabilities claimed by appellant for supply of power till the date of the approval of the Resolution Plan by the Adjudicating Authority is waived as per Resolution Plan. The corporate debtors sought reconnection during the ongoing CIRP and through which the corporate debtor also committed itself to pay the amounts due to appellant in monthly instalments. This letter is signed by the Director of corporate debtor and not by the IRP even though it was issued after the initiation of CIRP. It is also noted that electricity supply was reconnected to the corporate debtor. (Para 12)

- On perusing the letters exchanged between the appellant and respondent, it is found that the respondent has been making different requests in each letter regarding the quantum of increase of contract demand and waiver of security deposit. For example, respondent No. 1 sought an increase in contract demand from 10 MVA to 20 MVA from 31-1-2019, on which appellant sought security deposit of Rs. 6.43 crores for enhancement of contract demand. Then again respondent No. 1 sought revision of contract amount from 10 MVA to 16 MVA at 33 kilovolt power line supply and also a new connection to 132 KV powerline. Thereafter, by another letter respondent No. 1 requested for increase of contract demand from 10 MVA to 45 MVA over the next five years without any security deposit and installation of 132 KV powerline without payment of any security deposit over the next five years while agreeing to clear the outstanding dues as contained in the Resolution Plan. The appellant asked respondent to deposit security amount and in reply, respondent wrote to appellant to rescind its demand for security deposit, citing the approval of the Resolution Plan in its entirety in support of waiver of any security deposit over next five years. (Para 13)

- It is clear from the communications that the contract demand was at the level of 10 MVA and respondent sought its increase through its various letters. In addition, respondent also sought a change in electricity supply from a powerline of 33 KV to 132 KV. All these letters are given after the approval of the Resolution Plan. The request of the respondent regarding waiver of security deposit over next five years, and also seeking of security deposit for increasing the contract demand as well as supplying power through a higher voltage power supply line of 132 KV is considered proper under West Bengal Electricity Regulatory Commission Regulations. (Para 14)

- The respondent did not adhere to the payment schedule for the

payment of resolution amount to appellant DVC, hence, a disconnection notice was given to the respondent. (Para 16)

- In the light of the above, it is clear that once reconnection has been provided by the appellant at the previously held contract demand of 10 MVA through a 33 KV power supply line, any change in the contract demand or an enhanced power supply voltage of 132 KV will not be covered under the provisions of the approved Resolution Plan. (Para 21)

- Thus, insofar as the request of the successful resolution applicant regarding waiver of security deposit for 5 years for increase in the contract demand to 45 MVA and supply of power at an enhanced voltage of 132 KV is concerned, waiver of bank guarantee/cash as security deposit by DVC against regular power usage on basis of contract demand for at 132 KV for next five years from the date of approval of the Resolution Plan by the Adjudicating Authority is not given by a specific order by the Adjudicating Authority. Similarly, providing power supply through 132 KV supply line is also not granted by a specific order of NCLT. Thus, these requests only remain as proposals which have not been accepted or approved by specific order of the Adjudicating Authority while approving the Resolution Plan. Therefore, in the absence of any specific orders, the appellant is not obliged to grant any waiver of payment of security deposit over the next five years for increase in contract demand or supply of electricity by a 132 KV supply line. (Para 22)

- Moreover, it is also opined that any statutory or legitimate dues which might be demanded from the Successful Resolution Applicant (SRA) for supply of any services should be paid by the SRA and no waiver for any period of time for the future is not permissible. (Para 23)

- It is stated in the written submissions filed by the appellant that the respondent is in default of payment of electricity bills for the period February 2020 to August 2020. This amount has become due and payable to appellant after the submission and approval of the Resolution Plan by the Adjudicating Authority. The parties should take action regarding these or any subsequent dues including security deposit in accordance with the extant and relevant regulations of WBERC. The dues of electricity supplied by the operational creditor to the corporate debtor during the CIRP period, if not paid, should be paid from out of CIRP costs and the Resolution Professional should ensure it. (Para 24)

- Therefore, the impugned order is quashed and set aside and it is made clear that any security deposit or other charges for

requested increase in contract demand and enhanced supply line for electricity will have to be paid to the discom operational creditor in accordance with the relevant and extant laws and regulations. The payment of dues for electricity supplied to the corporate debtor during the moratorium period, to keep the corporate debtor as a going concern, should be paid out of CIRP costs, and the payment should be ensured by the Resolution Professional. Any dues relating to electricity supplied after the moratorium has ceased will have to be paid by the corporate debtor to the discom operational creditor. (Para 25)

CASE REVIEW

Cosmic Ferro Alloys Ltd. v. *Damodar Valley Corpn.* (2021) 133 taxmann.com 155 (NCLT - Kol.) (para 25) *set aside* (***See Annex***).

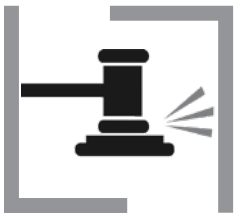
CASES REFERRED TO

Embassy Property Developments (P.) Ltd. v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 17), *Telangana State Power Distribution Co. Ltd.* v. *Srigdha Beverages* (2020) 6 SCC 404 (para 17), *Prasad Gempex* v. *Star Agro Marine Exports (P.) Ltd.* (2019) 107 taxmann.com 46 (NCL - AT) (para 17), *India Resurgence Arc (P.) Ltd.* v. *Amit Metaliks Ltd.* (2020) 127 taxmann.com 610/167 SCL 223 (SC) (para 18), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 18) and *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 (SC) (para 18).

Ms. Maninder Acharya, Sr. Adv. and **Ms. Madhumita Bhattacharjee**, Adv. *for the Appellant.* **Ramji Srinivasan**, Sr. Adv., **Dhiren Sharma**, **Naresh Balodia**, **Divakar Kumar**, **A.T. Patra**, **Vaijayant Paliwal** and **Ms. Charu Bansal**, Advs. *for the Respondent.*

† Arising out of Order of NCLT, Kolkata in *Cosmic Ferro Alloys Ltd.* v. *Damodar Valley Corpn.* (2021) 133 taxmann.com 155.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 156 (NCLAT - New Delhi)



(2021) 133 taxmann.com 144 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Bijoy Prabhakaran Pulipra (Resolution Professional, PVS Memorial Hospital (P.) Ltd.) v. State Tax Officer (Works Contract)

VENUGOPAL M., JUDICIAL MEMBER AND

V.P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH)(INSOLVENCY) NO. 42 OF 2021†

OCTOBER 7, 2021

Section 25, read with section 14, of the Insolvency and Bankruptcy Code, 2016 and regulation 14 of the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - Corporate Insolvency Resolution Process (CIRP) against corporate debtor was initiated and appellant was appointed as Resolution Professional (RP) - Respondent-GST department submitted its claim, which was revised by Resolution Professional - Adjudicating Officer allowed respondent›s claim in full and directed appellant to file an appeal before Joint Commissioner, State Sales Tax Department for a reassessment of GST amount payable - However, appellant, instead of complying with order of NCLT to file an appeal under provisions of GST Act against assessment order, being proper remedy, preferred clarification petition, which was dismissed by impugned order - Whether exercise of revision of GST assessment order was beyond jurisdiction of RP as RP was not having adjudicatory power given by GST Act and regulation 14 of CIRP Regulations only authorises IRP/RP to exercise power where claim is not precise due to any contingency or other reasons - Held, yes - Whether Adjudicating Authority had rightly considered statutory provision and suggested filing an appeal before appropriate forum and, therefore, act of Resolution Professional, exercising powers of GST authorities was without jurisdiction and not sustainable in law - Held, yes - Whether thus, Resolution Professional committed an error in exercising his power and exercised powers of GST Authorities under pretext of Regulation 14, which was not sustainable - Held, yes (Paras 20.10, 21 and 23)

