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INSOLVENCY AND BANKRUPTCY JOURNAL

NO. 9 | PG. 1-100 | SEPTEMBER 2021 | ₹ 500 (SINGLE COPY)

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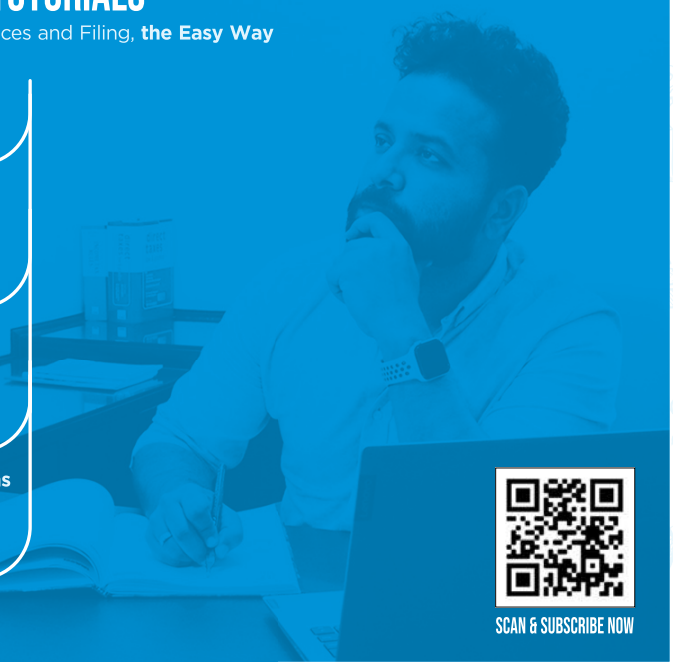

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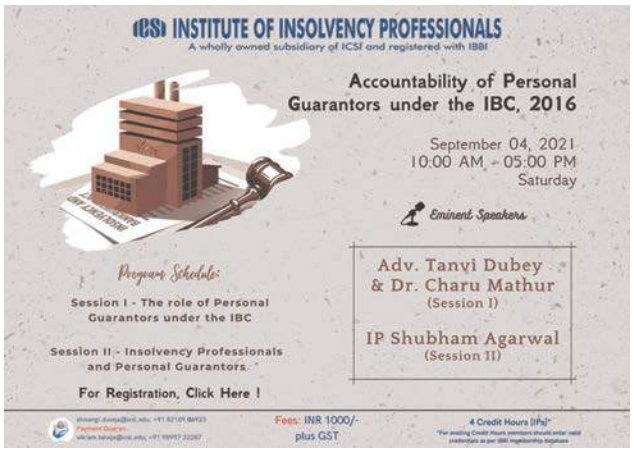
NEWS FROM THE INSTITUTE

◆ Workshop on 'Accountability of Personal Guarantors under IBC'

On 4th September, 2021, ICSI IIP organized a full day workshop on `**Accountability of Personal Guarantors under IBC**'. It was attended by 73 professional members. The workshop was addressed by the eminent speakers namely AOR Charu Mathur IP Shubham Agarwal.



◆ Workshop on 'IBC *vis-à-vis* Companies Act'

On 11th September, 2021, ICSI IIP organized a full day workshop on **'IBC *vis-à-vis* Companies Act'**. It was attended by 42 professional members. The workshop was addressed by the eminent speakers namely, CS Ravichandran and IP Anagha Anasingaraju.

◆ Workshop on "Writ Jurisdiction of High Court on the Objectives of IBC"

On 21st August, 2021, 2021, ICSI IIP organized a full day workshop on `**Writ Jurisdiction of High Court on the Objectives of IBC**'. It was attended by 44 professional members. The workshop was addressed by the eminent speakers namely, IP NPS Chawla and Adv. Pallavi Pratap.

◆ LIT UP Batch 12- preparation course for LIE was organised from 17th-19th September, 2021

ICSI IIP organized three full days intensive preparation course for Limited Insolvency Examination. Various eminent speakers addressed the three days sessions. The three days preparatory course was held online through zoom portal.

◆ Webinar on "Sale process of the Corporate Debtor as Going concern and the challenges faced by the Liquidator"

ICSI IIP in association with the British High Commission organises a session on "Sale process of the Corporate Debtor as Going concern and the challenges faced by the Liquidator" on September 29, 2021 from 3 PM to 5 PM. Inaugural address was given by Shri Nagendra Rao, President ICSI and the session was addressed by the experts in the industry like Mr. Vinod Kothari, Insolvency Professional in India, Mr. Saurav Panda, Partner at Shardul Amarchand Mangaldas, Mr. Stephen Harris, Insolvency Practitioner in EY UK and Mr. Simon Edel, Insolvency Practitioner in EY UK.

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

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

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

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At a Glance

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- **Anjali Rathi** *v.* **Today Homes and Infrastructure (P.) Ltd.**
(2021) 130 taxmann.com 253 (SC) • P-341

Section 14, read with sections 31 and 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - General - Home buyer agreements were entered between petitioners-home buyers and corporate debtor-developer - Housing project was abandoned, as a result, petitioners instituted proceedings before NCDRC and NCDRC allowed claim of petitioners directing corporate debtor to refund principal amount together with interest - Meanwhile, proceedings were initiated against corporate debtor under section 9 and same was admitted - CoC approved resolution plan submitted by consortium of home buyers and Adjudicating Authority was yet to decide on application for approval of said resolution plan - Petitioners, in instant special leave petition, raised grievance that application filed for initiation of corporate insolvency resolution process was merely to stall refund of amount due to petitioners in terms of NCDRC order - Petitioners submitted that during course of

proceedings before instant Court, settlements were arrived at and therefore promoters of corporate debtor shall be held liable personally to honour settlement - Whether moratorium was only in relation to corporate debtor and not in respect of directors/management of corporate debtor, against whom proceedings could continue - Held, yes - Whether thus, petitioners were not to be prevented by moratorium under section 14 from initiating proceedings against promoters of corporate debtor in relation to honouring settlements reached before instant court - Held, yes (Paras 12 and 15)

- **Ebix Singapore Private Limited** *v.* **Committee of Creditors of Educomp Solutions Limited**
  (2021) 130 taxmann.com 208 (SC) • P-351

I. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether IBC is silent on whether a successful Resolution Applicant can withdraw its Resolution Plan, however, statutory framework laid down under IBC and CIRP Regulations provide a step-by-step procedure which is to be followed from initiation of CIRP to approval by Adjudicating Authority - Held, yes - Whether in absence of any provision under IBC allowing for withdrawal of Resolution Plan by a successful Resolution Applicant, vesting Resolution Applicant with such a relief through a process of judicial interpretation would be impermissible - Held, yes - Whether Adjudicating Authority lacks authority to allow withdrawal or modification of Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in Resolution Plan - Held, yes - Whether IBC framework, does not enable withdrawals or modifications of Resolution Plans, once they have been submitted by RP to Adjudicating Authority after their approval by CoC- Held, yes - Whether enabling withdrawals or modifications of Resolution Plan at behest of successful Resolution Applicant, once it has been submitted to Adjudicating Authority after due compliance with procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by statute - Held, yes (Paras 147, 157, 161, 202 and 204)

II. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether a Resolution Plan, if in compliance with mandate of IBC, cannot be rejected by Adjudicating Authority and becomes binding on its approval upon all stakeholders including Central and State Government, local authorities to whom statutory dues are owed, operational creditors who were not a part of Committee of Creditors (CoC) and workforce of corporate debtor who would now be governed by a new management - Held, yes (Para 110)

III. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether unlike section 18(3)(*b*) of erstwhile SICA which vested Board for Industrial and Financial Reconstruction with power to make modifications to a draft scheme for sick industrial companies, Adjudicating Authority under section 31(2) of IBC can only examine validity of plan on anvil of grounds stipulated in section 30(2) and either approve or reject plan - Held, yes - Whether Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant; a rejection by Adjudicating Authority is followed by a direction of mandatory liquidation under section 33 - Held, yes - Whether section 30(2) does not envisage setting aside of Resolution Plan because Resolution Applicant is unwilling to execute it, based on terms of its own Resolution Plan - Held, yes (Para 157)

IV. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether a Resolution Applicant, after obtaining financial information of Corporate Debtor through informational utilities and perusing Information Memorandum is assumed to have analyzed risks in business of corporate debtor and submitted a considered proposal;

a submitted Resolution Plan is binding and irrevocable as between CoC and successful Resolution Applicant in terms of provisions of IBC and CIRP Regulations - Held, yes (Para 204)

V. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Whether inordinate delays in resolution process cause commercial uncertainty, degradation in value of corporate debtor and makes insolvency process inefficient and expensive and, therefore, NCLAT and NCLT are directed to endeavour, on a best effort basis, to strictly adhere to timelines stipulated under IBC and clear pending resolution plans forthwith - Held, yes (Para 205)

- **K.N. Rajakumar** *v.* **V. Nagarajan**
  (2021) 130 taxmann.com 254 (SC) • P355

Section 12A, read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Application under section 9 filed by operational creditor against corporate debtor was admitted by NCLT - Appellant, a director of suspended board of corporate debtor, submitted that parties had reached settlement - Said agenda was put to vote in CoC meeting and CoC by requisite majority decided to file an application under section 12A before NCLT for withdrawal of CIRP - NCLT subsequently, allowed application for withdrawal of CIRP - Whether since, after withdrawal of CIRP proceedings, powers and management of corporate debtor were handed over to directors of corporate debtor and from that date RP and CoC in relation to Corporate debtor had become *functus officio*, NCLT had rightly disposed appeal filed by operational creditor to set aside resolution passed in CoC meeting - Held, yes (Para 19)

- **National Spot Exchange Ltd.** *v.* **Anil Kohli, Resolution Professional for Dunar Foods Limited**
  (2021) 130 taxmann.com 229 (SC) • P-357

Section 61 of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authority - Appeals and Appellate Authority - Whether Appellate Tribunal has no jurisdiction to condone delay exceeding 15 days beyond period of 30 days, as contemplated under section 61(2) - Held, yes - Whether therefore, where certified copy of order passed by Adjudicating Authority was applied beyond period of 30 days and there was a delay of 44 days in preferring appeal which was beyond period of 15 days which maximum could have been condoned, it could not be said that NCLAT had committed any error in dismissing appeal on ground of limitation by observing that it had no jurisdiction and/or power to condone delay exceeding 15 days - Held, yes (Paras 11.2 and 12)

- **BKB Transport (P.) Ltd.** *v.* **NTPC Ltd.**
  (2021) 131 taxmann.com 255 (NCLAT-New Delhi) • P-359

Section 5(6), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Dispute - Operational creditor entered into a contract with corporate Debtor being thermal power corporation-NTPC, to transport coal - Corporate debtor did not make payment of outstanding amount - In response to demand notice, corporate debtor alleged short supply of coal by operational creditor and claimed that operational creditor was liable to pay penalty as per contract - Allegations of short supply were strongly denied by 'Operational Creditor' - NCLT observed existence of dispute between parties - Further, citing existence of arbitration clause in agreement to resolve dispute between parties, NCLT dismissed CIRP - NCLT, however, in its order, observed that there was short supply of coal by operational creditor - Whether since NCLT, in its order, had made observations touching on merit of matter, part of its order containing this observation was to be expunged for reason that such comments would come in way of arbitration proceedings, if any invoked - Held, yes (Para 7)

- **Dyanamic Engineers Ltd.** *v.* **Muhlenbau Equipments (P.) Ltd.**
  (2021) 131 taxmann.com 236 (NCLAT - Chennai) • P-372

Section 9 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Application by operational creditor - Whether when a debt and default is proved, Adjudicating Authority has to admit application to initiate corporate insolvency resolution process against corporate debtor otherwise it is complete - Held, yes - Operational creditor supplied goods to corporate debtor and raised invoices - Corporate debtor accepted supplies and invoices without any demur but made only part payment - Operational creditor issued demand notice - Corporate debtor did not reply to same - Despite service of notice regarding CIRP application filed by operational creditor, corporate debtor failed to appear before NCLT either in person or through its representatives - NCLT noticed that corporate debtor wilfully avoided payment of its liability - But default and instead of admitting application to initiate CIRP against corporate debtor, NCLT disposed of application with a direction to corporate debtor to settle claim within a period of 3 months - Whether said order was illegal without application of mind and therefore, same was to be *set aside* and application of operational creditor was to be admitted - Held, yes (Para 18)

- **Ergomaxx (India) (P.) Ltd.** *v.* **Registrar, National Company Law Tribunal, Bengaluru**
  (2021) 131 taxmann.com 217 (NCLAT - Chennai) • P-373

Section 60 of the Insolvency and Bankruptcy Code, 2016, read with rules 150 and 152 of the National Company Law Tribunal Rules, 2016 - Adjudicating Authority for corporate persons - Whether procedure for pronouncement of order is governed by NCLT rules and as per rules 150 to 152, pronouncement of order is necessary and if it is not adhered to, then, such an order is a nullity - Held, yes - NCLT disposed off CIRP petition filed by operational creditor against corporate debtor by allowing parties to settle matter mutually within reasonable time - NCLT also granted liberty to operational creditor to file a fresh petition if no settlement was reached - However, NCLT had neither pronounced its ruling in an open Court nor listed for pronouncement - Apart from that, there was no communication that was received by operational creditor in regard to pronouncement of order - Whether, thus, such order was to be declared a nullity and appeal against said order was to be allowed - Held, yes (Para 26)

- **Fipola Retail (India) (P.) Ltd.** *v.* **M2N Interiors**
  (2021) 131 taxmann.com 234 (NCLAT - Chennai) • P-376

Section 2, read with sections 3(23) and 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Application of code - NCLT admitted application filed by operational creditor under section 9 against corporate debtor - Corporate debtor alleged that said application would not be maintainable as application had been filed in name of proprietary concern and proprietary concern is not a 'person' for purpose of filing application under section 9 - Whether section 2(*f*) provides that provisions of Code shall apply to partnership firms and proprietorship firm - Held, yes - Whether proprietorship was through its proprietor and since, in instant case said section 9 application contained name of proprietorship firm as well as name of its sole proprietor, said application was maintainable and accordingly, appeal against order passed by NCLT was to be dismissed - Held, yes (Para 12)

- **Jayesh N. Sanghrajka, Erstwhile R.P. of Ariisto Developers (P.) Ltd.** *v.* **Monitoring Agency nominated by the Committee of Creditors of Ariisto Developers (P.) Ltd.**
  (2021) 131 taxmann.com 237 (NCLAT-New Delhi) • P-377

Section 25 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution Professional-Duties of - An application filed under section 9 in case of corporate debtor was admitted and Resolution Professional (RP) was appointed - While approving

resolution plan submitted by successful resolution applicant, NCLT disagreed with CoC which had approved success fees to RP of an amount of Rs. 3 crores and thus, directed RP and CoC to proportionately distribute said amount of Rs. 3 crore among underpaid operational creditors - Grievance of RP was that approval of success fees was a commercial decision of CoC and NCLT could not have interfered with same - It was noted that quantum of fees payable to RP could be fixed by CoC but it would be subject to scrutiny by NCLT as what was reasonable fees; reasonableness of fees was not part of commercial decision of CoC - Further, manner in which, RP in last minute pushed before CoC to claim success fees without putting on record necessary particulars was improper and incorrect - Whether thus, impugned order passed by NCLT wherein it disallowed success fees to RP was justified - Held, yes (Para 38)

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

From Chairman's Desk

Wisdom is the backbone on which a decision can be clarified, justified and sustained

Dear Professional Member(s),

Hope you are all keeping well.The past few months have been a testing period for all, particularly those who have suffered in terms of their health. But, as we move forward, the belief is that worst is over and we are heading for better times. Though the vaccination drive undertaken by the Government has given us this confidence, we must ensure that we move with caution. Afterall, as citizens and also as a nation, we are responsible if we do not do what we can do.

There have been a lot of challenges in the past few months, however, there have also been definite lessons that we have learnt and opportunities that we explored. The most important lesson for me would be that we have started focusing on protecting our people as best as we can. For that, there is a definite need to connect and keep in touch, as well as the need to take out time for oneself so as to have a balance between our personal life and professional life. As an organization, we have learnt our own lessons. I believe that ICSI IIP has emerged stronger, focused and better positioned.It is my belief that ICSI IIP is poised to deliver more on its objectives.In the past period when economic conditions were tough, Ifeel happy to see that ICSI IIP had its priorities

set straight and it served its professional members with the best of its services. I am particularly happy that during this period, on account of the online/virtual sessions, the institute has been able to engage with its professional members and frequently sessions were conducted periodically.

If we analyse our life pattern, we are bound to agree on one aspect of it, which is, that everything that we do is in some way contributing to someone's life. Now, if we also focus on making this a conscious process, then our lives are bound to be very different. Contribution to each other's lives does not mean that we shall make compromises to our lives or not make money in our respective business or profession. Rather, if we constantly see as to how to give our best to everyone around us, then profit shall be a natural consequence of our actions. We shall not have to worry then about our individual profits. Contribution is not about money or material resources only, rather, it is the basic volition of our lives. If we make our lives into a contribution, then our lives shall become meaningful and worthwhile to live because we will then be creating what we actually care for. If we are creating what we care for, then it will be a joy to go to work every day and do whatever best that we can. The moment we look as to how to contribute, the moment there is a certain pleasantness of experience within us, our body and mind shall function to the best of their capabilities. *Success* to me is a consequence of harnessing all that we have, to the best possible results, and for this we must be in a pleasant state of experience. Then, the more we do, the better we shall feel, and this shall happen only if we look at how to make contribution to everything around us. The other aspect that I believe that we all should focus on is bringing *integrity* to whatever we do. It is extremely important for one to inculcate the habit of integrity in his/her actions because ultimately (sooner or later) we get confronted with the results of what we do. If we loose of our integrity, then regret shall always be there, but if we are determined to do the best and with best intentions, then, despite the consequences of our actions, we shall have the confidence of having done the right thing. When we want to function in the world, how much trust we generate with the people that we interact with or deal with shall determine how easy or hard our daily efforts will be. In other words, if there is an atmosphere of trust, our ability to work gets greatly enhanced.This is simply

because everyone will pave the way for us rather than setting up impediments.

Coming to the legal developments this month, the DHFL insolvency resolution and takeover by Piramal Group has been the key highlight of this month. The resolution is seen as having scored many firsts. The chief amongst them is that DHFL is the first finance company which has secured a resolution plan under the IBC legal framework. The Administrator (appointed by the RBI), who became the resolution professional, succeeded in taking the proceedings to their logical conclusion. At the same time, what also caught the attention of all stakeholders is that the decision-making process of CoC is not yet subject to any regulations, guidelines, circular etc. The CoC, which is an institution tracing its origin/birth to the IBC itself, is evolving to comprehend its functions, roles and responsibilities in the context of balancing the interests of all stakeholders during the CIRP, and thus, the concerns which have been raised regarding capacity and conduct of CoC, are very likely to get resolved through the efforts (and consensus) of all stakeholders. We had a very comprehensive discussion paper from the IBBI on the subject, wherein, several issues concerning the functioning of CoC/FCs were highlighted. Needless to mention that the idea behind such a discussion paper is to throw open for a discussion different issues encountered in the process and to take stock of all constructive suggestions from the stakeholders (particularly the Professional members) which can then pave the way forward. The discussion paper has suggested a need to establish a code of conduct for the CoCs in order to guide it in terms of its accountability, duty and for establishing transparency in its working. The commercial wisdom of the CoC which has been given a prime role in deciding outcome of the CIRP process, has to have a sound basis for its exercise. Else, faith bestowed in this legal framework is likely to collapse sooner than later. In other words, what we must agree is that CoC has to be accountable, and its decision-making process has to be fair and transparent.

On its part, ICSI IIP shall be conducting a Round-table on the discussion paper. I am sure, all the professional members shall help us with their constructive and valuable suggestions thereof.

Please keep your health your top priority. Take care!

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

Managing Director's Message

You don't have to be great to start, but you have to start to be great.

Dear Professional Members,

It is always a pleasure to connect with you allover different mediums. Our monthly journal has been a true success especially in terms of allowing me to communicate with you all and sharing my thoughts and views with you. We, as an Insolvency Professional Agency, exist because of you and are here to serve you with the best possible services that we can provide. Our professional members are the biggest stakeholders and our biggest inspiration. Infact, the success of this legal framework is contingent on your efforts and functioning. You are the catalyst and an agent of change. It is my strong belief that the time and energy that you invest in discharging your professional responsibilities is directly proportional to the success of IBC legal regime,and it is growing stronger and stronger with each passing day on account of commitment with which you are working.

Needless to say that it is also helping our professional members to hone their leadership and managerial skills.The knowledge that you gain, the fine qualities that you imbibe, as well as the technical skills that you learn is your biggest take-away.We trust in you. You are our safe source and we bank all our efforts on you. When you are looking to do something substantial there shall always be challenges thrown on your way, but what we must always remember is that great efforts bear the sweet fruits of success. We want you to taste the fruit of success once and for the rest of your life.

In the past few years, our efforts (as a nation) to resolve all issues concerning the Economy (and the banking system) have become very evident to the world. The recent one pertains to the attempts being made to streamline the functioning of asset reconstruction companies (ARCs), wherein a committee constituted by the Reserve Bank of India has come up with a whole host of suggestions including the *creation of online platform for the sale of stressed assets* and *allowing ARCs to act as resolution applicants during the IBC process*. The Committee, which consists of very eminent personalities (being headed by former RBI Executive Director Sudarshan Sen) has suggested that the *scope of s. 5, SARFAESI Act, 2002 be expanded to permit ARCs to acquire financial assets from all regulated entities*. Such entities would include AIFs, FPIs, AMCs, making investment on behalf of MFs and all NBFCs including HFCs. The Committee in its report has noted that the performance of the ARCs has remained lacklustre so far, in terms of ensuring recovery and revival of businesses. It further points out that Banks and other investors could recover only about 14.29 per cent of the amount owed by borrowers in respect of stressed assets sold to ARCs during the 2004-2013 period. The data further reveals that 80 per cent of the recoveries, as made by the ARCs, has come through deployment of measures of reconstruction that do not necessarily lead to revival of businesses. The facts thus reveal the reason for the nation to think deep on the reforms that are needed to be carried out *vis-a-vis* the ARCs such that they are able to accomplish their true purpose. To improve the performance of ARCs, the RBI had thus appointed this Committee to examine the issues and recommend suitable measures for enabling the ARCs to meet the growing requirements of the financial sector. The Committee has also recommended that for all accounts above Rs. 500 crore, two bank-approved external valuers should

carry out a valuation to determine the liquidation value and fair market value. As per the suggestions, in case of loan accounts between Rs. 100 crore and Rs. 500 crore, one valuer can be appointed. However, final approval regarding the reserve price is to be given by a high-level committee which has the power to approve corresponding write-off of the loan. Reserve price as we know plays a very important role in ensuring true price discovery in auction which are conducted for sale of stressed assets. The report has also recommended that the minimum net-owned fund (NOF) requirement for ARCs should be increased to Rs. 200 crore wherein existing ARCs may be provided a glide path to meet this requirement.

There are a whole host of other very important suggestions provided in the detailed report submitted by the Committee. I encourage you all to go through the entire report and submit your suggestions thereof. The comments and suggestions on the report can be made to the RBI by December 15.

In my association so far with ICSI IIP, my endeavour has always been to keep the direction of our efforts focussed on growth of the Institute and its professional members and for that we have kept a very close co-ordination with our professional members under the very able guidance of our Governing Board. We are eager to cater to the needs of our members and remain progressive in our functioning, services and technological upgradation.

We are thankful to all our members for investing trust upon us and we ensure you of our best services at all times.

INTERVIEW

Munish Kumar Sharma
IP and Advocate

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

Historically India has had patchwork framework of insolvency laws and IBC is the first comprehensive law on the insolvency and bankruptcy. The most significant contribution of IBC, as I see, is change in credit culture. Now the borrower no longer thinks that it is "borrow it, use it and forget it", instead now they know that if they borrow and use funds, they must repay as well. IBC is neither a success nor a failure. It is not as successful as it was thought to be, at the same time, present regime is giving much better result than earlier insolvency laws, and with legacy cases soon coming to an end, one may expect much better results.

2. Since, "bad bank" concept has been introduced in India, will it help in reducing overall NPA situation in the economy? How will it impact the functioning of Insolvency and Bankruptcy Code?

"Bad Bank" will buy stressed assets from banks and will try to sell those stressed assets in the market. Technically, balance

sheets of banks will be cleaned, but there is no recovery unless these stressed assets are sold in market. Real challenge will lie in finding buyers for the stressed assets. In case "Bad Bank" fails to find buyers for stressed assets, it will end up camouflaging NPAs without any real solution. With large size NPAs being taken over by "Bad Bank", some space will be freed up in IBC regime and burden on IBC ecosystem, especially adjudicating authority, will be reduced, and one can expect better adherence to statutory timelines in disposal of cases before adjudicating authority.

3. 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?

My experience has been very satisfactory. As the Greek philosopher, Heraclitus, said: "change is the only constant", there can be number of changes in number of spheres, and I don't think I will able to list those out here.

4. Since you have been a Company Secretary by profession, how has being a Company Secretary helped you in handling the assignments?

IBC, 2016 is pre-dominantly procedural in nature. Company Secretaries are thoroughly trained and highly experienced in handling procedural aspect of law. These traits of Company Secretaries have immensely helped me in handling the assignments.

5. One of the major duties of Insolvency professionals is to identify avoidable transactions and seek appropriate reliefs from Adjudicating Authority. How far filing of these applications have benefitted the stakeholders under insolvency?

There are not many success stories of relief from Adjudicating Authorities in case of avoidable transactions. Given the strict timelines and normally non-availability of complete records and non-cooperation of existing management, RPs are not able to file full-proof applications before the Adjudicating Authorities. I personally feel this is one field where IPs need to hone up their skills and Section 19(2) applications needs to be given due priority by Adjudicating Authority.

6. What practical challenges are faced by an Insolvency Professional while carrying out the insolvency process which regulators are not aware about?

There is frequent and healthy interaction between the IPs and regulators, so I don't think there is any issue which the regulators are not aware about. Though, as IP one may not always be satisfied with the response of regulators to some of the issues.

7. What is your take on the implementation of Pre-packaged Insolvency Resolution Framework for Corporate MSMEs which has been introduced through "The

Insolvency and Bankruptcy Code (Amendment) Act, 2021?"

Since in Pre-Packs existing management continues in control of corporate debtor it will see less disruption of operations of the corporate debtor and the process is likely to be quicker, and also since there is consensual restructuring between corporate debtor and lender the implementation is likely to be smooth. But in last six months, for which Pre-Pack regime is in force, we have seen only one order of admission of Pre-Pack resolution application.

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

Problems of allottees of real estate projects are unique, quite distinct from problems of operational creditors and financial creditors. Whereas results under IBC for operational creditors and financial creditors have been better than previous regime, same cannot be said of allottees under real estate project. Notwithstanding the amendments to IBC to address problems of allottees under real estate project, allottees under real estate project have remained on fringe end under CIRP. In my view, if properly implemented, RERA is better suited to address issues of allottees under real estate project than IBC, 2016.

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?

One of the main functions, common to both IBBI and IPAs, is development of IP profession by training and regulation; and both these agencies have done quite well on this score. NCLTs at number of times have passed orders to safeguard the interest of the IPs. However, many IPs still feel that they need to be heard with little more patience.

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

IBC, 2016 so far has been largely successful; though if you look at the number of companies under liquidation, they are almost four times the number of companies with successful resolutions, but, if you look in terms of value, the value involved in successful resolutions is almost four times the value of companies under liquidation. But there are areas of concern, like - adherence to timelines, committee of creditors which is not accountable to anyone under IBC ecosystem, unbridled power of COC to replace resolution professional without assigning any reason, which in turn may impact independence of resolution professionals, infrastructures and manning at NCLTs. These are some of the issues that needs to be addressed if IBC, 2016 is to see its desired result. Future of profession of IP is linked to future of IBC, 2016.

Insight!

Case Study: The Rise, The Fall & The Comeback of Alok Industries

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Abstract

If I ask stock traders to put their money in a company which has just come out of the insolvency resolution proceedings, they'd probably just ignore me. But who knew back in February, 2020 that, this multibagger in the past, `Alok Industries Limited' a bankrupt company taken over by Mukesh Ambani's Reliance Industries and JM Financials Ltd, would have led you in the list of wealth builders giving returns of more than double within few months, hitting upper circuits for 17 consecutive times[1]. This study aims to discuss the history, fall and the rapid comeback of this company, which would be impossible if there would not have been the legislations like the Insolvency and Bankruptcy Code, 2016 (IBC, 2016).

Alok Industries is one of the 12 large accounts with outstanding loans greater than Rs. 5000 crore that the Reserve Bank of India asked banks to refer to the NCLT proceedings. In June 2017, the Ahmedabad bench of the National Company Law Tribunal (NCLT) admitted State Bank of India's (SBI) insolvency petition against Alok Industries. Alok Industries owed lenders a total of around Rs. 30,000 crore. Reliance Industries Ltd. and

JM Financial Ltd. took over the company after having acquired it in bankruptcy proceedings.

This case study aims to give a brief about the background and birth of the company, factors that led to its fall, the process under IBC, its acquisition by Reliance Industries Limited and JM Financial Ltd ; and post CIRP performance of the Alok Industries Limited.

Key Words: NPA, IBC, Independent Advisory Committee, Insolvency, Bank loans, non-performing assets

1. RESEARCH METHODOLOGY

The research methodology to conduct this study was majorly secondary research or desk research, involving the already existing data. Hence, only secondary sources of data collection is used in this case study. Data is collected from various sources, such as, books, publications and reports of Reserve Bank of India (RBI), Insolvency and Bankruptcy Board of India (IBBI), Ministry of Corporate Affairs (MCA), Press Information Bureau (PIB), Securities and Exchange Board of India (SEBI), and other official publications, Journals, Working Papers, Internet sources and Research papers.

The period of data used in this case study is from FY 2017-18 to the FY 2021-22. The data available prior to or at the beginning of FY 2017-18 is also used to further the analysis.