Section 238 of the Insolvency and Bankruptcy Code, 2016, read with section 107 of the Central Goods and Services Tax Act, 2017 - Corporate insolvency resolution process - Overriding effect of Code - Whether GST amount is an amount of tax levied under assessment order as per Goods and Services Tax Act, 2017 and same cannot be edited or reduced by Resolution Professional himself and if Resolution Professional is aggrieved by GST assessment, he should file appeal under section 107 of CGST/SGST Act, 2017 - Held, yes - Whether any revision of assessment orders cannot be made under pretext of section 238, section 238 cannot be read as conferring

any appellate or adjudicatory jurisdiction in respect of issues arising under other statutes - Held, yes (Para 20.4)

FACTS

- The application for the Corporate Insolvency Resolution Process was filed by 'N' and 'O' against corporate debtor under section 9.
- Said application was admitted by NCLT, vide order dated 16-10-2019. The appellant was appointed as the Interim Resolution Professional ('IRP'), who was later confirmed as Resolution Professional (RP) based on the Resolution passed by the Committee of Creditors.
- The Respondent *i.e.* GST department had submitted the claim for in form 'B' under Regulation 7 of the IBBI (Insolvency Resolution Process for corporate persons) Regulations, 2016 on 20-2-2020.
- During CIRP, the RP had revised the admitted claim amount of the Respondent after due verification of the GST claim with the books of account of the corporate debtor and the electronic register maintained by the Respondent, in accordance with Regulation 14 of CIRP regulation and had sent detailed information on the revision of the admitted claim to the Respondent.
- Being aggrieved by the action of RP, the Respondent State Tax Officer (Works Contract) filed an application before the Adjudicating Authority under section 60(5) to allow the claim amount submitted by the Respondent in full.
- The Adjudicating Authority vide its order dated 4-11-2020 had directed the appellant to file an appeal before the Joint Commissioner, State Sales Tax Department for a reassessment of the GST amount payable, based on the audited financial statements for the financial year 2018-19 and the notification issued by the Government of India dated 28-6-2017.
- The RP stated that after receiving proper and validated information from the promoters of the corporate debtor, the COC, directed the RP to explore other possibilities to re-verify the claim amount.
- After that, with the permission of the CoC, the appellant had filed Miscellaneous Application before the NCLT, to issue necessary clarification to the appellant in respect to the filing of the appeal before the Joint Commissioner, SGST Department as directed by the NCLT vide its order dated 4-11-2020.
- On the said clarification petition, the Adjudicating Authority/NCLT vide the impugned order dated 28-1-2021 had directed that there was no error in its earlier order to be clarified by the Tribunal and had also ordered that the third prayer about clarification of the pre-deposit mandated under section 107 of the GST Act for preferring the appeal, need not be considered.

On appeal:

HELD

- The appellant filed Clarification Petition before the Adjudicating Authority/NCLT, Kochin Bench stating the necessary clarification as to whether the RP has authority under Regulations 13 and 14 of CIRP Regulations to file Appeal before the Joint Commissioner, GST, as part of verification and determination of claim submitted by the GST department. The Resolution Professional further sought clarification as to whether judgment, decree or order if any passed by the Appellate Authority under the CGST Act, pursuant to the appeal filed by the corporate debtor, shall be binding on the corporate debtor when Moratorium is declared by Adjudicating Authority/NCLT by virtue of section 14. The Resolution Professional further sought clarification as to whether the requirement of Pre-deposit of Rs. 37,964,304 mandated under section 107 of the GST Act shall be prejudicial to the interest of corporate insolvency resolution process. (Para 20.1)
- The appellant, instead of complying with the order of NCLT to file an appeal under the provisions of the GST Act against the said assessment order, being the proper remedy, preferred the clarification petition, which was dismissed by the impugned order. (Para 20.2)
- It is pertinent to mention that all the assessment orders were passed before the declaration of Moratorium. Therefore, it has attained finality in the absence of any challenge against the assessment orders before the Appellate Authority as provided under the statutes. (Para 20.3)
- It is also important to mention that the GST amount is an amount of tax levied under the assessment order as per the Goods and Services Tax Act, 2017. It cannot be edited or reduced by the Resolution Professional himself. Even if the IRP/Resolution Professional was aggrieved by the said order, they should have filed the appeal under section 107 of the CGST/SGST Act, 2017, read with rule 108 of the GST Rules 2017. Any revision of assessment orders also cannot be made under the pretext of section 238 of IBC. Section 238 of Insolvency and Bankruptcy Code cannot be read as conferring any appellate or adjudicatory jurisdiction in respect of issues arising under other statutes. (Para 20.4)
- After going through the Regulations 10 to 14 of the CIRP Regulations, it is clear that IRP/RP may, under Regulation 10, call clarifications from a creditor for substantiating the whole or part of its claim. Furthermore, under Regulation 12, the IRP/RP is entitled to updation of the creditor's claim based on the satisfaction of the claim. Finally, Regulation 13 mandates to verify every claim as on the insolvency

commencement date within seven days from the last date of the receipt of the claims. (Para 20.6)

- Under Regulation 14, IRP/RP is entitled to determine the amount of claim in a case where the amount claimed by the creditor is not precise due to any contingency or other reasons. In such circumstances, IRP is authorised to make the best estimate of the amount of the claim based on the information available with him. (Para 20.7)
- However, under regulation 14(2), IRP/RP is empowered to revise the amounts of claim admitted, including the estimates of the claims made under sub-regulation (1) when it comes across additional information warranting such revision. (Para 20.8)
- In the instant appeal, IRP/RP has stated that on 13-7-2020 the promoter and Suspended Managing Director of the corporate debtor informed that the amount claimed by GST department is exorbitantly high as the department has erroneously charged GST on the total turnover of the corporate debtor without taking into account the Notification No. 9 of 2017 about integrated tax rate dated 28-6-2017 issued by Government of India. After getting access to the financial information of the corporate debtor maintained in the in-house IT server, he had verified the records of the corporate debtor with the assistance of the suspended Managing Director. He verified the claims submitted by the GST Department with the books of account maintained by the corporate debtor and the information provided by the Suspended Managing Director. Further, on verification, it is found that the GST department had calculated the GST liability on the filing of return for the financial years 2018-19 and 2019-20 on the best judgment basis on the total turnover of the corporate debtor. However, as per Notification No. 9 of 2017, dated 28-6-2017, the healthcare services by a clinical establishment are exempted from Goods and Services Tax. Accordingly, the revenue under the head 'inpatient collections' and 'outpatient collections'. Based on the above and in the best interest of the CIRP, he had revised the admitted claim amount of the Respondent to Rs. 106,09,299 after due verification of the GST claims with the books of account of the corporate debtor in accordance with regulation 14 of the CIRP Regulations. (Para 20.9)
- The IRP/RP has revised the admitted claim of the respondent based on the above circumstances. The above exercise of revision of the GST assessment order was beyond the jurisdiction of the IRP/RP. It is pertinent to mention that the IRP/RP was not having the adjudicatory power given by the GST Act. Regulation 14 of the CIRP Regulations only authorises the IRP/RP to exercise power where

the claim is not precise due to any contingency or other reasons. (Para 20.10)

- The Adjudicating Authority has rightly considered the statutory provision and suggested filing an appeal before the appropriate forum. But at the same time, the Resolution Professionals, considering the CoC as an authority in law, had exercised the powers of GST authorities. Therefore, the said act of the Resolution Professional is without jurisdiction and not sustainable in law. (Para 21)
- Insolvency and Bankruptcy Code is a complete Code in itself. Section 25 provides the duties of the Resolution Professional. Section 28 makes the provision for approval of the Committee of creditors for certain actions in the CIRP. The Committee of creditors is empowered to exercise its commercial wisdom in the Corporate Insolvency Resolution Process. But under the exercise of commercial wisdom, it cannot exercise judicial power. It has no role in the acceptance or rejection of the claim. Acceptance or rejection of a claim is under the duties of IRP/Resolution Professional, and the aggrieved party can agitate the same before the Adjudicating Authority. For this reason, the Committee of Creditors has also recommended filing an appeal before the appropriate forum. (Para 22)
- It is held that the Resolution Professional committed an error in exercising their power and exercised the powers of GST Authorities under the pretext of Regulation 14, which is not sustainable. (Para 23)
- Therefore, appeal sans merit and is to be dismissed. (Para 24)

CASE REVIEW

Bijoy Prabhakaran Pulipra (*Resolution Professional, PVS Memorial Hospital (P.) Ltd.*) v. *State Tax Officer* (*Works Contract*) (2021) 133 taxmann.com 143 (NCLT - Delhi) (para 24) *affirmed* (***See Annex***).

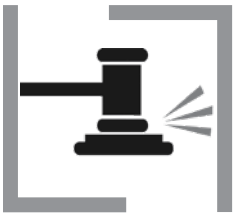
CASES REFERRED TO

Navneet Kumar Gupta v. *Bharat Heavy Electricals Ltd.* (2019) 104 taxmann.com 287 (NCL-AT) (para 19.4) and *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 19.4).

Bijoy Prabhakaran Pulipra, Adv. *for the Appellant.* **B. Sarath Babu** and **E.K. Kumaresan**, Advs. *for the Respondent.*

† Arising out of order of NCLT, Kochi Bench in *Bijoy Prabhakaran Pulipra (Resolution Professional, PVS Memorial Hospital (P.) Ltd.)* v. *State Tax Officer (Works Contract)* (2021) 133 taxmann.com 143.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 144 (NCLAT - Chennai)



(2021) 133 taxmann.com 179 (NCLT - Kolkata)

NATIONAL COMPANY LAW TRIBUNAL, KOLKATA BENCH

DBS Bank Ltd. v. Hindusthan National Glass & Industries Ltd.

RAJASEKHAR V.K., JUDICIAL MEMBER

AND HARISH CHANDER SURI, TECHNICAL MEMBER

C.P (IB) NO. 369/KB/2020 (AMENDED ON OCTOBER 22, 2021)

OCTOBER 21, 2021

Section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Financial creditor had sanctioned ECB Loan Facility to corporate debtor on specific terms and conditions and compliance mentioned therein - Corporate debtor continued to be in distress both commercially and financially for few years and could not service its debt obligation towards its lenders, as a result of which gradually its loan accounts with all lenders became irregular and were hence declared and/or categorized as Non-Performing Asset (NPA) - Accordingly, an application was filed by financial creditor under section 7 seeking initiation of corporate insolvency resolution process against corporate debtor - Corporate debtor submitted that it had been in discussion with lenders in order to formulate an effective resolution plan to pay off outstanding dues phase-wise and said settlement plans were in accordance with schemes promulgated by Reserve Bank of India, from time-to-time - However, corporate debtor had not been able to adhere to terms of settlement deed inspite of repeated opportunities granted by financial creditor - Whether therefore, application filed by financial creditor under section 7 for initiating CIRP against corporate debtor was to be admitted - Held, yes (Paras 36 and 37)

FACTS

- Financial creditor was one of the lenders of a consortium comprising 12 Bankers/Lenders, who lent and advanced money and granted loan facility to the corporate debtor under diverse loan Agreements executed from time-to-time and upon execution of other banking documents and instruments in usual course of business. It was submitted that the State Bank of India was the leading bank to all other members of the Consortium, including the financial creditor.
- Financial creditor had sanctioned ECB Loan Facility to corporate debtor and security offered by the corporate debtor was pari passu first charge on Fixed Assets (Movable Immovable Assets) of the borrower both present and future. Financial creditor had agreed to sanction the requested facility to the corporate debtor on the specific terms and conditions and compliance mentioned therein.

- Corporate Debtor continued to be in distress both commercially and financially for few years and could not service its debt obligation towards its lenders, as a result of which gradually its loan accounts with all the lenders became irregular and were hence declared and/ or categorized as Non-Performing Asset (NPA).
- Accordingly an application was filed by financial creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of corporate insolvency resolution process against corporate debtor.
- Corporate debtor, however with *bona fide* intention negotiated with lenders for settlement of their outstanding dues and to regularize its loan accounts from time-to-time. Discussions and negotiations took place in this regard between the corporate debtor and the said lenders in order to formulate an effective resolution plan to pay off the outstanding dues phase-wise, the said settlement plans were in accordance with the schemes promulgated by Reserve Bank of India, from time-to-time. The corporate debtor had agreed to repay the settlement amount but it could only make payment of entire sum and defaulted in payment, despite having been granted two extensions.
- Thus, the financial creditor submitted that corporate debtor had not been able to adhere to the terms of settlement inspite of repeated extensions and therefore this application may kindly be admitted.

HELD

- It is stated that there have been discussions on settlement plan between the corporate debtors and the financial creditors and minutes of the meetings have also been placed on record. It is noticed that the SBI and DBS Bank Limited have given their consent for grant of time to the corporate debtor repeatedly in the past. The way there have been repeated requests for extension of time by the corporate debtor on the same ground of ongoing discussions with the financial institutions without any substantive progress being evidenced or noticed on the ground, before this Adjudicating Authority is not satisfying. Surprisingly, the financial institutions have also not cared to raise any objection for such repeated requests of time of extension and they do not seem to be very keen on pursuing the matter for reasons best known to them. It smacks of some sort of collusion between the parties, which is nothing but wasting the time of this Adjudicating Authority. (Para 35)
- During the course of hearing, the financial creditor proposed to give further time to the corporate debtor

without any written instructions from the financial creditor, which was against the pleadings placed on record by the financial creditor. In these circumstances, the financial creditor was asked to withdraw the application because as per the provisions of section 7 and other relevant provisions and, on going through the pleadings of both the parties, no further time could be granted and the petition deserves to be admitted. It is strange that on the one hand, the financial creditor filed application for initiation of CIRP against the corporate debtor and placed on record their rejoinder and other relevant documents for admission of the application but during the course of oral arguments they tend to support the corporate debtor, which is nothing but providing undeserving leverage to the corporate debtor by the financial creditor, particularly when in the rejoinder it has been specifically and unambiguously submitted that the corporate debtor has not been able to adhere to the terms of the settlement deed inspite of repeated opportunities granted by the financial creditor. Such a tendency amongst the Bar members could not have been supported, as a counsel when engaged by a particular financial creditor should stick to its pleadings. In the present matter, the pleadings specifically and loudly speak for admission of the application because the OTS proposal has failed due to the non-adherence of the terms and conditions fixed between the parties by way of Settlement Agreement. There cannot be any other plea by the financial creditor in such circumstances. However, the financial creditor had indicated that on or before reopening i.e. 20-10-2021, he will seek instructions either to withdraw the application, or else will accept whatever orders are passed by in the present application by this Adjudicating Authority. (Para 36)

- Since no instructions or application has been filed for withdrawal of the present application, in view of the pleadings of the parties and documents placed on record, this is a fit case for admission and initiation of CIRP against the corporate debtor and therefore the following orders are passed:

(*i*) The application filed by the financial creditor under section 7 for initiating Corporate Insolvency Resolution Process against the corporate debtor is hereby admitted.

(*ii*) A moratorium is declared and public announcement is made in accordance with sections 13 and 15 of the I & B Code, 2016.

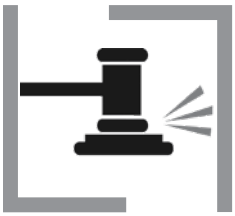
(*iii*) Moratorium is declared for the purposes referred to in section 14. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under section 15. The public announcement referred to in clause (*b*) of sub-section

(1) of section 15, shall be made immediately.