2. INTRODUCTION

The Insolvency and Bankruptcy Bill was introduced by the NDA Government in the year 2015, but got the assent of the Hon'ble President of India on 28th May 2016. Certain provisions of the Act have come into force from 5 August and 19 August 2016. The Code was passed by parliament in May 2016 and became effective in December 2016.This was introduced as a reform focused towards fastening the long insolvency process and to cure the tremendously spreading diseases of Bad Debts in our Banking sector.

In June 2017, an Independent Advisory Committee for the Reserve Bank of India, identified 12 Bad Debt Accounts totalling about 25% of the Gross NPA's of the banking system, directing banks to immediately refer for bankruptcy proceedings. The RBI even made a plea to the Hon'ble NCLTs to prioritize these cases. Alok Industries Limited was one of these 12 companies. In fact, it was the only textile company which was placed in this list of 12 stressed accounts as the list was majorly dominated by steelmakers, power and infrastructure companies.

It has been witnessed that due to excess debts and furious expansion plans, companies fall in trouble. Alok Industries has a similar story but with a twist no one expected.

3. HISTORY AND PROFILE OF THE COMPANY

Let's start from the beginning. Alok Industries Ltd. based in Mumbai, India was established in 1986 as a private limited company to carry on the business of an integrated textiles solution. The company got listed in the Bombay Stock Exchange and the National Stock Exchange of India in 1993.

The organization has manufacturing facilities in Silvassa, Navi Mumbai and Vapi. Over the years, it had expanded into weaving, knitting, processing, home textiles and garments.

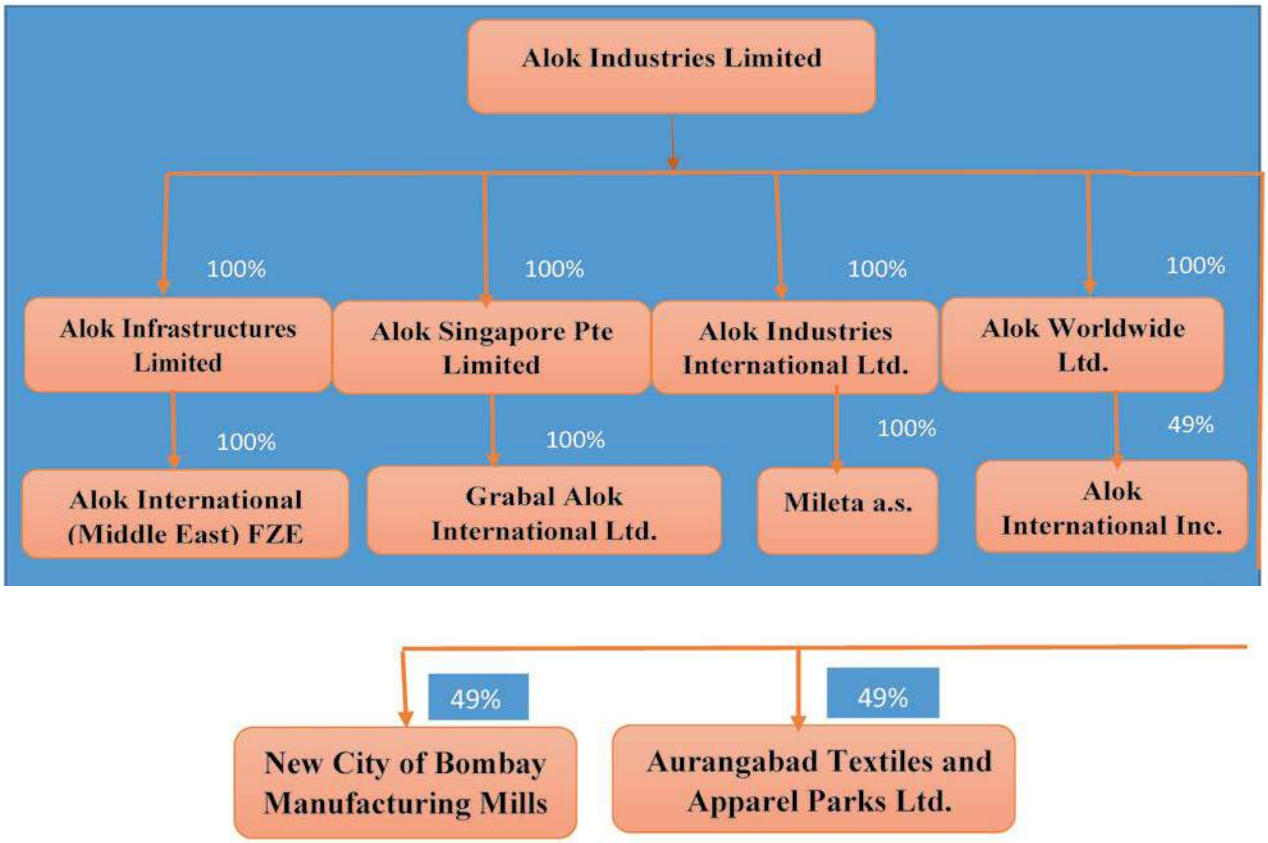
It also provides embroidered products through Grabal Alok Impex Ltd., its associate company. It evolved into a diversified manufacturer of world-class home textiles, garments, apparel fabrics and polyester yarns, selling directly to manufacturers, exporters, importers, retailers and to some of the world's top brands. The major dealings of the company involve Cotton Yarn, Garment Fabric, Home Textiles and Polyester Yarn.

Alok Industries also has an international presence in the retail segment through its associate concern, Grabal Alok (UK) Limited. This entity owns more than 200 outlets across England, Scotland and Wales for menswear, womenswear, children wear, footwear, homeware and accessories.

In addition, Alok Industries has also invested in premium commercial/residential projects across Mumbai through its wholly owned subsidiaries.

The Authorised Share Capital of Alok Industries is Rs. 4000,00,00,000/- (Rupees Four Thousand Crores) only. The paid up share capital of the company is Rs. 746,52,51,228/- (Rupees Seven Hundred Forty Six Crores, Fifty Two Lacs, Fifty one Thousands and Two Hundred Twenty Eight) only[2].

Furthermore, Alok Industries has a number of subsidiaries, associate companies and joint ventures as follows:



Source: Annual Reports of FY 2019-20 of Alok Industries Ltd.

Its 27th annual report shows a 26% of total product exports in about 90 countries around the globe.[3] Alok Industries bagged numerous awards such as 'Silver Trophy', 'Certificate of Excellence by Kohl group', etc. All these happened to be added as a feather on their hat.

4. JOURNEY OF ALOK INDUSTRIES SINCE INCORPORATION

1986	Incorporation of Company
1993	Becomes a public limited company with a Rs. 4.5 crore
1995	Sets up financial and technical collaboration with Grabal, Albert Grabher GmbH & Co of Austria to make embroidered products through a joint venture company, Grabal Alok Impex Ltd.
1996	Annual sales of Rs. 100 crores
1997	Right issue of equity shares aggregating to Rs. 14.98 crore
1998	Private placement of equity shares of Rs. 16 crore to Century Direct Fund (Mauritius).
2000	Turnover exceeds Rs. 300 crore, including export of Rs. 9 crore.
2001	Expansion initiated under Technology Upgradation Fund Scheme (TUFs) for weaving and processing capacities with investment of Rs. 225 crore.
2002	◆ Rights issue of FCDs of Rs. 51 crore. ◆ Turnover exceeds Rs. 550 crore.
2004	◆ Turnover surpasses Rs. 1,000 crore ◆ Commenced Phase I & II of expansion programme (Spinning, Weaving, Processing & garmenting) aggregating to Rs. 1,175 crore under TUFs.
2005	◆ FCCB issue of USD 35 million.

2006	◆ Texprocil silver trophy awarded for second highest export in manufacturer exporter - made ups category. ◆ FCCB issue of USD 70 million.
2007	◆ ISO 9001:2000 certification obtained ◆ Turnover reaches Rs. 1,800 crore, Export at Rs. 640 crore ◆ Domestic retail brand 'H&A' launched ◆ Embarked on expansion of Rs. 1,100 crore under phase III under TUFs
2008	◆ Turnover crosses Rs. 2,000 crore ◆ Exports crosses Rs. 1,000 crore ◆ Raised ECB of USD 90 million ◆ Acquired stake in UK retail "Store Twenty One"
2009	◆ Rights issue of Equity shares of Rs. 450 crore completed
2010	◆ Turnover touches Rs. 4,300 crore, Exports crosses Rs, 1,500 crore ◆ Qualified Institutional Placement of Equity Shares of Rs. 425 crore
2011	◆ 25 years of corporate journey completed ◆ Turnover crosses Rs. 6,300 crore, Exports reach Rs, 2,200 crore
2012	◆ Turnover crosses Rs. 8900 crores Exports reach Rs. 3030 crores.
2013	◆ Won the maximum number of Export Awards for the year 2012-2013 ◆ Export Crosses Rs. 5000 crores ◆ Rights Issue of Rs. 551 crores ◆ Domestic sales crosses Rs. 14,808 crores
2015	◆ Domestic sales crosses Rs. 18,269 crores ◆ Exports crosses Rs. 3861 crores
2016	◆ Domestic sales crosses Rs. 10,699 crores ◆ Exports crosses Rs. 1223 crores
2017	◆ Pursuant to an application made by State Bank of India, the Hon'ble National Company Law Tribunal, Ahmedabad bench ("Adjudicating Authority"), vide its order dated 18th July, 2017, had ordered the commencement of the corporate insolvency resolution ("CIR") process in respect of the company under the provisions of the Insolvency and Bankruptcy Code, 2016 ◆ Domestic sales was around Rs. 7243 crores ◆ Exports were around Rs. 1082 crores ◆ Loss before tax was Rs. 5,625 crore
2019	◆ On 08th March, 2019 NCLT approved the resolution plan submitted JM Financial Asset Reconstruction Company Ltd. and Reliance Industries Ltd.

2020	◆ The overall operations of the company continued to run at average of about 30% due to working capital constraints. ◆ Total sales of the Company increased by 1.20% to Rs. 3,166.34 crore from Rs. 3,128.76 crore in the previous year: ◆ Domestic sales increased by 3.2% to Rs. 2,385.97 crore from Rs. 2312.76 crore in the previous year. ◆ Export sales decreased by 4.4% to Rs. 780.38 crore from Rs. 816.00 crore in previous year. ◆ Operating Profit before Tax (PBT) (before exceptional items) was loss of Rs. 830.09 crore as compared to PBT (before exceptional items) loss of Rs. 4,763.96 crore in the previous year. ◆ The reported Profit after Tax (after exceptional item) for the year was Rs. 1,224.55 crore as compared to Profit After Tax (after exceptional item) of Rs. 2,283.82 crore.

5. THE RISE OF ALOK INDUSTRIES

Up till 15 years since its incorporation, the company carried on its business very smoothly in readymade garments, polyester yarns and spinning & weaving. But soon, success slipped out of its hands and Alok industries found itself on the edge of bankruptcy. Let us understand how.

In 2005, company wanted to expand their business as well as wanted to set up few new business plans. As a result they opted for two expansion plans. ***First***, they wanted to increase their spinning capacity for which they invested around Rs. 10,000 Crore rupees. These funds for investment were raised through debts. The company was very confident about their expansion plans, but there were major managerial flaws, the resources and assets of the company were underutilized, due to which there was not much rise in the profits of the company. ***Second***, next expansion was to open retail textiles stores to sell garments, both in India and outside. By this time, company officially started seeking huge losses. They launched a garment retail chain under the name *'H&A Store'* in India, they opened around 350 stores within a period of 3 years. Simultaneously, they launched similar stores in U.K as *'Store 21'*, they opened around 220 stores in U.K. as well.

All these expansions were done with the help of taking debts from banks and it became difficult for company to pay such huge amount. The borrowings of the company took a whooping jump of 800% from the year 2007 to 2017. The borrowing of Rs. 3337 crore in the financial year 2007 increased to Rs. 25,506 crore in 2017.[4] In 2007, company also entered into the real estate business by acquiring commercial property through its subsidiary company-Alok Infrastructures Limited. This also required large amount of capital.

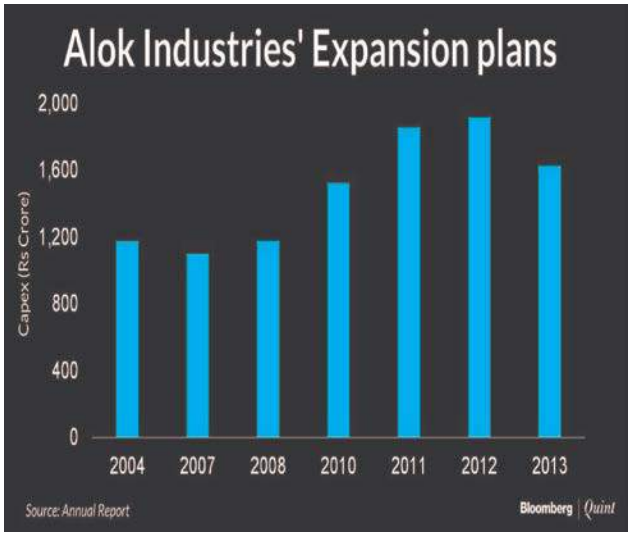
Due to poor management, these huge scale investments went in vain, both the strategies of the company failed, the profits from the retail outlets were also very poor. The company was eventually left with no other choice but to close these stores, they gradually closed almost all the stores across India and abroad.

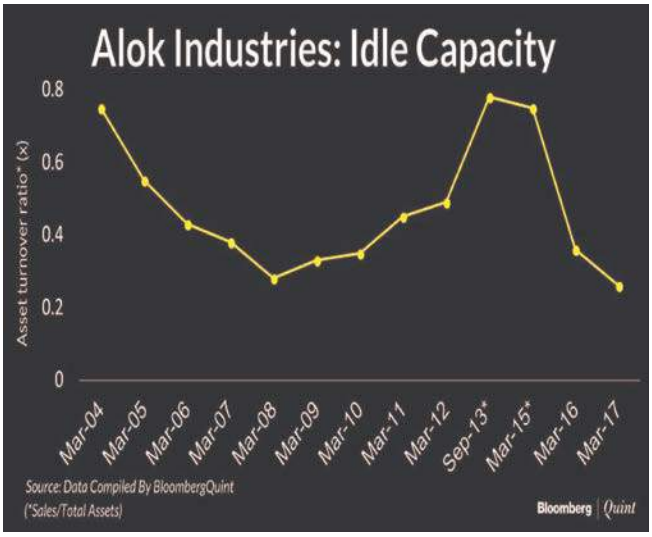
6. THE FALL OF ALOK INDUSTRIES

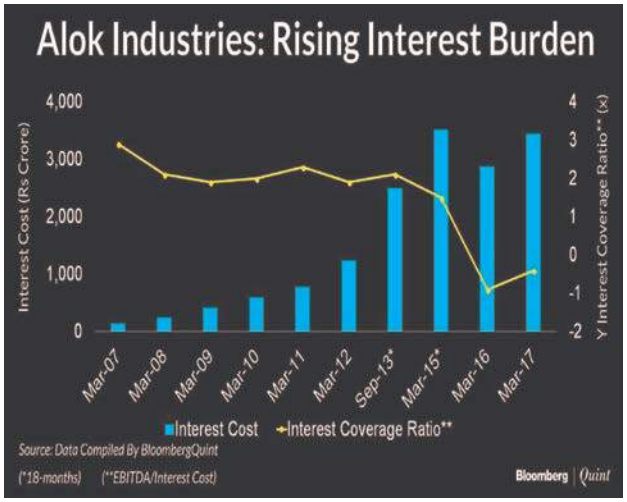
The idea of expansion was not a sound decision for the Alok industries and as it was going into losses so they decided to shut down their retail stores. So all the stores in India as well as U.K. were all closed. By the end of 2012, the closure process of the retail stores had started,[5] almost 500 stores both in India and U.K. were shut down, it was evident that the company's expansion plans had failed tremendously, but an even bigger issue was still awaiting the attention of the company *i.e.* its debts.