(*iv*) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period. (Para 37)

Vikram Wadehra and **Vidushi Chokhani**, Advs. *for the Appellant.* **Jishnu Saha**, Sr. Adv., **Kuldip Mallik** and **Ms. Labanyasree Sinha**, Advs. *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 179 (NCLT - Kolkata)



(2021) 133 taxmann.com 105 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Vidyasagar Prasad v. UCO Bank

JARAT KUMAR JAIN, JUDICIAL MEMBER AND V. P. SINGH, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 238 OF 2020†

OCTOBER 4, 2021

Section 238A, read with section 5(8), of the Insolvency and Bankruptcy Code, 2016 and section 18 of Limitation Act, 1963 - Corporate insolvency resolution process - Limitation period - Whether an application filed under section 7 would not be barred by limitation on ground that it had been filed beyond a period of three years from date of classification of a loan account of corporate debtor as NPA if there was an acknowledgement of debt by corporate debtor before expiry of period of limitation of three years, in which case period of limitation would get extended by a further period of three years - Held, yes - Corporate debtor had availed credit facilities from financial creditor - However, corporate debtor failed to pay interest and principle amount as agreed and its account was classified as NPA (Non-Performing Assets) on 5-11-2014 - Financial creditor filed an application under section 7 on 13-2-2019 - NCLT by impugned order admitted said application - Corporate debtor challenged said order on ground that application filed under section 7 was time barred - Whether since corporate debtor had issued a letter to financial creditor on 7-6-2016 wherein it had given one time settlement proposal, said letter amounted to acknowledgement of liability by corporate debtor - Held, yes - Whether therefore, application filed under section 7 on 13-2-2019 was not time barred - Held, yes (Paras 8, 11.10 and 11.11)

FACTS

- Appellant-corporate debtor availed credit facilities from the respondent Financial Creditor in the shape of Term Loan, Foreign Letter of credit with bank guarantee facilities.
- The corporate debtor could not maintain financial discipline in payment of interest and principal amount as agreed and, therefore, the account of corporate debtor was classified as Non-Performing Assets on 5-11-2014. The financial creditor issued a notice of recall on 19-11-2014 under section 13(2) of SARFAESI Act, 2002 directing the corporate debtor and its guarantor to repay the entire loan. After that, the financial creditor filed an Original Application to recover its dues before the Debts Recovery Tribunal (DRT). But no material

orders have been passed in the said proceedings.

- During the pendency of the proceeding of SARFAESI Act, 2002 financial creditor filed an application under section 7 which was admitted by the impugned order. The Adjudicating Authority considering the acknowledgement of debt in the balance sheet of the corporate debtor had passed the impugned order.
- On appeal, the corporate debtor contended that the application filed under section 7 by financial creditor was time barred having been filed after more than 4.5 years from the date on which the alleged default occurred. It was contended that the only date of default, as stated in Form 1, was 5-11-2014, whereas section 7 application was filed on 13-2-2019. It was further contended that there was no admission of liability which would amount to acknowledgement of debt.

HELD

- An Application filed under section 7 would not be barred by limitation on the ground that it had been filed beyond a period of three years from the date of classification of a loan account of the corporate debtor as NPA if there were an acknowledgement of the debt by the corporate debtor before the expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years. (Para 8)
- The appellant's 1st objection about the acknowledgement of liability is that there is no specific mention of the name of financial creditor in any liability column of the two balance sheets. Consequently, the balance sheets do not attract the ingredients of section 18 of the Limitation Act, 1963 to extend the limitation period. (Para 11.1)
- Non-furnishing of information by the Financial Creditor at the time of filing an application under section 7 need not necessarily entail in dismissal of the application. Instead, an opportunity can be provided to the Financial Creditor till the admission/rejection of petition to provide additional information required for the satisfaction of the Adjudicating Authority with respect to the occurrence of the default. (Para 11.3)
- Supreme Court in the case of *Rajendra Narottamdas Sheff v. Chandra Prakesh Jain* (2021) 131 taxmann.com 2 has held that the burden of *prima facie* proving occurrence of default and that the Application filed under section 7 is within the period of limitation is entirely on the financial creditor. While the decision to admit an application is typically made on the basis of material furnished by the financial creditor, the Adjudicating Authority is not barred

from examining the material placed on record by the corporate debtor to determine that such application is not beyond the period of limitation. The plea of section 18 of the Limitation Act not having been raised by the financial creditor in the application filed under section 7 cannot come to the rescue of the Appellant's in the facts of the case. It is further observed that if the documents constituting acknowledgement of their debt had not been brought on record, the application filed under section 7 would be liable to be dismissed. (Para 11.4)

- Therefore, in the instant case, the balance sheet that has been brought on record in the instant case before the Adjudicating Authority shall be taken into consideration while deciding the question of limitation and default on the part of the corporate debtor. The said documents cannot be ignored simply on the premise that it is not pleaded in the application filed for initiation of the Corporate Insolvency Process. (Para 11.5)

- The balance sheet for the financial year ending on 31-3-2017, was part of the record before the Adjudicating Authority and was annexed with section 7 application, which was also duly admitted by the Appellant during the hearing. Subsequently, the balance sheet for the financial year ending will 31-3-2019, was annexed with the reply filed by respondent No. 1 before the Tribunal on 2-3-2020. However, as the practice and procedure of the Tribunal, the same was not accepted at the filing counter without the specific mention of the Tribunal. (Para 11.6)

- The Company's balance sheet is prepared in the statutory format, which does not provide for giving the specific name of every secured or unsecured creditor. (Para 11.7)

- It is further observed that the corporate debtor has not denied that there are no outstanding dues to the financial creditor. A perusal of extract of register of charges submitted with RoC, shows that a charge of rupees one hundred and seventy-five crores created by the corporate debtor has not been satisfied and remains outstanding. (Para 11.8)

- After the judgment of Supreme Court in case Asset Reconstruction Co. (India) Ltd. v. Bishal Jaiswal (2021) 126 taxmann.com 200/166 SCL 82, it is settled that entries in books of account and/or balance sheets of a Corporate Debtor would amount to an acknowledgement under section 18. (Para 11.9)

- In the instant case, the corporate debtor issued a letter dated 7-6-2016 wherein it has given OTS proposal. Based on the ratio of the judgment of Supreme Court in the case of *Lakshmirattan Cotton Mills Co. Ltd.* v. *Aluminium Corpn. of India Ltd.* (1971) 1 SCC 623 that there is an acknowledgement of subsisting

liability of the corporate debtor. However, it may not necessarily specify the exact nature of the liability. But it indicates the jural relation between the parties, and in any event, the same can also be derived by implication. Further, the said Letter is not "without prejudice" basis and, therefore, amounts to an unequivocal acknowledgement of liability of the corporate debtor. A reading of the documents reveals that the corporate debtor has acknowledged/subsisting liability to attract the provisions of section 18 of the Limitation Act, 1963. (Para 11.10)

- Thus, instant Appeal is dismissed. (Para 11.11)

CASE REVIEW

UCO Bank v. *Kaizen Power Ltd.* (2021) 133 taxmann.com 104 (NCLT - New Delhi) (para 11.11) *affirmed* (**See Annex.**)

Dena Bank v. *C. Shivakumar Reddy* (2021) 129 taxmann.com 60 (SC) (para 5.5); *Rajendra Narottamdas Sheth* v. *Chandra Pakash Jain* (2021) 131 taxmann.com 2 (SC) (para 11.4); *Asset Reconstruction Co. (India) Ltd.* v. *Bishal Jaiswal* (2021) 126 taxmann.com 200/166 SCL 82 (SC) (para 11.7) and *Lakshmirattan Cotton Mills Co. Ltd.* v. *Aluminium Corpn. of India Ltd.* (1971) 1 SCC 67 (para 11.10) *followed*.

CASES REFERRED TO

Babulal Vardharji Gurjar v. *Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 118 taxmann.com 323 (para 5.4), *Dena Bank* v. *C. Shivakumar Reddy* (2021) 129 taxmann.com 60 (SC) (para 5.5), *Reliance Asset Reconstruction Co. Ltd.* v. *Hotel Poonja International (P.) Ltd.* (Civil Appeal No. 4221 of 2020, dated 21-1-2021) (para 5.5), *Asset Reconstruction Co. (India) Ltd.* v. *Bishal Jaiswal* (2021) 126 taxmann.com 200/166 SCL 82 (SC) (para 5.5), *Shanti Conductors (P.) Ltd.* v. *Assam State Electricity Board* (2020) 2 SCC 677 (para 5.8), *Bengal Silk Mills Co.* v. *Ismail Golam Hossain Arif* 1961 SCC Online Cal. 128 (para 5.13), *Atlantic and Pacific Fibre Importing and Manufacturing Co. Ltd.*, In re (1928) Ch. 836 (para 5.13), *Pandam Tea Co. Ltd.*, In re 1973 SCC Online Cal. 93 (para 5.13), *The Coliseum (Barrow) Ltd.*, In re (1930) 2 Ch. 44 (para 5.13), *Jones* v. *Bellgrove Properties Ltd.* (1949) 2 KB 700 (para 5.13), *Kashinath Sankarappa* v. *New Akot Cotton Ginning & Pressing* 1949 SCC Online MP 123 (para 5.13), *Mahabir Cold Storage* v. *CIT* (1991) 56 Taxman 42F/188 ITR 91 (SC) (para 5.15), *A.V. Murthy* v *B.S. Nagabasavanna* (2002) 38 SCL 639 (para 5.15), *Usha Rectifier Corpn. (I) Ltd* v. *CCE* (2011) 11 SCC 571 (para 5.15), *S. Natarajan* v. *Sama Dharman* 2014 SCC Online 1812 (para 5.15), *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 5.22), *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* (2019) 109 taxmann.com 395/156 SCL 397 (SC) (para 6.10), *Jignesh Shah* v. *Union of India* (2019) 109 taxmann.com 486/156 SCL 542 (SC) (para 6.10), *Vashdeo R. Bhojwani* v. *Abhyudaya Co-op. Bank Ltd.* (2019) 109 taxmann.com 198/156 SCL 539 (para 6.10), *Lakshmirattan Cotton Mills Co. Ltd.* v. *Aluminium Corpn. of India Ltd.* (1971) 1 SCC 67 (para 6.12) and *Rajendra Narottamdas*

Sheth v. *Chandra Pakash Jain* (2021) 131 taxmann.com 2 (SC) (para 10).

Abhijeet Sinha, **Sandeep Bajaj** and **Devansh Jain**, Advs. *for the Appellant*. **Partha Sil**, **Tavish Bhushan Prasad**, **Prateek Kushwaha** and **Kanishk Khetan**, Advs. *for the Respondent*.

† Arising out of Order of NCLT, New Delhi in *UCO Bank* v. *Kaizen Power Ltd.* (2021) 133 taxmann.com 104.

FOR FULL TEXT OF THE JUDGMENT SEE
(2021) 133 taxmann.com 105 (NCLAT - New Delhi)

Committee of Creditors

The Committee of Creditors (CoC) is the supreme decision making body of the Corporate Debtor during Corporate Insolvency Resolution Process. Pursuant to Section 18(c) of the Insolvency and Bankruptcy Code, 2016 (Code), the Interim Resolution Personnel is entrusted with the duty to constitute CoC. Typically, all the unrelated financial creditors constitute the CoC and each financial creditor wields voting rights in proportion to the financial debt owed to them. In the event that a corporate debtor does not have any financial creditors or all financial creditors are related parties, CoC is constituted with eighteen largest operational creditors by value. If the number of operational creditors is less than eighteen, the CoC shall include all such operational creditors. Section 28 of the Code, enumerates a set of actions which cannot be performed without prior approval from the CoC, say, raising of interim finance, creation of security interest over the corporate debtors' assets, change in ownership of the corporate person, undertaking related party transactions, etc. The CoC exercises its power of decision making through the process of voting. The Code provides that the thresholds for general decision making in the CoC should not be less than 51%. Certain significant instances such as extension of CIRP period, appointment or replacement of resolution professional, raising of interim finance; creating security interest on assets of the CD; change in ownership or capital structure; amend constitutional documents of

the CD; change management of the CD or its subsidiary; appointment of statutory auditor or internal auditor; undertake related party transactions, approval of resolution plan, liquidation of Corporate Debtor etc. require a higher threshold of 66%. Where the CoC decides to accept the applicants' request for withdrawal which has the effect of terminating the CIRP midway requires a still higher threshold of 90%. The CoC pursues resolution; evaluates the best resolution plan and circumvents liquidation, to the extent feasible.

Commercial wisdom of Committee of Creditors

CoC's decision with requisite voting share in relation to the resolution plan is sacrosanct. It can be said that the CoC has authority with no judicial scrutiny. Once the resolution plan is approved by the CoC, it has to be placed before the NCLT by the Resolution Professional for its approval and the power of NCLT is circumscribed to the parameters in Sections 30 and 31 of the Code. The Code does subject the resolution plan *per se* to judicial scrutiny. The supremacy of commercial wisdom of the CoC has been reaffirmed time and again by the National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT) and the Supreme Court (SC).

In the matter of *K. Sashidhar* v. *Indian Overseas Bank & Ors*, the Hon'ble Supreme Court noted that the legislature, while enacting the IBC, has consciously not provided any ground to challenge the justness of the "commercial decision" expressed by the financial creditors - be it to approve or reject the resolution plan. The opinion so expressed by voting is non-justiciable. The Court held that neither the NCLT nor the NCLAT has the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors.

In the matter of *Kalpraj Dharamshi & Anr* v. *Kotak Investment Advisors Ltd. & Anr.*, the Hon'ble Supreme Court held that the commercial wisdom of Committee of Creditors (CoC) is not to be interfered with, excepting the limited scope as provided under sections 30 and 31 of the Insolvency and Bankruptcy Code, 2016 (IBC).

Taking note of various decision of the Supreme Court, the Court held that the legislative scheme is unambiguous. The legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the Adjudicating Authority and that the decision of CoC's 'commercial wisdom' is made non-justiciable.

> "... the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same."

> "... the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis."

In the matter of *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta & Ors.*, the Supreme Court had again re-emphasized the primacy of the commercial wisdom of the CoC by holding that the

scope of judicial review by NCLT while approving a Resolution Plan was required to be within the parameters of Section 30(2) of the IBC and with respect to the NCLAT, it must be within the parameters of Section 32 read with Section 61(3) of the IBC. The Supreme Court further observed that the NCLT/NCLAT can under no circumstance trespass upon a business decision of the majority of the CoC. Furthermore, the Supreme Court also held that the limited judicial review available by NCLT/NCLAT is to see that the CoC's decision has considered the following parameters:

- That the Corporate Debtor needs to continue as a going concern during the insolvency resolution process
- That it needs to maximise the value of the assets of the Corporate Debtor
- That interests of all stakeholders, including operational creditors, have been taken care of

It is pertinent to mention that the basis of this principle lies upon a fundamental assumption that financial creditors are fully informed about the viability of the Corporate Debtor and the feasibility of the proposed Resolution Plan and its impact on all the stakeholders, and, therefore, they act pursuant to scrupulous examination of the Resolution Plan.

However, many a times the adjudicating authorities pointed out the deficiencies in the decision-making process of the CoC.