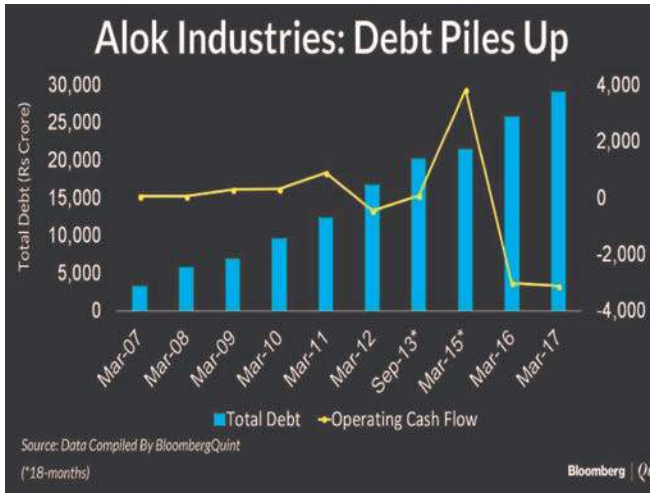
Several banks have given the debt to the Alok Industries limited such as SBI along with several other banks.

Between March 2007 till September 2013, the company saw its debt jump six times to Rs. 20,230 crore. To add to company's woes, interest rates started to rise. The company's own interest costs jumped to about 13 per cent from 7.5 per cent. This put pressure on the company's ability to service debt. Over time, interest costs became the second largest expense for Alok Industries after raw materials.









Source: Bloombergquint[6]

As the company has expanded its business by taking debt and it was becoming very difficult for the company to repay such amount. In the result of which, they incurred huge losses. In 2007, they incurred the loss of about Rs. 3337 crores and in the year 2010, they incurred the loss of Rs. 9673 crores. Like this, the debt also increased and in 2017 it incurred it to Rs. 30000 crores and accordingly, the debt amplified by 800%.

Alok Industries could not utilize its assets well. The assets turnover ratio which indicates the efficiency of deploying assets to generate revenue, remained below and declined sharply. Irrespective of the success or failure of the company's strategies and plans, the company was bound to pay back the debts along with the interest. By 2017, the company was burdened under the weight of its enormous financial debts. It took no time for the company to reach a point where the second biggest expense of the company, after raw material cost, became the cost of interest. Till 2007, because the borrowings were low, the interest cost was Rs. 142 crore, but this amount took a disastrous increase, by 2015. The interest on debts increased to Rs. 3,513 crore. This amount was unimaginably huge as compared to the size of the company. Till 2015, the net profits of the company ranged from Rs. 200 to Rs. 300 Crore, but due to the burden of debts and interest on them, the company started booking huge losses, within one year, the company moved from a profit of Rs. 258 crore (2015) to a loss of Rs. 4357 crore (2016) and another loss of Rs. 3083 crore (2017).

So in June 2017, the Reserve Bank of India released the list of 12 companies that were not able to repay the debt amount to the banks to go into the process of insolvency. Alok Industries was one of those 12 stressed accounts identified by RBI. Several banks had given the debt to the Alok Industries Limited such as SBI along with several other banks.

As on 31-5-2017, following were the amount defaulted by Alok Industries against banks[7]:

1. State Bank of India: Rs. 2218.56 crores
2. State Bank of Patiala: Rs. 309.92 crores
3. State Bank of Hyderabad: Rs. 419.20 crores
4. State Bank of Mysore: Rs. 252.63 crores
5. State Bank of Travancore: Rs. 320.04 crores
6. State Bank of Bikaner and Jaipur: Rs. 251.80 crores

The Hongkong and Shanghai Banking Corporation Limited had also filed winding up petition against Alok Industries before the Hon'ble High Court of Bombay in 2016. However, such petition was not admitted.

7. REASONS FOR FINANCIAL STRESS

Issues	Financial Stress
Expansion in Spinning	As the company was very sure about the spinning business but there were few points which was a shortfall as the Alok industries' spinning business was underutilized and then also they have expanded their spinning capacity. They were not able to utilize the assets properly. Analyst also said Alok Industries invested in the spinning business which already had excess capacity in India, therefore the same could not generate a commensurate revenue for the company.
Diversification gone wrong	Apart from expansion, company also get into new business ventures. It opened retail stores in India and U.K. in the name of H&A and Store 21. It also entered into real estate sector through incorporating its subsidiary company- Alok Infrastructures Limited, wherein also huge capital was locked up.
Expansion of business by taking debts	The company begged huge loans from banks to support all expansion and investment activities. These loans grew with time and so did the cost of interest. Alok Industries expanded its borrowings around Rs. 30000 crore and this placed the company in the radar of RBI. Accordingly, RBI included Alok Industries in the list of 12 stressed accounts which RBI asked banks to refer to the NCLT for initiating insolvency proceedings.

Textile industry, by nature is very volatile, sometimes there is huge demand, and suddenly there is none. At the time, when Alok industries were already trying to make up for its past mistakes, it went on to make blunders. This company entered into the real estate sector in 2007. They set foot in the retail markets through H&A and Store 21.[8] This trail of losses, market competition, operational inefficiency & internal mismanagement led to shutting down of most of the retail sector. When the company actually realized that it is making losses, it was deeply drowned by debts. Alok industries due to mismanagement was blindly borrowing huge amounts and investing.

It is pertinent to understand what led to the company defaulting their loans, borrowing money from banks and investing them into operations, it became a huge problem when such investments do not yield good sales thereby leading to profits. If we analyze the data below in *Table 1*, it will be evident that the sales of the company on March 2007 was Rs. 1,806 Cr. It kept on increasing steadily till March 2017, but just the next year in 2018 we see a huge drop. The sales dropped from Rs. 24,153 Cr. in 2015 to Rs. 12,924 Cr. in 2016, and further to Rs. 8,723 Cr. in 2017. Simultaneously, we see the borrowings increase from Rs. 3,337 Cr. in 2007 to Rs. 25,506 Cr. in 2017. This had a major

impact of the profitability of the business. The profits drastically fell from Rs. 165 Cr. in 2007 to a loss of Rs. 3,083 Cr. in 2017. This led to continuous default in loan installment payments. The company was not even in a position to pay back the interest amount of the loan let alone the principal amount. This was basically a case of extremely high expansion, not backed by a strong revenue growth. The lenders were definitely not going to be quite.

Table 1

March	Borrowings	Interest	Sales	Net Profits
2007	3,337	142	1,806	165
2008	5,834	252	2,234	190
2009	6,956	418	3,021	74
2010	9,673	599	4,327	138
2011	12,123	782	6,615	312
2012	16,050	1,235	9,785	93
2013	19,932	2,814	21,388	297
2015	18,009	3,513	24,153	258
2016	22,037	2,874	12,924	-4,357
2017	25,506	3,442	8,723	-3,083
2018	27,415	4,711	5,514	-18,580

Source: www.screener.in

8. CORPORATE INSOLVENCY RESOLUTION PROCESS

On the 12th of June 2017, the Internal Advisory Committee (IAC) of the RBI identified 12 accounts that covered about 25% of the banking systems non-performing assets, for immediate resolution under the Insolvency and Bankruptcy Code. The IAC directed the lender Banks to refer to the Insolvency and Bankruptcy Court for all accounts with total outstanding loans amounting to more than INR 5,000 crore, with at least 60% classified as non-performing by banks as on March 31, 2016.[9]

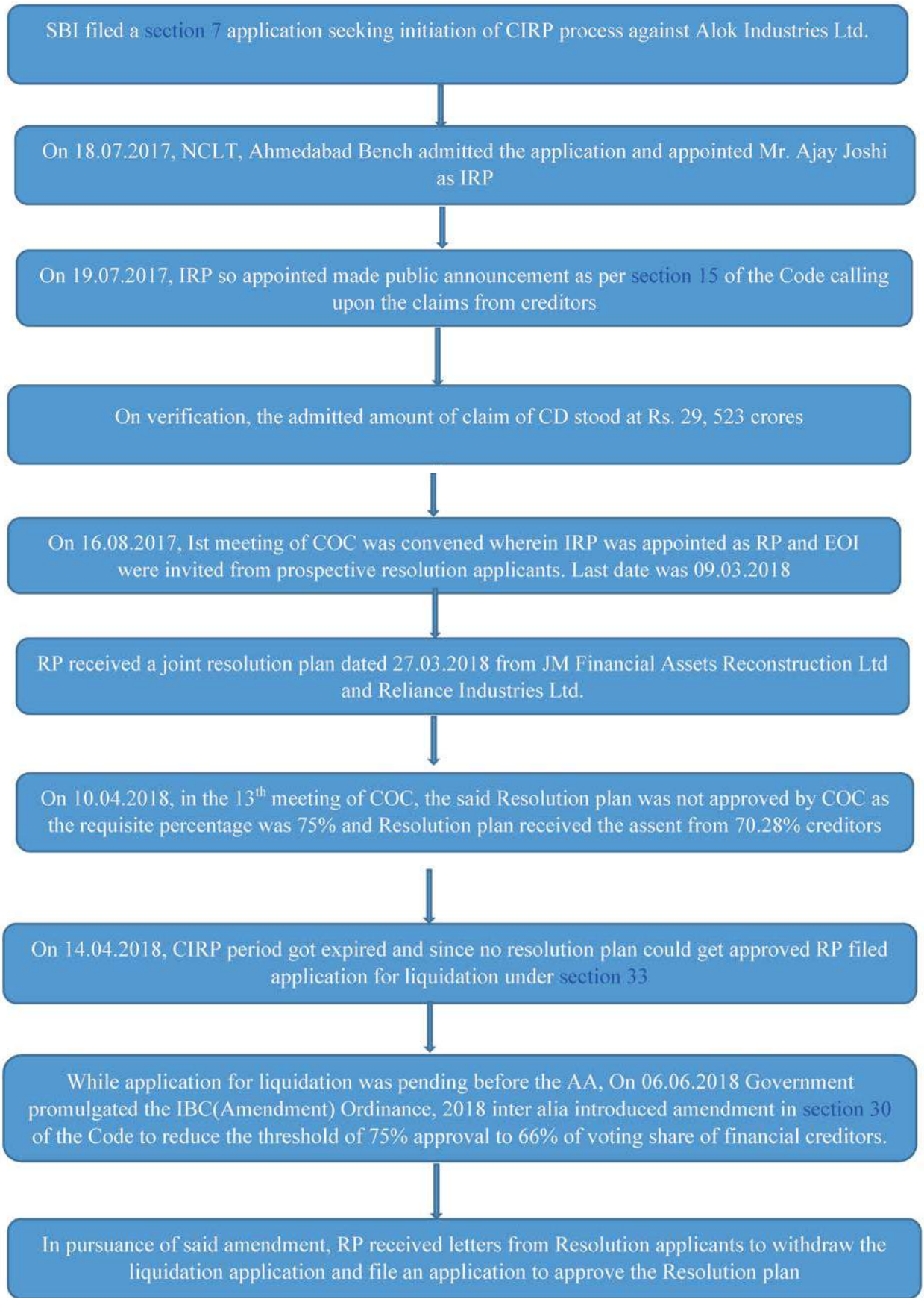
State Bank of India (SBI), the lead bank initiated the insolvency proceedings against Alok Industries in June 2017. The company owed the lenders a total of 30,000 crore. The Ahmedabad bench of the National Company Law Tribunal (NCLT) admitted the State Bank of India's insolvency petition, appointing Mr. Ajay Joshi as the Interim Resolution Professional (IRP) for insolvency proceedings. A case for liquidation was already pending before the Bombay

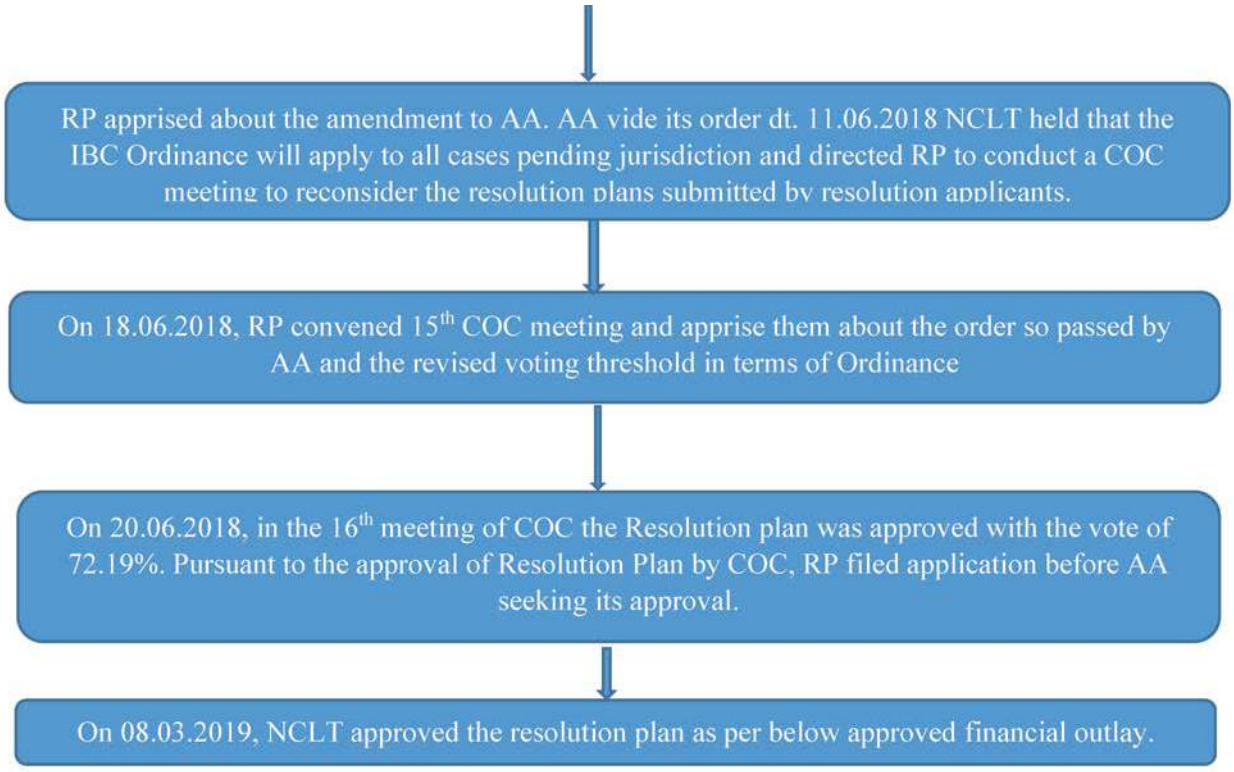
HC, prior to SBI's application. Industrial and Commerce Bank of China (ICBC) even sought dismissal of the insolvency proceedings, but to no avail, as Section 238 of the Insolvency and Bankruptcy Code (IBC), 2016, prevailed over the former as a subsequent Act.[10] By December 2017, the Insolvency Professional supervising the bankruptcy process of the company had to call for fresh bids to resolve the Rs. 29,000 Cr. default. Among the 12 NPA Accounts listed by the RBI's IAC, Alok Industries was the only company that did not receive any bids when the insolvency professional invited Expression of Interest (EoI).