Flaws in the Commercial Wisdom Theory

By end of June 2021, 394 CIRPs ended with approval of resolution plans. These processes took on average 406 days, after the courts have excluded the delays that are excludable. The total time taken, without excluding any delays due to litigation is 459 days. Until end of June 2021, there were 1349 CIRPs in which liquidation was ordered and such orders were issued after 383 days since commencement of CIRP. The Code provides a time-bound process and it has been observed in many cases delays are due to CoC. Many a times the representative of financial creditors who do not have authority to make decisions take part in CoC meetings. They merely attend the meetings and decisions are taken from higher hierarchy in their respective institutions. They act as glorified representatives and are not empowered with adequate decision-making powers. This calls into question not only the competence of the participating representatives but also puts question mark on its role as part of the CoC from the perspective of the financial institutions approach. The indecision of the CoC leads to delay in the process militating against the CoC's sole purpose. The court called such creditors, `speed breakers and roadblocks obviously cause obstacles to achieve the targets of speedy disposal…'

In the matter of *Mr. Rajnish Jain* v. *Manoj Kumar Singh - IRP & Ors.*, the Hon'ble NCLAT held that "It is surprising and interesting to note that Members recorded that "despite the Order passed by Hon'ble NCLT Allahabad the CoC is of the view that they no longer wish to continue

M/s BVN Traders in the category of the "Financial Creditor" in the CoC and want to review their decision in this regard." "No Longer wish"? This is strange. This is the danger due to which collating is not left to CoC……. Thus CoC sat in Appeal over Impugned Order and passed resolutions to the contrary, which cannot be said to be legal."

In the matter of *Bank of Baroda* v. *Mr. Sisir Kumar Appikatla, & Ors.* the AA rejected the resolution plan approved by the CoC on the grounds that the Resolution Plan of resolution applicant was only used as a ploy to gain control of the CD by the very person who had pushed the CD into insolvency. While rejecting an appeal by an FC in the matter the NCLAT observed: "This in itself raises eyebrows. This is further compounded by approval of the Restructuring Plan camouflaged as Resolution Plan emanating from an ineligible person which renders the role of the Committee of Creditors questionable. Such circumstances justify raising of inference of complicity."

In the matter of *K. Shashidhar, MD, Kamineni Steel & Power India Ltd.* v. *Kamineni Steel & Power India Ltd. and Others (Banks),* the AA taking note of delaying tactics by the members of CoC in finalizing/ approving resolution plans observed that "functioning of these three banks prima facie do not adhere to the preamble of IBC……., therefore functioning of these three Banks in resolving bad loans deserves to be scrutinised by the RBI which is the regulatory authority of the Banks."

In the matter of STCI Finance Ltd. through *Subash Chandra Modi* v. *Parinee Developers Private Limited,* adjudicating authority while dismissing the application of RP for withdrawal of CIRP, made observations against CoC for their conduct in postponing the issuance of EOI, Form-G continuously 10 times without obtaining approval for the same from the AA. Further observed that CoC had taken law in to its hands and not complied with applicable provisions of the Code and CIRP Regulations.

In the CIRP of Varrsana Ispat Limited, the lead FC recovered debt during moratorium from the company's account it was maintaining. In liquidation, even when the company was a going concern and a scheme under section 230 of the Companies Act, 2013 was under consideration, and despite instruction to contrary from the NCLT, the liquidator distributed Rs. 26 crores to FCs under their pressure.

In the CIRP of Bhushan Power & Steel Ltd., the Resolution Professional paid a fee of about Rs. 12 crores for the services of lender's legal counsel, rendered prior to CIRP and during CIRP. It was recorded in the minutes of the CoC that if the IBBI objects to inclusion of such expenses in insolvency resolution process cost, this amount would be reimbursed by the FCs on a *pro rata* basis. Such an arrangement was clearly in contravention of the IBBI's circular, dated 12-6-2018, which clearly states that IRPC shall not include any legal fee paid to legal counsel of the lenders/creditors. Clearly the RP and CoC deliberately planned for contravening a law.

In the matter of *Jindal Saxena Financial Services Pvt. Ltd.* v. *Mayfair Capital Private Limited,* there were four financial creditors

who attended the first meeting of the CoC. In the said meeting, the CoC did not approve appointment of IRP as RP since two of the four financial creditors, having aggregate voting rights of 77.97% required internal approvals from their competent authorities. The AA observed: "We deprecate this practice. The Financial Creditors/Banks must send only those representatives who are competent to take decisions on the spot. The wastage of time causes delay and allows depletion of value which is sought to be contained. The IRP/RP must in the communication addressed to the Banks/Financial Creditors require that only competent members are authorized to take decisions should be nominated to the CoC. Likewise, Insolvency and Bankruptcy Board of India shall take a call on this issue and frame appropriate Regulations."

In various other occasions the courts observed that the CoC violated the provisions of Code and acted detrimental to the collective process of resolution.

Code of Conduct for Committee of Creditors

It is pertinent to mention that presently all stakeholders *i.e.* Insolvency Professionals, Valuers, Information Utilities etc. are regulated, whereas the CoC works in unregulated environment. Considering the instances where the conduct of CoCs or some financial creditors have been under question and the fact that decisions of the CoC impact the life of the firm & consequently its stakeholders, the IBBI *vide* discussion paper dated 27th August, 2021 proposed to put in place a code of conduct for CoC that shall elevate accountability and responsibility of CoC to ensure transparency in the functioning of a CoC.

Conclusion

The Code of Conduct for CoC would support procedural certainty and fairness in the Corporate Insolvency Resolution Process. The introduction of principles and processes such as transparency, prior due diligence, prohibition of misrepresentation of facts, disclosure of conflict of interest, non-adoption of illegal or improper means to achieve objective, co-operation with Insolvency Professional, non-concealment of any material information, disqualification for misconduct etc. shall strengthen the ability of the CoC to exercise its commercial wisdom for the benefit of the Corporate Debtor, while also ensuring that the interests of all stakeholders are best served.

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STCI Finance Ltd. through Subhash Chandra Modi v. *Parinee Developers Private Ltd.,* (2021), IA No. 264 of 2021 in Company Petition No. (IB) 4147/MB/2019.

M/s. Jindal Saxena Financial Services Pvt. Ltd. v. *M/s Mayfair Capital Private Limited,* (2018), C.A. No. 523 (PB)/2018

FAQs on 'Fresh Start Process under IBC'

1. Who is entitled to make an application under fresh start process?

As per Section 80, a debtor, for a fresh start process in respect of his qualifying debts can make an application to the Adjudicating Authority (AA) if-

a. the gross annual income of the debtor does not exceed sixty thousand rupees;

b. the aggregate value of the assets of the debtor does not exceed twenty thousand rupees;

c. the aggregate value of the qualifying debts does not exceed thirty -five thousand rupees;

d. he is not an undischarged bankrupt;

e. he does not own a dwelling unit, irrespective of whether it is encumbered or not;

f. a fresh start process, insolvency resolution process or bankruptcy process is not subsisting against him;

g. no previous fresh start order under this Chapter has been made in relation to him in the preceding twelve months of the date of the application for fresh start;

2. From when does an interim moratorium commence if an application for fresh start is filed?

As per Section 81, an interim moratorium commences on the date of filing of application u/s 80 in relation to all the debts and shall cease to have effect on the date of admission or rejection of such application.

3. Within what time period a Resolution Professional submit report to AA recommending acceptance or rejection of the application?

The resolution professional shall examine the application made under section 80 within ten days of his appointment, and submit a report to the Adjudicating Authority, either recommending acceptance or rejection of the application.

4. When shall Adjudicating Authority pass order for acceptance or rejection of application?

As per Section 84, the Adjudicating Authority may within fourteen days from the date of submission of the report by the resolution professional, pass an order either admitting or rejecting the application made.

5. When can moratorium under Fresh Start Process cease to have effect?

The moratorium ceases to have effect at the end of the period of one hundred and eighty days beginning with the date of admission unless the order admitting the application is revoked under section 91.

6. On what grounds a Resolution Professional can seek revocation of the order made for admission of the fresh start process?

As per Section 91, a resolution professional may seek revocation on the following grounds:

(*a*) if due to any change in the financial circumstances of the debtor, the debtor is ineligible for a fresh start process; or

(*b*) non-compliance by the debtor of the restrictions imposed under sub-section (3) of section 85; or

(*c*) if the debtor has acted in a *mala fide* manner and has wilfully failed to comply with the provisions of this Chapter.

7. When shall Resolution Professional submit final list of qualifying debts?

The resolution professional shall prepare a final list of qualifying debts and submit to the Adjudicating Authority at least seven days before the moratorium period comes to an end.

8. What are the liabilities from which an Adjudicating Authority discharges the debtor on passing the discharge order?

The Adjudicating Authority shall discharge the debtor from the following liabilities, namely: -

(*a*) penalties in respect of the qualifying debts from the date of application till the date of the discharge order;

(*b*) interest including penal interest in respect of the qualifying debts from the date of application till the date of the discharge order; and

(*c*) any other sums owed under any contract in respect of the qualifying

debts from the date of application till the date of the discharge order.

9. Whether a Resolution Professional appointed can be replaced in the Fresh Start Process?

When the debtor or the creditor is of the opinion that the resolution professional appointed is required to be replaced, he may apply to the Adjudicating Authority (AA) for the replacement. AA within seven days of the receipt of the application make a reference to the Board for replacement of the resolution professional. The Board within ten days of the receipt of a reference recommend the name of insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.

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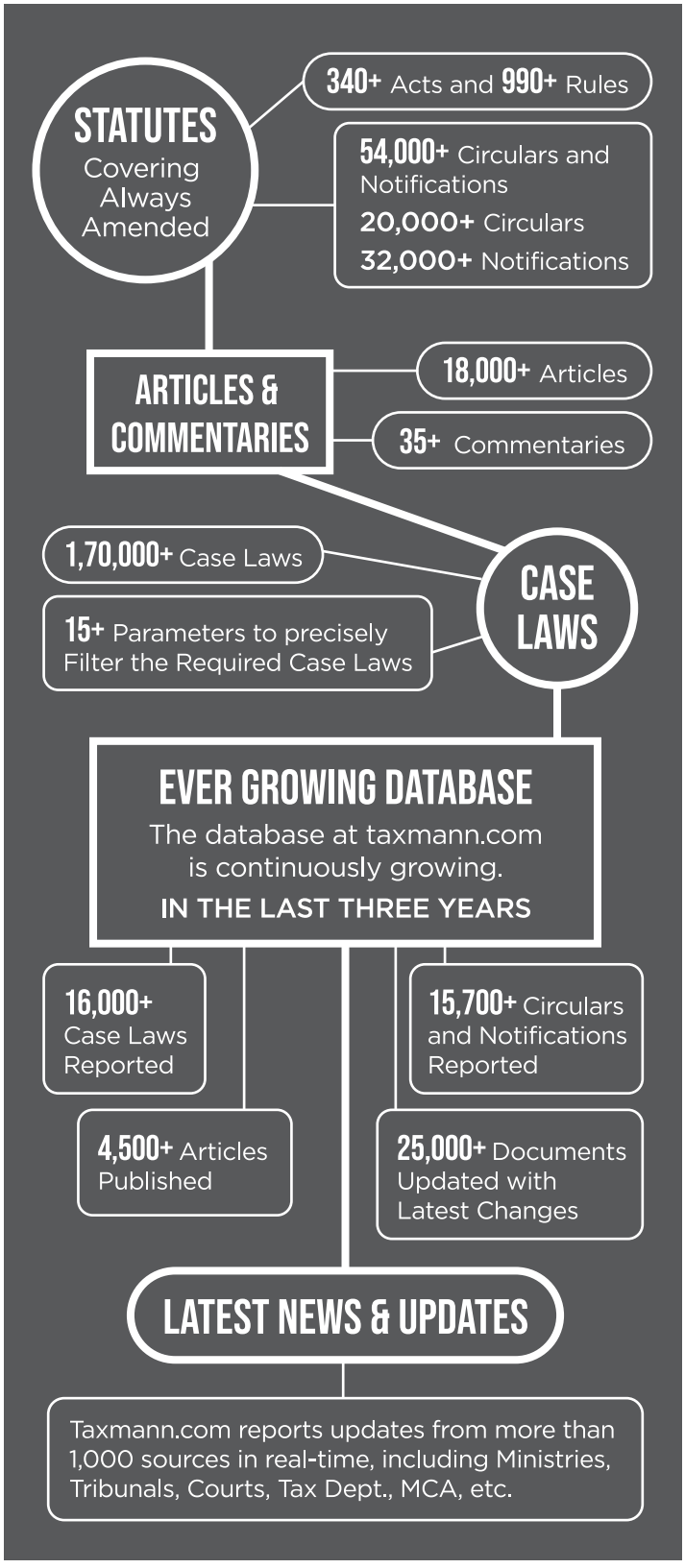

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Regulatory updates

The IBBI *vide* its Press release No. IBBI/PR/2021/26 dt. 13th October, 2021 notified regarding Dr. Navrang Saini, Whole Time Member, IBBI being given additional charge as Chairperson, IBBI. The notification can be accessed at the following link:

https://ibbi.gov.in//uploads/press/6071df2124de1ad71fbc79cfdd6a1394.pdf

Group insolvency Framework - European Unions

Introduction

In recognition of the complexities of insolvency proceedings wrt Groups of Companies, the European Union introduced Regulation (EU) 2015/848 of the European Parliament and of the Council on the subject of "Insolvency Proceedings". The European Union has thus legislated to facilitate effective cooperation between all Insolvency Practitioners and all Insolvency Courts involved in the numerous insolvency proceedings taking place in different member states. The cooperation obligations for insolvency administrators arise under the Regulations where two or more group companies of the same group have initiated insolvency proceedings.

The Regulation, which came into force in the year 2017, provides for a mechanism to deal with insolvency proceedings in respect of members of a group of companies which fall in the territory of the European Union (EU), though located in different member states.

As stated in its Preamble (Para 54), the Regulations provide for the "Procedural Rules on co-ordination of the Insolvency proceedings of members of a Group of Companies". The objective, therefore, is to achieve "efficiency of co-ordination", while not violating the

principle of "separate legal personality" of the corporate. It has been opined by many eminent thinkers that the choice of "procedural co-ordination" has been made to accord maximum respect to the applicable company laws to each group company.

The objective of conducting Group Co-ordination Proceedings, apart from promoting co-operation and communication *inter se* the Courts and Insolvency Practitioners, is: (*a*) effective administration of insolvency proceedings of group members; and (*b*) promote the interest of creditors.

Major Provisions

Insolvency Proceedings of Member of Group Companies (Chapter V of the Regulations (Article 56 to Article 77)

Chapter V is divided into two sections

- Section 1- Co-operation and communication
- Section 2- Co-ordination

Section 1- Co-operation and communication broadly covers the following heads

- Co-operation and communication between insolvency practitioners:

Where insolvency proceedings relate to two or more members of a group of companies, an insolvency practitioner appointed for one member of the group shall cooperate with any other insolvency practitioner appointed for another member of the same group in a way that such cooperation appropriately facilitates the effective administration of the proceedings and is not incompatible with the rules applicable and doesn't entail any conflict of interest.