By June 2018, Reliance Industries Ltd.(RIL) along with JM Financial Asset Reconstruction Company (ARC) managed to get the approval of the lenders, striking the deal for Rs. 5,050 Cr. out of which Rs. 4,550 Cr. were supposed to be given to the lender banks, and Rs. 500 Cr. to be invested in the company. RIL acquired a stake of 37.7% for Rs. 250 crore and JM Financial 6.15% in Alok Industries as part of resolution plan[11]. The Banks had to take a haircut of around 86%.

The CoC had no intentions to accept such an offer, one of the earlier joint resolution plan had been rejected by the CoC in April 2018. This second round of voting was done because 270 day deadline to resolve insolvency causes under the IBC had passed, and the company was set to be sent for liquidation.[12] Fearing that liquidation would lead to erosion of value and a loss of livelihood, the employee's trust of the company and other operational creditors had filed an interlocutory petition in NCLT, Ahmedabad. Thereafter, on the direction of the tribunal, the Resolution Professional asked the CoC to reconsider the new resolution plan.[13]

In the case of Alok Industries, banks recovered only Rs. 5,000 crore against claims of close to Rs. 30,000 crore. Following is the flow of events of the case before the NCLT, Ahmedabad:


SBI filed a section 7 application seeking initiation of CIRP process against Alok Industries Ltd.
On 18.07.2017, NCLT, Ahmedabad Bench admitted the application and appointed Mr. Ajay Joshi as IRP
On 19.07.2017, IRP so appointed made public announcement as per section 15 of the Code calling upon the claims from creditors
On verification, the admitted amount of claim of CD stood at Rs. 29, 523 crores
On 16.08.2017, Ist meeting of COC was convened wherein IRP was appointed as RP and EOI were invited from prospective resolution applicants. Last date was 09.03.2018
RP received a joint resolution plan dated 27.03.2018 from JM Financial Assets Reconstruction Ltd and Reliance Industries Ltd.
On 10.04.2018, in the 13th meeting of COC, the said Resolution plan was not approved by COC as the requisite percentage was 75% and Resolution plan received the assent from 70.28% creditors
On 14.04.2018, CIRP period got expired and since no resolution plan could get approved RP filed application for liquidation under section 33
While application for liquidation was pending before the AA, On 06.06.2018 Government promulgated the IBC(Amendment) Ordinance, 2018 inter alia introduced amendment in section 30 of the Code to reduce the threshold of 75% approval to 66% of voting share of financial creditors.
In pursuance of said amendment, RP received letters from Resolution applicants to withdraw the liquidation application and file an application to approve the Resolution plan



9. SEQUENCE OF EVENTS OF CIRP PROCEEDING BEFORE NCLT

The thumbnail sketch of the sequence of events of CIRP proceedings before NCLT according to the orders passed in the Insolvency Process of Alok Industries by the NCLT are set out hereunder.

Order Dated	Order Passed by	Brief of the Order
18th July, 2017	NCLT, Ahmedabad	A Petition under section 7 of the IBC was filed by the State Bank of India against Alok Industries on the direction of the RBI via its letter dated 15th June 2017. The HSBC Bank had also filed winding up petition against Alok Industries before the Hon'ble High Court of Bombay in 2016. However, the petition was not admitted. One of the controversies in this order of admission was whether the tribunal can entertain the petition despite the pendency of a winding up petition before the Hon'ble High Court of Bombay. But Section 238 of the code came to a rescue, it was held that the provisions of this code have overriding effect over any law which is inconsistent with the provisions of the code. Also since no winding up order had been passed by the concerned High

Order Dated	Order Passed by	Brief of the Order
		Court, the Tribunal deemed it fit to maintain the application before it. Adjudicating Authority basing on material available on record, concluded that there exists default and a default had occurred in repayment of the financial debt. The AA admitted the application under section 7 sub-section 5(*a*), appointing Mr. Ajay Joshi as the IRP under section 13(1)(*c*) of the Code.
24th October, 2018	NCLT, Mumbai	A petition was filed against Alok Infrastructures Ltd., a subsidiary of Alok Industries Ltd., by Axis Bank under section 7 of the IBC on the ground that Alok Infrastructures defaulted in making payment of Rs. 100,32,11,439/- including interest. NCLT admitted the petition basis the records filed by the creditor.
1st November, 2018	NCLT, Ahmedabad	An IA filed for withdrawal of 298/2018 in view of the NCLAT order wherein the Hon'ble appellate court observed that clause (*b*) and (*c*) of the regulation 38(1) are inconsistent with section 240(1) of the IBC, 2016. Further it was observed that any resolution plan which provides liquidation value to the Operational/Financial Creditor(*s*) in view of the said regulations without any other reason to discriminate between two set of creditors similarly situated cannot be approved being illegal. In this view the prayer for withdrawal of IA 298/2018 was allowed. It was further ordered that all the dissenting financial creditor shall be paid in proportion to their respective value of the outstanding debts, in the same manner as the assenting member.
4th January, 2019	NCLT, Ahmedabad	An application was filed under section 60(5) of the Code, by IDBI Bank (one of the financial creditors), against the provisions Resolution Plan stating the same to be self-contradictory. The applicants had voted against 2 resolution plans earlier. After the Amendment to the Code whereby required majority of voting share was reduced to 65%, the Employee's Welfare Trust of the Corporate Debtor filed an Interim Application requesting to reconsider the Resolution Plan. In the 16th Meeting of the CoC the said Resolution Plan was Approved on 21-6-2018 by 73.19%. IDBI Bank had alleged that the Plan seeks to curtail the rights of IDBI over the securities created by the third party security provider as the amount to be recovered is restricted to Rs. 10 Crore only, thereafter it would be assigned to the ARC Trust. It was later held that Sections 3 and 7, does not amount to a waiver by Financial Creditor of any of their claims against subsidiaries. It was observed that there is no ambiguity in the resolution plan and INR 10 Crore is just a commercially agreed cap in terms of enforcement of security over immovable properties of the 3rd party.

Order Dated	Order Passed by	Brief of the Order
8th March, 2019	NCLT, Ahmedabad	An Interim Application No. 259 of 2018 was filed for approval of the Resolution Plan under section 30(6) r/w section 31(1) of the Code r/w Reg. 39(4) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016. A lot of Intervention/Interlocutory Applications were filed with various grievances. It was observed that these applications were filed after the application for approval of Resolution Plan was filed by the Resolution Applicants. These applications were filed at such a belated date, that their claims did not seem *bonafide*. The court while rejecting these applications observed that these applicants were well aware of their fate and position but none of them approached the AA on the date of Approval of the Plan. This application approved the Resolution Plan with immediate effect, allowing IA 259/2018 and dismissed all the other IAs.
26th July, 2019		An I.A. No. 320/2019 was filed by the Applicant under section 60(5) of the Code, seeking clarifications/rectifications of the typographical errors in the Order dated 8th March 2019. The court found that there are certain typographical errors due to inadvertence, which were rectified, *vide* the said order.
24th October, 2019	NCLAT	A Company Appeal (AT) no. 1093/2019 was filed after 191 days. It was brought to the notice of the court that the said appeal is barred by limitation. The appellants did not appear before the court during the previous hearings. The court resultantly held that it cannot condone the delay beyond 15 days, and are not inclined to adjourn the matter.

10. PERFORMANCE OF THE COMPANY BEFORE, DURING AND POST CIRP PROCESS

The table below highlights the financial performance of Alok Industries in the last five years:

(Amount in Rs. crore)

	Post CIRP		During CIRP		Pre-CIRP
Particulars (in Crs.)	**2021**	**2020**	**2019**	**2018**	**2017**
Revenue	3,735.32	3,166.34	3,128.76	5,381.95	8,326.06
Other Income	21.66	85.19	124.32	236.31	165.69
Total Income	3,756.98	3,251.53	3,253.08	5,618.26	8,491.75
Expenditure	-7,903.43	-1,499.62	-438.69	-23,294.87	-13,605.10
Interest	-472.72	-98.57	-4,158.00	-4,682.87	-3,273.52
PBDT	-4,146.45	1,751.91	2,814.39	-17,676.61	-5,113.35
Depreciation	-285.43	-529.45	-533.17	-527.81	-512.62

	Post CIRP		During CIRP		Pre-CIRP
Particulars (in Crs.)	**2021**	**2020**	**2019**	**2018**	**2017**
PBT	-4,431.88	1,222.46	2,281.22	-18,204.42	-5,625.97
Tax	-1,423.11	0.73	0.91	-11.19	2,123.54
Net Profit	-5,854.99	1,223.19	2,282.13	-18,215.61	-3,502.43
Equity	496.53	221.08	1,368.64	1,368.63	1,357.87
EPS	-15.68	8.45	16.67	-134.14	-25.80
CEPS	--	--	20.57	-129.24	-22.02
OPM %	-111.01	55.33	89.95	-328.44	-61.41
NPM %	-156.75	38.63	72.94	-338.46	-42.07

Source: BSE

As the company was earning profit till 2015 but after that, the company was earning losses continuously till 2018. In 2019, the company earned profit because of exceptional items. In 2020 also, the company did not earn profit and for the first three quarters, the company had suffered a loss of a huge amount. Textile firm Alok Industries reported a consolidated net loss of Rs. 500.11 crore for the quarter ended March 31, 2021. The company had reported net profit of Rs. 1,790.87 crore of the corresponding quarter a year ago. Total income during the quarter under review stood at Rs. 1,478.63 crore, up 95.04 per cent, as against Rs. 758.11 crore reported in the same quarter a year ago.[14] The company reported exceptional gain of Rs. 2,052.55 crore in January-March 2020, on account of debt resolution plan.

Net Loss of Alok Industries reported to Rs. 92.44 crore in the quarter ended June 2021 as against net loss of Rs. 10192.80 crore during the previous quarter ended June 2020. Sales rose 254.04% to Rs. 1223.07 crore in the quarter ended June 2021 as against Rs. 345.46 crore during the previous quarter ended June 2020.[15]

11. DURING CIRP-2019

The joint Resolution Plan of JM Financial Assets Reconstruction Ltd and Reliance Industries Ltd for the Company had been approved by the Adjudicating Authority. After the approval of the Resolution Plan, a monitoring committee was formed w.e.f 12th march, 2019 to manage the affairs of Alok Industries as a Going Concern. The resolution plan proposed reduction of the Company's share capital without any payout to the shareholders, by reducing the face value of each issued and outstanding equity share. Interest on the borrowings accrued for the period from 2017-2019, amounting to Rs. 7045.19 crore was derecognized. Arising out of this adjustment, the Company recorded a total comprehensive Income of Rs. 2283.02 Crore for the year ended 31st March, 2019. The Company's accumulated losses amounted to Rs. 15658.54 Crore. Total liabilities of the Company as on 31st March, 2019, exceeded total assets by Rs. 12922.11 Crore.

Source: moneycontrol.com[16]

Source: moneycontrol.com

Source: moneycontrol.com

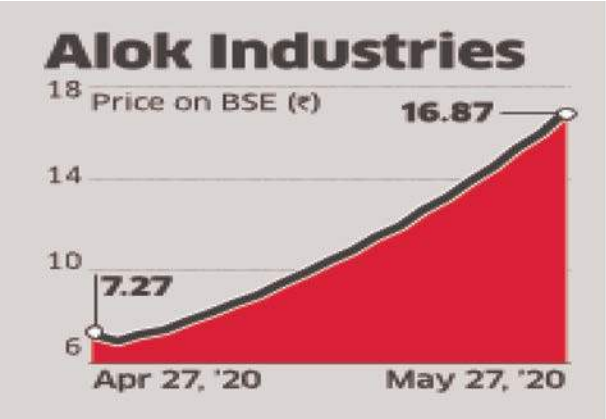
Revenue from operations for the period up till June, 2017 included excise duty, which is discontinued with effect from 1st July, 2017 upon implementation of Goods and Service Tax (GST) Act. The revenue in 2019 saw a steep fall since 2017 as the company's level of operations during that time period was at 30% capacity only. The net profits did see a positive figure during this period even during the Company went through the CIR Process. The Return on Equity (ROE) also saw a great positive change from -183 in 2017 to -14 in 2019. For better understanding please refer to the Graphical representation of Revenue, Net Profits and ROE hereinabove.

As there was no bid for the Alok Industries as there was no such progress in the company so Mukesh Ambani's Reliance Industries along with JM financial decided to takeover Alok industries limited at a bid of Rs. 5050 cores out of which Rs. 4550 crore had been paid to the banks from which the lot industries have taken the loan and remaining 500 crore were to be invested in the company. Hence, that's how in the restructuring process banks suffered loss of Rs. 25000 crore, which was around 86% haircut. As a result of which, the Reliance Industries got 37.7% stakes in Alok industries and JM financial got 6.15% stakes in Alok industries. And remaining stakes are in the hands of the public and entities.

12. POST CIRP (2020-21)

The Mumbai-based Alok Industries was acquired by Reliance Industries along with JM Financial Asset Reconstruction Company in 2019 after the Ahmedabad bench of the National Company Law Tribunal (NCLT) had in March 2019 approved their bid for Rs. 5,050 crore.

In the process of restructuring, the company got delisted from the stock exchange. But on 27 February 2020, the company got listed on the stock exchange after it was taken over by the Reliance and JM financials at Rs. 14/- per share. But due to the pandemic COVID-19 which has spread throughout the country and has disturbed several sectors of the economy, the price of the share of Alok Industries also falls at Rs. 4/- per share.



Source: Economic Times

The Company recorded a total comprehensive income of Rs. 1224.55 crore for year ended 31st March, 2020.

Further, due to the outbreak of Corona virus Disease (COVID-19), the company had to temporarily suspend operations. Alok Industries had informed exchanges earlier that it had shut its manufacturing units and offices from March, 2020 due to Covid-19. But after the production resumed at some places of production, the company did see increased revenue generated in the year. Net profits also increased considerably. The Company's operations and revenue during the period

were impacted due to Covid-19 and also due to the fact that the capacity utilization over the past few years have been in the range of 25-30%. With the new business plan in place, there was a focus to increase the capacity utilization gradually in a phased manner.