In order to do so, the insolvency practitioner shall:

- Share the relevant information for the proceedings while protecting the confidentiality of information;
- Coordinate the administration and supervision of the affairs of the group members;
- Consider restructuring of group members and coordinate if any restructuring plan comes up.
- Cooperation and communication between courts
- When insolvency proceedings are related to two or more members of a group of companies, a court which has opened such proceedings shall cooperate with other courts before which proceedings concerning another member of same group is pending to the extent that such cooperation is not incompatible with the rules applicable to them and does not leads to conflict of interest.
- The Courts are empowered to appoint an independent person or body to act on their instructions.
- The Co-operation can be ay any means that court considers appropriate like coordination in appointment of practitioners or conducting of hearings or any type of communication of information.
- Co-operation and communication

between insolvency practitioners and courts:

An insolvency practitioner appointed in insolvency proceedings concerning a member of a group of companies:

- Shall co-operate and communicate among the courts in which proceedings of the members of the group is pending;
- May request information or seek assistance from the courts in which proceedings of the other members of the group is ongoing.
- Costs of co-operation and communication in proceedings concerning members of a group of companies:
- The costs incurred by a insolvency practitioner or a court in the process of co-operation and communication of insolvency proceedings of members of a group of companies shall be considered as the cost of the proceedings.
- Powers of the insolvency practitioner in proceedings concerning members of a group of companies

To facilitate the effective administration of proceeding, an Insolvency Practitioner appointed:

- Be heard in any of the proceedings of any other member of the group;
- Request stay of realisation of the assets in respect of any member of the group;
- Apply for the opening of group co-ordination proceedings.

The court before ordering the stay shall hear the reason for requesting of stay and if reasons are considered appropriate it may grant stay for a period not exceed 3 months. It may further extend the duration of stay but total duration shall not exceed 6 months.

The stay ordered by the court allows the Insolvency Practitioner to take suitable measure under national law to guarantee the interests of the creditors involved.

Co-ordination involves the following process :

- Request to open group coordination proceedings
- Choice of court for group co-ordination proceedings
- Notice by the Court to the insolvency practitioners appointed in other companies of the same group
- Objections by insolvency practitioners of other group Companies
- Decision to open group coordination proceedings
- Consequences of objections to the proposed coordinator
- Decision to open group coordination proceedings

Detailed Procedure for Group Co-ordination

1. Group Co-ordination proceedings may be requested before the court. (Article 61)

   Group coordination proceedings

may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group, by an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group. The request shall be accompanied by

(*a*) a proposal as to the person to be nominated as the group coordinator (`the coordinator'), details of his or her eligibility pursuant to Article 71, details of his or her qualifications and his or her written agreement to act as coordinator;

(*b*) an outline of the proposed group coordination, and in particular the reasons why the conditions set out in Article 63(1) are fulfilled;

(*c*) a list of the insolvency practitioners appointed in relation to the members of the group and, where relevant, the courts and competent authorities involved in the insolvency proceedings of the members of the group;

(*d*) an outline of the estimated costs of the proposed group coordination and the estimation of the share of those costs to be paid by each member of the group.

Without prejudice to Article 66 (i.e., choice of Courts), Where the opening of group co-ordination proceedings is requested before courts of different Member States, any court other than the court first seised shall decline jurisdiction in favour of that court.(Article 62)

Who can be appointed as coordinator?(Article 71)

1. The coordinator shall be a person eligible under the law of a Member State to act as an insolvency practitioner.

2. The coordinator shall not be one of the insolvency practitioners appointed to act in respect of any of the group members, and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members.

Role of Co. coordinator

Tasks and rights of the coordinator

1. The coordinator shall:

(*a*) identify and outline recommendations for the coordinated conduct of the insolvency proceedings;

(*b*) propose a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' in-

solvencies. In particular, the plan may contain proposals for:

(*i*) the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;

(*ii*) the settlement of intra-group disputes as regards intra-group transactions and avoidance actions;

(*iii*) agreements between the insolvency practitioners of the insolvent group members.

2. The coordinator may also: (*a*) be heard and participate, in particular by attending creditors' meetings, in any of the proceedings opened in respect of any member of the group; (*b*) mediate any dispute arising between two or more insolvency practitioners of group members; (*c*) present and explain his or her group coordination plan to the persons or bodies that he or she is to report to under his or her national law; (*d*) request information from any insolvency practitioner in respect of any member of the group where that information is or might be of use when identifying and outlining strategies and measures in order to coordinate the proceedings; and (*e*) request a stay for a period of up to 6 months of the proceedings opened in respect of any member of the group, provided that such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the proceedings for which the stay is requested; or request the lifting of any existing stay. Such a request shall be made to the court that opened the proceedings for which a stay is requested

Choice of court for group coordination proceedings (Article 66)

1. Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed that a court of another Member State having jurisdiction is the most appropriate court for the opening of group coordination proceedings, that court shall have exclusive jurisdiction.

2. The choice of court shall be made by joint agreement in writing or evidenced in writing. It may be made until such time as group coordination proceedings have been opened in accordance with Article 68.

3. Any court other than the court seised under paragraph 1 shall decline jurisdiction in favour of that court.

4. The request for the opening of group coordination proceedings shall be submitted to the court agreed in accordance with Article 61.

Notice by the Court to the insolvency practitioners appointed in other companies of the same group

Notice by the Court (Article 63)

The court seised of a request to open group coordination proceedings shall give notice as soon as possible of the request for the opening of group coordination proceedings and of the proposed coordinator to the insolvency practitioners appointed in relation to the members of the group, if it is satisfied that:

(*a*) the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members;

(*b*) no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings; and

(*c*) the proposed coordinator fulfils the requirements laid down in Article 71.

Objections by insolvency practitioners (Article 64)

1. An insolvency practitioner appointed in respect of any group member may object to:

   (*a*) the inclusion within group coordination proceedings of the insolvency proceedings in respect of which it has been appointed; or

   (*b*) the person proposed as a coordinator.

2. It shall be lodged with the court referred to in Article 63 within 30 days of receipt of notice of the request for the opening of group coordination proceedings by the insolvency practitioner

Consequences of objection to the inclusion in group coordination

1. Where an insolvency practitioner has objected to the inclusion of the proceedings in respect of which it has been appointed in group coordination proceedings, those proceedings shall not be included in the group coordination proceedings.

2. The powers of the court referred to in Article 68 or of the coordinator arising from those proceedings shall have no effect as regards that member, and shall entail no costs for that member

Consequences of objections to the proposed coordinator

Where objections to the person proposed as coordinator have been received from an insolvency practitioner which does not also object to the inclusion in the group coordination proceedings of the member in respect of which it has been appointed, the court may refrain from appointing that person and invite the objecting insolvency practitioner to submit a new request.

Decision to open group coordination proceedings

1. After the period referred to in Article 64(2) has elapsed, the court may open group coordination proceedings where it is satisfied that the conditions of Article 63(1) are met. In such a case, the court shall:

   (*a*) appoint a coordinator;

   (*b*) decide on the outline of the coordination; and

   (*c*) decide on the estimation of costs and the share to be paid by the group members.

2. The decision opening group coordination proceedings shall be brought to the notice of the participating insolvency practitioners and of the co-ordinator.

Cost of Coordination is regarded as cost of proceedings

The costs of the co-operation and communication provided for in Articles 56 to 60 incurred by an insolvency practitioner or a court shall be regarded as costs and expenses incurred in the respective proceedings.

Rights of the Insolvency Practitioners in cases where Group Coordination Proceedings

It *inter alia* provides that the Insolvency Practitioner appointed in the insolvency proceedings of one Group Company shall have a right to be heard in the proceedings of another group company. In such proceedings he can request for a stay of any measure related to the realisation of the assets in the proceedings opened with respect to any other member of the same group. The proviso to the clause *inter alia* provides that such a stay is necessary in order to ensure the proper implementation of the restructuring plan; the restructuring plan would be to the benefit of the creditors in the proceedings for which the stay is requested.

Under the Regulations, the Insolvency Practitioners are required to:(*i*) communicate relevant information with each other as soon as is practicable and insofar as confidentiality arrangements allow, (*ii*) co-operate, as is required, for the progression of the insolvency proceedings (insofar as doing so is not contrary to national law and does not give rise to conflict of interest issues), (*iii*) consider the possibility of a collective management of group affairs, and (*iv*) consider negotiating and drafting a proposal for a coordinated restructuring of the group.

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

Interpretation of European Courts

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

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

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