To gather a better understanding of the performance of the Company, a comparative chart of some financial ratios is produced below:

	Post CIRP		During CIRP		Pre-CIRP
	2021	2020	2019	2018	2017
Basic EPS	**-15.68**	**8.45**	**16.67**	**-134.15**	**-25.79**
Revenue from Operations/Share (Rs.)	7.52	14.32	22.86	38.97	59.87
PBDIT/Share (Rs.)	-0.87	-0.91	-0.53	-94.95	-13.55
PBIT/Share (Rs.)	-1.45	-3.31	-4.43	-98.81	-17.32
PBT/Share (Rs.)	-8.93	5.53	16.67	-133.02	-41.43
Net Profit/Share	**-11.79**	**5.53**	**16.67**	**-133.11**	**-25.79**
Enterprise Value (Cr.)	32,604.37	28,426.84	23,402.78	24,634.48	22,669.61
EV/EBITDA (X)	-75.36	-140.68	-321.47	-1.90	-12.32
Market Cap/ Net Operating Revenue (X)	2.68	0.27	0.19	0.08	0.05
Price/Net Operating Revenue	2.68	0.27	0.19	0.08	0.05
Earnings Yield	**-0.59**	**1.41**	**3.75**	**-44.52**	**-8.68**

Table 2- Source: www.screener.in; Source: Economic Times

Looking at the aforementioned ratios, it is evident that Earnings Per Share since 2017 has definitely travelled a path towards betterment. The profitability of the company has drastically increased since 2018 from -134 EPS to 2020 recording 8.45 EPS. The Net operating Revenue was also increased from 0.08 in 2017 to 2.68 in 2021. The earning yield has also increased from a negative 44.5 in 2017 to a positive 1.4 in 2020. This is definitely due to the increase in revenue and Net Profits during that period.

13. CONCLUSION AND RECOMMENDATION

The Adjudicating Authority is quite clear in its terms when it comes to the compliance with the objectives of the Insolvency and Bankruptcy Law in India. It was by April 2020, that the lenders received their monies from RIL and JM Financials Ltd for Alok Industries Resolution.

Looking at this case, it is evident how serious our Tribunals are about long term aims and essence of the Code. Very efficiently

the AA highlighted the importance of resolution above liquidation, taking the Apex Courts decision in the matter of *K Sashidhar* v. *Indian Overseas Bank & Ors.* as the precedent. The NCLT in this matter, very efficiently accentuated the fact that priority is to be given to the resolution and not liquidation. Liquidation is never in the larger interest of public, workmen and stakeholders directly related to the corporate debtor, it should always be the last resort. Resolution is a Rule and Liquidation is an Exception.

The Resolution Process of Alok Industries was quite a roller coaster ride for everyone related to the process, it brought about better understanding of the IBC and resulted in the achievement of its aims. It is the result of this that we are witnessing a betterment in the health of the company. The company had seen days as bad as getting delisted from the BSE, it got relisted at Rs. 14 per share and dipped to Rs. 4 per share in March 2020, due to the Covid-19 Outbreak.

Also, due to the nature of business being in textiles, the company had seen a great business opportunity of using its resources in the production of PPE Kits and masks being greatly in demand as an essential tool to fight against the Covid-19 Pandemic.[17] When this pandemic COVID-19 has spread and also the deficiency of PPE kit and masks has been observed and it was taken into consideration by Mr. Mukesh Ambani to start the business of manufacturing PPE kits for the doctors as India was importing it from china at Rs. 2000/- per kit. So to revive Alok industries from the losses, they decided to manufacture PPE kits for doctors at lowered prices so Alok industries (Silvassa plant) started manufacturing PPE kits. Most of the manufacturing units of Alok Industries had to be shut down during this time but later the management decided to produce PPE Kits. After that the Alok industries started increasing the production of PPE kits and gradually started manufacturing more than one lac PPE kits per day.

This was an opportunity for the management of Alok Industries before January 2020. The PPE Kits that were available in India were being imported from China at very high costs and poor quality. The management employed 10,000 workers at their Silvassa Plant just to focus on manufacturing PPE Kits. The share prices of the company has seen a sudden jump within a very short period, there was an upper circuit also imposed by the market regulator. At present, the Share Price is at an average of Rs. 24 per share. India reduced import of PPE kits from china and started manufacturing its PPE kits in its own countries at the lesser amount that is Rs. 650/- and almost 15-18% of the PPE kits are manufactured by Alok industries itself so they cover the large market share in case of manufacture of PPE kits'.

So like this, the reliance industries took over Alok industries, and because of which share price of Alok industries also got affected. The name Reliance itself has hyped up the whole scenario. With the assistance of such a company, Alok industries will soon be placed once again on the ladder of fortune and success. The company is indeed in better hands despite all the unfavourable circumstances in the economy.

●●●

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(2021) 130 taxmann.com 253 (SC)

SUPREME COURT OF INDIA

Anjali Rathi *v.* **Today Homes and Infrastructure (P.) Ltd.**

DR. D.Y. CHANDRACHUD, VIKRAM NATH

AND MS. HIMA KOHLI, JJ. SLP APPEAL (C) NO. 12150 OF 2019†

CIVIL APPEAL NOS. 5231-38 OF 2019

SEPTEMBER 8, 2021

Section 14, read with sections 31 and 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - General - Home buyer agreements were entered between petitioners-home buyers and corporate debtor-developer - Housing project was abandoned, as a result, petitioners instituted proceedings before NCDRC and NCDRC allowed claim of petitioners directing corporate debtor to refund principal amount together with interest - Meanwhile, proceedings were initiated against corporate debtor under section 9 and same was admitted - CoC approved resolution plan submitted by consortium of home buyers and Adjudicating Authority was yet to decide on application for approval of said resolution plan - Petitioners, in instant special leave petition, raised grievance that application filed for initiation of corporate insolvency resolution process was merely to stall refund of amount due to petitioners in terms of NCDRC order - Petitioners submitted that during course of proceedings before instant Court, settlements were arrived at and therefore promoters of corporate debtor shall be held liable personally to honour settlement - Whether moratorium was only in relation to corporate debtor and not in respect of directors/management of corporate debtor, against whom proceedings could continue - Held, yes - Whether thus, petitioners were not to be prevented by moratorium under section 14 from initiating proceedings against promoters of corporate debtor in relation to honouring settlements reached

before instant court - Held, yes (Paras 12 and 15)

FACTS

Home buyer agreements were entered into between petitioners/home buyers and developer/corporate debtor which envisaged that delivery of possession of apartments in almost all cases was to be in 2014.

- Project was abandoned, as a result, petitioners instituted proceedings before NCDRC seeking refund of their monies and NCDRC allowed their claim directing corporate debtor to refund principal amount together with interest.
- Execution proceedings were instituted by the petitioners. The NCDRC passed further orders in the course of execution proceedings directing corporate debtor to refund the entire amount along with interest and costs.
- In the meantime, proceedings were initiated against the corporate debtor under section 9 and the Adjudicating Authority admitted the petition following which corporate insolvency resolution process was initiated and moratorium was declared.
- By a vote of 96.93 per cent, the CoC approved the resolution plan which was submitted by the consortium of home buyers. An application was filed by the resolution professional for approval of the resolution plan before the Adjudicating Authority. The Adjudicating Authority was yet to decide on said application for approval.
- The order of the NCLT resulted in the filing of special leave petition before instant court. The grievance raised in the petition was that application filed for initiation of corporate insolvency resolution process against the corporate debtor was merely to stall the refund of the amount due to petitioners in terms of the NCDRC order.
- Petitioners further submitted that during course of the proceedings before the instant court, settlements were arrived at and hence promoters of the corporate debtor shall be held liable personally to honour the settlements. Reliance was placed on the resolution plan which was approved by the CoC, which contained stipulations that management, promoters, shareholders, managers, directors, officers etc. who were in charge on or before CIRP commence date shall continue to be liable for all the liabilities, claims, demand, obligations, penalties etc.

HELD

- The conspectus of facts before instant Court reveals that the petitioners have participated in the proceedings before the RP and later, the CoC. The Resolution Plan which has been submitted by the consortium of home buyers stands approved by the CoC and

the proceedings are now pending before the Adjudicating Authority, awaiting its approval under section 31(1). If the petitioners have any objections to the Resolution Plan, they are to submit them before the Adjudicating Authority. NCLT is directed to ensure that the application for approval is disposed of expeditiously and preferably within a period of six weeks from the date of receipt of a certified copy of instant order.

- The petitioners urged that the instant Court should direct that the personal properties of the promoters be attached in view of the provisions contained in the Resolution Plan which have been extracted earlier. The Resolution Plan is still to be approved by the Adjudicating Authority under the provisions of section 31(1). Hence, when the Resolution Plan awaits approval, it would not be appropriate for the instant Court to issue a direction of that nature. After the Resolution Plan is approved under the provisions of section 31(1), consequences emanating from the statutory provision would ensue to the benefit of the home buyers.

- Further, since the moratorium declared in respect of the corporate debtor continues to operate under section 14, no new proceedings can be undertaken or pending ones continued against the corporate debtor. (Para 14)

- At this juncture, however the right of the petitioners must be clarified to move against the promoters of the corporate debtor, even though a moratorium has been declared under section 14. In the judgment in *P.Mohanraj* v. *Shah Bros. Ispat (P.) Ltd.*, (2021) 125 taxmann.com 39/167 SCL 327 (SC), a three Judges Bench of the instant Court held that proceedings under sections 138 and 141 of the Negotiable Instruments Act, 1881 against the corporate debtor would be covered by the moratorium provision under section 14. However, it clarified that the moratorium was only in relation to the corporate debtor and not in respect of the directors/ management of the corporate debtor, against whom proceedings could continue.

- Thus, the petitioners would not be prevented by the moratorium under section 14 from initiating proceedings against the promoters of the corporate debtor in relation to honouring the settlements reached before the instant Court. However, as indicated earlier, the instant Court cannot issue such a direction relying on a resolution plan which is still pending approval before an Adjudicating Authority. (Para 15)

- In view of the aforesaid directions, SLP shall stand disposed of as well as the civil appeal. Liberty is granted to the petitioners to take recourse to the remedies which are available in law after the decision of the Adjudicating Authority on

the approval application under section 31(1), and subject to the consequence thereafter. (Para 16)

CASE REVIEW

Today Homes & Infrastructure (P.) Ltd. v. *Gaurav Jain* (2021) 129 taxmann.com 416 (Delhi) (para 15), *set aside* (*See Annex*).

P. Mohanraj v. *Shah Bros. Ispat (P.) Ltd.* (2021) 125 taxmann.com 39/167 SCL 327 (SC) (para 15) *followed*.

CASES REFERRED TO

P. Mohanraj v. *Shah Bros. Ispat (P.) Ltd.* (2021) 125 taxmann.com 39/167 SCL 327 (SC) (para 15).

Pawanshree Agrawal, AOR *for the Petitioner.* **Himanshu Satija**, Adv., **E.C. Agrawala,** AOR **Manoj Yadav,** AOR, **Sushil Kaushik,** Advs., **Ranbir Singh Yadav, Mrs. Shally Bhasin, Ayush Sharma,** AORs, **Aditya Parolia, Piyush Singh, Nithin Chandran, Akshay Srivastava, Ms. Aditi Sinha, Rajesh Kumar,** Advs. and **Gaurav Goel,** AOR *for the Respondent.*

JUDGMENT

Dr. D.Y. Chandrachud, J. - The petitioners are home buyers in a group housing project, Canary Greens in Sector 73, Gurgaon, being developed by the first respondent. Home buyer agreements were entered into between the eleven petitioners and the first respondent. Clause 21 of the agreements envisaged that possession of the apartments would be delivered within a period of thirty-six months, which in almost all cases was to be in 2014.

2. The grievance of the petitioners is that the project was abandoned by the developer. As a result, they instituted proceedings[1] before the National Consumer Dispute Redressal Commission[2] seeking refund of their moneys with interest. On 12 July 2018, the NCDRC allowed their claim by directing the first respondent to refund the principal amount paid by the petitioners together with 12 per cent interest from the date of deposit along with costs within four weeks. There was a provision in the order for interest being enhanced to 14 per cent if the amount was not paid within the stipulated period. This order of the NCDRC has attained finality.

3. Execution proceedings[3] under sections 25 and 27 of the Consumer Protection Act 1986[4] were instituted by the petitioners. The NCDRC issued notice on 7 September 2018. In the meantime, certain orders were passed by the NCDRC on 23 October 2018 in separate execution proceedings pertaining to other home buyers in the same housing project. The first respondent challenged this order of the NCDRC before the High Court of Delhi[5], and by an order dated 19 November 2018, the order of the NCDRC dated 23 October 2018 was stayed by the Delhi High Court.

4. The execution proceedings initiated by the petitioners were adjourned by the NCDRC on 13, 25 and 26 February 2019. Certain settlement terms were offered by the judgment debtor on 27 February 2019, which were not acceptable to the decree holders. On 5 March 2019, the proceedings were again adjourned to explore the proposals furnished by the first respondent. Eventually, on 11 March 2019, since no settlement was arrived at, the Managing Director of the first respondent

was directed to appear personally. The first respondent filed a petition[6] before the Delhi High Court to challenge the order of the NCDRC requiring the personal presence of the Managing Director. By an order dated 27 March 2019, the Delhi High Court issued notice to the petitioners and also issued a direction that no coercive steps shall be taken against the Managing Director of the first respondent in terms of the order dated 11 March 2019 passed by the NCDRC. That has given rise to the first in the batch of Special Leave Petitions before this Court, namely, SLP (C) No 12150 of 2019.

5. On 1 April 2019, the NCDRC passed a further order in the course of the execution proceedings. Paragraph 14 of the order is extracted below:

"As the Judgment Debtor has failed to refund the entire amount as directed by this Commission in its order dated 12th July, 2018, we direct the Judgment Debtor to refund the entire amount along with interest and costs in terms of the order dated 12th July, 2018 within two weeks from today failing which Mr. Ajay Sood, Director, shall be taken into custody and all the properties of the Judgment Debtor and the personal properties of the Judgment Debtor shall be attached and the decretal amount shall be recovered from it. *However, this order of taking into custody and attachment of property shall be given effect into only after the Hon'ble Delhi High Court decides the matter.*"

(*Emphasis Supplied*)

Thus, the execution applications were disposed of. The order of the NCDRC has resulted in the filing of appeals before this Court, being Civil Appeal Nos. 5231-5238 of 2019, by the petitioners/appellants for the limited purpose of challenging the final direction of the NCDRC, *i.e.*, that order of custody of the Managing Director of the first respondent and attachment of properties of the first respondent shall only be given effect to once the Delhi High Court decides the first respondent's petition.

6. During the pendency of the proceedings before this Court, arising out of the order of the Delhi High Court, certain developments took place. On 1 July 2019, notice was issued in SLP (C) No. 12150 of 2019 and the order of the Delhi High Court was stayed. On 11 September 2019, the Court was informed that seven petitioners have settled their dispute and that a settlement with the others was likely.

7. In the meantime, on 31 October 2019, proceedings were initiated against the first respondent before the National Company Law Tribunal[7] under section 9 of the Insolvency and Bankruptcy Code, 2016[8] by an operational creditor. The Adjudicating Authority admitted the petition, following which the corporate insolvency resolution process[9] was initiated and a moratorium was declared under section 14 of the IBC. The specific direction of the NCLT was as follows:

`15. In the given facts and circumstances, the Operational Creditor has established the default on the part of Corporate Debtor in payment of the operational debt. The Petition filed under section 9 fulfils all the requirements of law. Therefore, the petition is admitted in terms of section 9(5) of the IBC. Accordingly, the CIRP is initiated and moratorium is declared in terms of Section 14 of the Code. As a necessary

consequence of the moratorium in terms of section 14(1)(*a*), (*b*), (*c*) & (*d*), the following prohibitions are imposed, which must be followed by all and sundry:

> "(*a*) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
>
> (*b*) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
>
> (*c*) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
>
> (*d*) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor."

This order of the NCLT resulted in the filing of a Special Leave Petition before this Court, being SLP (C) Diary No 45043 of 2019 by certain other homebuyers. The grievance raised in this petition is that the application filed for the initiation of corporate insolvency against the first respondent was merely to stall the refund of the amount due to the homebuyers, in terms of the order of the NCDRC dated 12 July 2018.

8. Thereafter, the petitioners lodged their claims before the Resolution Professional[10], though without prejudice to their contentions in the proceedings pending before this Court. The RP issued an Information Memorandum to prospective Resolution Applicants in terms of the IBC. Two Resolution Applicants came forth before the RP, namely: (*i*) I & E Advertising Private Limited; and (*ii*) a consortium representing the home buyers. It appears that the developer had other projects as well, and the consortium represented the homer buyers of all the projects.

9. In view of these developments, by an order dated 8 July 2021, this Court directed that a meeting of the Committee of Creditors[11] be convened within a period of two weeks so that a final decision could be taken on whether any of the Resolution Plans are acceptable to it. The CoC consists only of representatives of the home buyers, no financial institutions being involved. The Court has been apprised, by Mr Himanshu Satija, counsel appearing on behalf of the RP, that by a vote of 96.93 per cent, the CoC approved the Resolution Plan which was submitted by the consortium of home buyers. On 21 August 2021, an application was filed by the RP for approval of the Resolution Plan before the Adjudicating Authority and some objections have been received. The Adjudicating Authority is yet to decide on this application for approval.

10. Mr Pawanshree Agarwal appears on behalf of the petitioners. Mr Himanshu

Satija appears for the RP. Mr Manoj Yadav appears for second to sixth respondents, a group of home buyers. Mr Akshay Srivastava and Mr Ayush Sharma have intervened on behalf of other home buyers.

11. Mr Pawanshree Agarwal, counsel appearing on behalf of the petitioners submitted that during the course of the proceedings before this Court, settlements were arrived at and hence the promoters of the Corporate Debtor, namely, the first respondent should be held liable personally to honour the settlements, particularly having regard to the order dated 1 April 2019, which was passed by the NCDRC in the course of the execution proceedings. In this context, reliance has been placed on paragraph 10(*g*) of the Resolution Plan which has been approved by the CoC, which contains the following stipulation:

> "10. (*g*) However, the erstwhile management, promoters (*de jure* or *de facto*), shareholders, managers, directors, officers, employees, workmen or other personnel who were in charge on or before CIRP commence date of THIPL shall continue to be liable for all the liabilities, claims, demand, obligations, penalties etc. arising out of any (*i*) proceedings, inquiries, investigations, orders, show causes, notices, suits, litigation etc. (including those arising out of any orders passed by the NCLT or any other court/department pursuant to the provisions of the Code or pursuant to any order passed/imposed by the SEBI), whether civil or criminal, pending before any authority, court, tribunal or any other forum prior to the acquisition of control by the Resolution Applicant over THIPL, or (*ii*) that may arise out of any proceedings, inquiries, investigations, orders, show cause, notices, suits, litigation etc. (including any orders that may be passed by the NCLT or any other court/department pursuant to the provisions of the Code), whether civil or criminal, that may be initiated or instituted post the approval of the Resolution Plan by the NCLT on account of any transactions entered into, or decisions or actions taken by, such existing management, promoters (de jure or *de facto*), shareholders, managers, directors, officers, employees, workmen or other personnel of THIPL, the new management of THIPL and/or the Resolution Applicant shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto."

12. The conspectus of facts before this Court reveals that the petitioners have participated in the proceedings before the RP and later, the CoC. The Resolution Plan which has been submitted by the consortium of home buyers stands approved by the CoC and the proceedings are now pending before the Adjudicating Authority, awaiting its approval under section 31(1) of the under the IBC. If the petitioners have any objections to the Resolution Plan, they are to submit them before the Adjudicating Authority. We direct the NCLT to ensure that the application for approval is disposed of expeditiously and preferably within a period of six weeks from the date of receipt of a certified copy of this order.

13. Counsel for the petitioners urged that this Court should at the present stage

direct that the personal properties of the promoters be attached in view of the provisions contained in the Resolution Plan which have been extracted earlier. The Resolution Plan is still to be approved by the Adjudicating Authority under the provisions of Section 31(1) of the IBC. Hence, at this stage, when the Resolution Plan awaits approval, it would not be appropriate for this Court to issue a direction of that nature. After the Resolution Plan is approved under the provisions of section 31(1), consequences emanating from the statutory provision would ensue to the benefit of the home buyers. Hence, we have already directed that the NCLT shall dispose of the approval application filed on 21 August 2021, within a period of six weeks from the date of receipt of a certified copy of this order.

14. Further, since the moratorium declared in respect of the first respondent Corporate Debtor continues to operate under section 14 of the IBC, no new proceedings can be undertaken or pending ones continued against the Corporate Debtor. Section 14(1) of the IBC reads as follows:

> "14. *Moratorium.*—(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely—
>
> (*a*) the institution of suits or continuation of pending suits or proceedings *against the corporate debtor* including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
>
> (*b*) transferring, encumbering, alienating or disposing of *by the corporate debtor* any of its assets or any legal right or beneficial interest therein;
>
> (*c*) any action to foreclose, recover or enforce any security interest created *by the corporate debtor* in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
>
> (*d*) the recovery of any property by an owner or lessor where such property is occupied by or in the possession *of the corporate debtor*."
>
> (*Emphasis Supplied*)

15. At this juncture, we must however clarify the right of the petitioners to move against the promoters of the first respondent Corporate Debtor, even though a moratorium has been declared under section 14 of the IBC. In the judgment in *P. Mohanraj* v. *Shah Bros. Ispat (P.) Ltd.* (2021) 125 taxmann.com 39/167 SCL 327 (SC) a three judge Bench of this Court held that proceedings under sections 138 and 141 of the Negotiable Instruments Act 1881 against the Corporate Debtor would be covered by the moratorium provision under section 14 of the IBC. However, it clarified that the moratorium was only in relation to the Corporate Debtor (as highlighted above) and not in respect of the directors/management of the Corporate Debtor, against whom proceedings could continue. Speaking through Justice Rohinton F. Nariman, the Court held:

"102. Since the corporate debtor would be covered by the moratorium provision contained in Section 14 IBC, by which continuation of section 138/141 proceedings against the corporate debtor and initiation of section 138/141 proceedings against the said debtor during the corporate insolvency resolution process are interdicted, what is stated in paras 51 and 59 in *Aneeta Hada (Aneeta Hada* v. *Godfather Travels & Tours (P) Ltd.,* (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241) would then become applicable. The legal impediment contained in section 14 IBC would make it impossible for such proceeding to continue or be instituted against the corporate debtor. *Thus, for the period of moratorium, since no Sections 138/141 proceeding can continue or be initiated against the corporate debtor because of a statutory bar, such proceedings can be initiated or continued against the persons mentioned in section 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in section 14 IBC would apply only to the corporate debtor, the natural persons mentioned in section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act."*

(*Emphasis Supplied*)

We thus clarify that the petitioners would not be prevented by the moratorium under section 14 of the IBC from initiating proceedings against the promoters of the first respondent Corporate Debtor in relation to honoring the settlements reached before this Court. However, as indicated earlier, this Court cannot issue such a direction relying on a Resolution Plan which is still pending approval before an Adjudicating Authority.

16. In view of the above directions, SLP (C) No. 12150 of 2019 and SLP (C) Diary No. 45043 of 2019 shall stand disposed of as well as the civil appeal, being Civil Appeal Nos 5231-5238 of 2019. Liberty is granted to the petitioners to take recourse to the remedies which are available in law after the decision of the Adjudicating Authority on the approval application under section 31(1), and subject to the consequence thereafter.

17. Pending applications, if any, stand disposed of.

ANNEX

(2021) 129 taxmann.com 416 (Delhi)

HIGH COURT OF DELHI

Today Homes & Infrastructure (P.) Ltd. v. Gaurav Jain

MS. ANU MALHOTRA, J.
CM(M) NO. 494 OF 2019
CM APPL.NOS. 13977 & 13978 OF 2019
MARCH 27, 2019

Ms. Kankika Agnihotri, **Preeti Singh Oberoi** and **Ms. Sukriti Gandhi**, Advs. *for the Peitioner*.

ORDER

CM APPL. 13978/2019

1. Exemption allowed, subject to just exceptions.

2. The application is disposed of.

CM(M) 494/2019 & CM APPL. 13977/2019

3. Initial submissions have been made on behalf of the petitioner.

4. *Inter alia* reliance is placed on behalf of the petitioner on the proceedings dated 19-11-2018 in CM(M) 1391/2018 submitting to the effect that the facts and circumstances are similar in relation to the tripartite agreements *inter alia* with banks and consumers, *vide* the said order dated 19-11-2018, an ad interim stay of the operation of the order dated 23-10-2018 in Execution Application No. 82/2017 in CC/198/2015 before the NCDRC had been granted till the next date of hearing and the matter having been re-notified for 2nd April, 2019, which is stated to be pending before this Court.

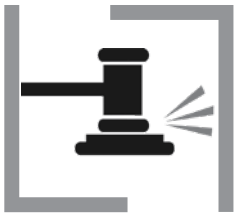
5. Notice of the petition and the accompanying application be issued to the respondents on taking of steps by the petitioner through all permissible modes, process returnable for 2nd April, 2019 till which date, no coercive action be taken in terms of the order dated 11-3-2019 against the petitioner herein.

6. Copy of the order be given Dasti under the Signatures of the Court Master.

●●●

† Arising out of Order of High Court, Delhi in *Today Homes & Infrastructure (P.) Ltd.* v. *Gaurav Jain* (2021) 129 taxmann.com 416

1. Consumer Complaint Nos 1242, 1243, 1245, 1246, 1248, 1249, 1250 and 1251 of 2017
2. "NCDRC"
3. EA Nos 158, 159, 161-162, 164-166 and 168 of 2018
4. "COPRA"
5. CM(M) No 1391 of 2018
6. CM(M) No 494 of 2018
7. "NCLT"/"Adjudicating Authority"
8. "IBC"
9. "CIRP"
10. "RP"
11. "CoC"



(2021) 130 taxmann.com 208 (SC)

SUPREME COURT OF INDIA

Ebix Singapore Private Limited *v.* Committee of Creditors of Educomp Solutions Limited

DR. DHANANJAYA Y. CHANDRACHUD AND M.R. SHAH, JJ.

CIVIL APPEAL NOS. 3224 & 3560 OF 2020 & 295 OF 2021†

SEPTEMBER 13, 2021

I. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether IBC is silent on whether a successful Resolution Applicant can withdraw its Resolution Plan, however, statutory framework laid down under IBC and CIRP Regulations provide a step-by-step procedure which is to be followed from initiation of CIRP to approval by Adjudicating Authority - Held, yes - Whether in absence of any provision under IBC allowing for withdrawal of Resolution Plan by a successful Resolution Applicant, vesting Resolution Applicant with such a relief through a process of judicial interpretation would be impermissible - Held, yes - Whether Adjudicating Authority lacks authority to allow withdrawal or modification of Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in Resolution Plan - Held, yes - Whether IBC framework, does not enable withdrawals or modifications of Resolution Plans, once they have been submitted by RP to Adjudicating Authority after their approval by CoC- Held, yes - Whether enabling withdrawals or modifications of Resolution Plan at behest of successful Resolution Applicant, once it has been submitted to Adjudicating Authority after due compliance with procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by statute - Held, yes (Paras 147, 157, 161, 202 and 204)

II. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether a Resolution Plan, if in compliance with mandate of IBC, cannot be rejected by Adjudicating Authority and becomes binding on its approval upon all stakeholders including Central and State Government, local authorities to whom statutory dues are owed, operational creditors who were not a part of Committee of Creditors (CoC) and workforce of corporate debtor who would now be governed by a new management - Held, yes (Para 110)

III. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether unlike section 18(3)(*b*) of erstwhile SICA which vested Board for Industrial and Financial Reconstruction with power to make modifications to a draft scheme for sick industrial companies, Adjudicating Authority under section 31(2) of IBC can only examine validity of plan on anvil of grounds stipulated in section 30(2) and

either approve or reject plan - Held, yes - Whether Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant; a rejection by Adjudicating Authority is followed by a direction of mandatory liquidation under section 33 - Held, yes - Whether section 30(2) does not envisage setting aside of Resolution Plan because Resolution Applicant is unwilling to execute it, based on terms of its own Resolution Plan - Held, yes (Para 157)

IV. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether a Resolution Applicant, after obtaining financial information of Corporate Debtor through informational utilities and perusing Information Memorandum is assumed to have analyzed risks in business of corporate debtor and submitted a considered proposal; a submitted Resolution Plan is binding and irrevocable as between CoC and successful Resolution Applicant in terms of provisions of IBC and CIRP Regulations - Held, yes (Para 204)

V. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Whether inordinate delays in resolution process cause commercial uncertainty, degradation in value of corporate debtor and makes insolvency process inefficient and expensive and, therefore, NCLAT and NCLT are directed to endeavour, on a best effort basis, to strictly adhere to timelines stipulated under IBC and clear pending resolution plans forthwith - Held, yes (Para 205)

CASE REVIEW

Maharashtra Seamless Ltd. v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567 (SC) (para 138) and *Committee of Creditors of Essar Steel Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 146) *followed*.

Committee of Creditors of Educomp Solutions Ltd. v. *Ebix Singapore Pte. Ltd.* (2020) 119 taxmann.com 184 (NCL-AT) (para 206) *affirmed*.

CASES REFERRED TO

Committee of Creditors of Educomp Solutions Ltd. v. *Ebix Singapore Pte. Ltd.* (2020) 119 taxmann.com 184 (NCL-AT) (para 1), *Ebix Singapore Pte. Ltd.* v. *Mahender Kumar Khandelwal* (2020) 119 taxmann.com 183 (NCL-AT) (para 2), *Kundan Care Products Ltd.* v. *Amit Gupta* (2021) 123 taxmann.com 86/164 SCL 321 (NCL-AT) (para 40), *Astonfield Solar (Gujarat) (P.) Ltd.*,In re (2018) 100 taxmann.com 376/(2019) 151 SCL 123 (NCLT - New Delhi) (para 41), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (Company Appeal (AT) Insolvency No. 1045 of 2019, dated 15-10-2019) (para 57), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 58), *Riya Travel & Tours India (P) Ltd.* v. *C.U. Chengappa* (2001) 9 SCC 512 (para 82), *Committee of Creditors of Essar Steel Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 82), *K Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (para 82), *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (para 83), *Innoventive*

Industries Ltd. v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (para 83), *Swiss Ribbons (P) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (para 83), *Allied Domecq (Holdings) Ltd.* v. *Allied Domecq First Pension Trust Ltd.* (2008) Pens. L.R. 425 (para 85), *Reinwood Ltd.* v. *L Brown & Sons Ltd.* (2008) 1 W.L.R. 696 (para 85), *Doleman* v. *Shaw* (2009) Bus. L.R. 1175 (para 85), *Standard Life insurance Ltd.* v. *Oak Dedicated Ltd.* (2008) EWHC 222 (para 85), *Nagabhushanammal* v. *C Chandikeswaralingam* (2010) 4 SCC 434 (para 85), *National Thermal Power Corporation Ltd.* v. *Siemens Atkeingesellschaft* AIR 2007 SC 1491 (para 86), *Haridwar Singh* v. *Bagun Sumbrui* (1973) 3 SCC 889 (para 86), *ArcelorMittal India (P.) Ltd.* v. *Satish Kumar Gupta* (2019) 105 taxmann.com 186/153 SCL 390 (para 86), *Committee of Creditors AMTEK Auto Ltd.* v. *Dinkar T Venkatasubramanian* (2021) 124 taxmann.com 481/165 SCL 511 (para 91), *Kalparaj Dharamshi* v. *Kotak Investment Advisors Ltd.* (2021) 125 taxmann.com 194 (SC) (para 91), *Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC (India) Ltd.* (2021) 125 taxmann.com 360/166 SCL 678 (SC) (para 91), *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 337 (SC) (para 91), *Hoffinger Indus, Inc , In re* 327 BN 389 (Bankr ED Ark 2005) (para 107), *S.K. Gupta* v. *K.P. Jain* (1979) 3 SCC 54 (para 111), *India Thermal Power Ltd.* v. *State of MP* (2000) 3 SCC 379 (para 115), *TBI Realsations Plc. Oaley Smith* v. *Greenberg* (2004) BCC 81 (CA) (para 119), *Tueker* v. *Gold Fields Mining LCC* (2010) BCC 544 (CA) (para 119), *Heis* v. *Financial Services Compensation Scheme Ltd.* (2018) EWCA Civ 1327 (para 119), *Rhino Enterprises Properties Ltd.*, In re (2020) EWHC 2370 (Ch) (para 119), *Daewoo Singapore Pte Ltd.* v. *CEL Tractors (P.) Ltd.* (2001) 4 SLR 35 (CA) (para 120), *Kempe Larles W. Kampe Jr.* v. *Ambassador Insurance Co.*, (1998) 1 W.L.R. 271 (para 120), *Caratti* v. *Hillman* (1974) WAR 92 (SC) (para 121), *Health Care*, Inc, 287 B.R. 867, (US Bankruptcy Court, WD.) (para 122), *Laxmi Pat Surana* v. *Union Bank of India* (2021) 125 taxmann.com 394/166 SCL 318 (SC) (para 125), *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/138 SCL 567 (SC) (para 138), *Lokhandwala Kataria Construction (P) Ltd.* v. *Nisus Finance and Investment Managers LLP* (2018) 92 taxmann.com 207 (SC) (para 145), *Uttara Foods and Feeds (P) Ltd.* v. *Mona Pharmachem* (2018) 92 taxmann.com 185 (SC) (para 145), *Brilliant Alloys (P) Ltd.* v. *S Rajagopal* 2018 SCC Online 3154 (para 145), *Government of Andhra Pradesh* v. *Smt. P Laxmi Devi* (2008) 4 SCC 720 (para 145), *Satyadhyan Ghosal* v. *Deorajin Debi* (1960) 1 SCR 590 (para 164), *Sheodan Singh* v. *Daryao Kunwar* (1966) 4 SCR 300 (para 166), *Har Krishan Lal* v. *State of J&K* (1994) 4 SCC 422 (para 168), *Daryao* v. *State of U.P.*(1962) 1 SCR 574 (para 169), *Erach Boman Khavar* v. *Tukaram Shridhar Bhat* (2013) 15 SCC 655 (para 170) and *Jaswant Singh* v. *Custodian of Evacuee Property* (1985) 3 SCC 648 (para 173)

K.V. Vishwanathan, Riting Rai, *Sr. Advs.* **Rajat Sehgal, Gautam Swarup, Vandana Anand, Mandavya Kapoor, Karthikeya Jaiswal** *for the Appellant.* ***Gunjan Jindal,*** *Advs.* **Ramji Srinivassan,** *Sr. Adv.* ***Prithu Garg,*** AOR ***Shailendera Singh, Harimohana N., Ankush Bhardwaj, Shivkrit Raj, Tirth***

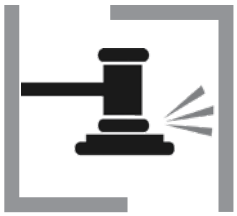
Nayak, Advs. and ***Vinam Gupta,*** AOR *for the Appellant.* **Shyam Divan**, Sr. Adv. ***Ms. Misha, Siddhant Kant, Ms. Moulshree Shukla,*** *Advs.* **Mrs. S.S. Shroff,** AOR ***Nakul Dewan,*** *Sr. Adv.* ***Ms. Pooja Mahajan,*** *Adv.* ***Avinash B. Amarnath,*** AOR **Ms. Mahima Singh, S. Mahajan, Ms. Neelu Mohan,** Advs. **Nakul Dewan,** Sr. Adv. ***Atul Sharma, Abhishek Sharma, Ashly Cherian, Anisha Mahajan, Ms. Harshita Agarwal,*** Advs. ***Gautam Talukdar, V. Giri,*** Sr. Adv. ***Ashish Rana,*** AOR ***Anurag Singh,*** Adv. ***Jayant Mehta,*** Sr. Adv. ***Ms. Sonia Dube, Shatadru Chakraborty, Ms. Kanchan Yadav, Ms. Surbhi Anand*** *and* ***Surya Kapoor***, Advs. *for the Respondent.*

●●●

† Arising from Committee of Creditors of *Educomp Solutions Ltd. v. Ebix Singapore Pte. Ltd.* (2020) 119 taxmann.com 184 (NCL-AT)

For Full Text of the Judgment see

(2021) 130 taxmann.com 208 (SC)



(2021) 130 taxmann.com 254 (SC)

SUPREME COURT OF INDIA

K.N. Rajakumar v. **V. Nagarajan**

L. NAGESWARA RAO, B.R. GAVAI AND B.V. NAGARATHNA, JJ.

CIVIL APPEAL NOS. 1792 AND 2901 OF 2021

SEPTEMBER 15, 2021

Section 12A, read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Application under section 9 filed by operational creditor against corporate debtor was admitted by NCLT - Appellant, a director of suspended board of corporate debtor, submitted that parties had reached settlement - Said agenda was put to vote in CoC meeting and CoC by requisite majority decided to file an application under section 12A before NCLT for withdrawal of CIRP - NCLT subsequently, allowed application for withdrawal of CIRP - Whether since, after withdrawal of CIRP proceedings, powers and management of corporate debtor were handed over to directors of corporate debtor and from that date RP and CoC in relation to Corporate debtor had become functus officio, NCLT had rightly disposed appeal filed by operational creditor to set aside resolution passed in CoC meeting - Held, yes (Para 19)

FACTS

- One 'R' joined corporate debtor as a Junior Assistant. Since he was not receiving salary regularly, he filed an application under section 9. NCLT admitted said application.
- Appellant, director of corporate debtor claimed that parties had entered into settlement. Said agenda was put to vote is CoC meeting.
- CoC in its meeting, unanimously resolved to file an application for withdraw CIRP initiated in respect of the corporate debtor. NCLT subsequently, allowed said application.
- Corporate debtor filed an appeal to set aside resolution passed in CoC meeting.

HELD

- The Adjudicating Authority is entitled to withdraw the application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of 90 per cent voting share of the CoC. (Para 13)
- The principal objects of the IBC is providing for revival of the corporate debtor and to make it a going concern. Every attempt has to be first made to revive the concern and make it a going concern, liquidation being the last resort. (Para 16)

- The corporate debtor has already settled the issue with the operational creditor, who have resolved to withdraw the CIRP proceedings and by virtue of withdrawal of CIRP proceedings, the corporate debtor now is a going concern. (Para 17)
- The order of NCLAT allowing the appeal filed by the corporate debtor and setting aside the passed by NCLT under section 9 has admittedly not been challenged by 'R'. In pursuance of the assurance given before NCLAT, an amount of Rs. 18,50,000/- was also paid to 'R' towards arrears of salary by the corporate debtor. (Para 18)
- After the withdrawal of CIRP proceedings, the powers and management of the corporate debtor were handed over to the Directors of the corporate debtor and from that date RP and CoC in relation to the corporate debtor had become *functus officio*. NCLT thus, has rightly disposed of the application filed by 'R'. (Para 19)
- In the result, there is no reason to interfere with the same. Appeal filed by 'R' therefore dismissed. (Para 20)

CASE REVIEW

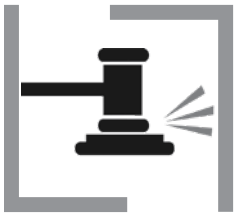
K.N. Rajakumar v. *V. Nagarajan* (2021) 129 taxmann.com 417 (NCLAT - Chennai) (para 20) *affirmed.* (See annex)

CASES REFERRED TO

D Ramjee v. *Aruna Hotels Ltd.* (2018) 99 taxmann.com 268 (NCLT - Chennai) (para 4), *Aruna Hotels Ltd.* v. *N Krishan* (2018) 91 taxmann.com 167 (NCLAT - New Delhi) (para 4), *N. Subramanian* v. *Aruna Hotels Ltd.* (2018) 98 taxmann.com 276 (NCLT-Chennai) (para 4), *Subasri Realty (P.) Ltd.* v. *N. Subramanian* (2018) 99 taxmann.com 160 (NCLAT - New Delhi) (para 4), *N. Subramanian* v. *Aruna Hotel Ltd.* (2021) 125 taxmann.com 139/165 SCL 1 (SC) (para 4), *N. Subramanian* v. *Aruna Hotels Ltd.* (Civil Appeal No. 187 of 2019, dated 19-3-2021) (para 4), *Vidya Charan Shukla* v. *Purshottam Lal Kaushik* (1981) 2 SCC 84 (para 11), *K.I. Shephard* v. *Union of India* (1987) 4 SCC 431 (para 11) and *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 (SC) (para 15).

Balaji Srinivasan, AOR, **Ritin Rai,** Sr. Adv., **S. Santanam Swaminadhan,** Adv., **Kartik Malhotra,** Adv., **Ms. Abhilasha Shrawat,** Adv. and **Mrs. Aarthi Rajan,** AOR *for the Appellant.* **K.V. Vishwanathan,** Sr. Adv., **Arvindh Pandian,** Sr. Adv., **Balaji Srinivasan,** AOR, **Ms. Garima Jain,** Adv., **Ms. Pallavi Sengupta,** Adv., **Ms. Aakriti Priya,** Adv., **Mohammed Shahrukh,** Adv., **Prateek Yadav,** Adv., **Ms. Lakshmi Rao,** Adv., **Sandeep Kumar Ambalavanan,** Adv., **Mohan Chevanan,** Adv., **P.S. Sudheer,** AOR and **Ms. Shruti Jose,** Adv. *for the Respondent.*

For Full Text of the Judgment See
(2021) 130 taxmann.com 254 (SC)



(2021) 130 taxmann.com 229 (SC)

SUPREME COURT OF INDIA

National Spot Exchange Ltd. *v.* Anil Kohli, Resolution Professional for Dunar Foods Limited

M.R. SHAH AND ANIRUDDHA BOSE, JJ.

CIVIL APPEAL NO. 6187 OF 2019†

SEPTEMBER 14, 2021

Section 61 of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authority - Appeals and Appellate Authority - Whether Appellate Tribunal has no jurisdiction to condone delay exceeding 15 days beyond period of 30 days, as contemplated under section 61(2) - Held, yes - Whether therefore, where certified copy of order passed by Adjudicating Authority was applied beyond period of 30 days and there was a delay of 44 days in preferring appeal which was beyond period of 15 days which maximum could have been condoned, it could not be said that NCLAT had committed any error in dismissing appeal on ground of limitation by observing that it had no jurisdiction and/or power to condone delay exceeding 15 days - Held, yes (Paras 11.2 and 12)

CASE REVIEW

National Spot Exchange Ltd. v. *Anil Kohli RP of Dunar Foods Ltd.* (2019) 109 taxmann.com 268 (para 12) *affirmed.*

Union of India v. *Popular Construction Co.* (2002) 37 SCL 622 (SC) (para 12); *New India Assurance Company Ltd.* v. *Hilli Multipurpose Cold Storage (P.) Ltd.* (Civil Appeal Nos. 10941-42 of 2013, dated 4-3-2020) (para 12); *CMD/Chairman, Bharat Sanchar Nigam Ltd.* v. *Mishri Lal* (2011) 14 SCC 739 (para 12); *Popat Bahiru Govardhane* v. *Special Land Acquisition Officer* (2013) 10 SCC 765 (para 12); *Oil & Natural Gas Corporation Ltd.* v. *Gujarat Energy Transmission Corporation Ltd.* AIR 2017 SC 1352 (para 12) and *Teri Oat Estates (P.) Ltd.* v. *U.T. Chandigarh* (2004) 2 SCC 130 (para 12) *followed.*

CASES REFERRED TO

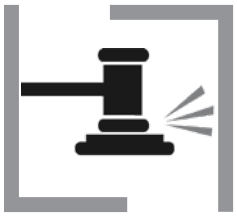
Chitra Sharma v. *Union of India* (2018) 96 taxmann.com 216/148 SCL 833 (SC) (para 5.4), *Jaiprakash Associates Ltd.* v. *IDBI Bank Ltd.* (2019) 111 taxmann.com 46/156 SCL 782 (SC) (para 5.4), *Reliance General Insurance Co. Ltd.* v. *Mampee Timbers and Hardwares (P.) Ltd.* (2021) 3 SCC 673 (para 5.4), *Union of India* v. *Popular Construction Co.* (2002) 37 SCL 622 (SC) (para 6.1), *New India Assurance Company Ltd.* v. *Hilli Multipurpose Cold Storage (P.) Ltd.* (Civil Appeal Nos. 10941-42 of 2013, dated 4-3-2020) (para 6.2), *Rohitash Kumar* v. *Om Prakash Sharma* (2013) 11 SCC 451 (para 6.3), *CMD/Chairman, Bharat Sanchar Nigam Ltd.* v. *Mishri Lal* (2011) 14 SCC 739 (para 6.3), *Raghunath Rai Bareja* v. *Punjab National Bank* (2007) 2 SCC 230 (para 6.3), *Popat Bahiru Govardhane* v. *Special Land Acquisition Officer* (2013) 10 SCC 765 (para

6.3), *Martin Burn Ltd.* v. *Corporation of Calcutta* AIR 1966 SC 529 (para 6.3), *Oil & Natural Gas Corporation Ltd.* v. *Gujarat Energy Transmission Corporation Ltd.* AIR 2017 SC 1352 (para 6.5), *J.J. Merchant* v. *Shrinath Chaturvedi* (2002) 6 SCC 635 (para 8.1), *Madamanchi Ramappa* v. *Muthaluru Bojappa* AIR 1963 SC 1633 (para 10.2), *Council for Indian School Certificate Examination* v. *Isha Mittal* (2007) 7 SCC 521 (para 10.2), *P.M. Latha* v. *State of Kerala* (2003) 3 SCC 541 (para 10.2), *Laxminarayan R. Bhattad* v. *State of Maharashtra* (2003) 5 SCC 413 (para 10.2), *Nasiruddin* v. *Sita Ram Agarwal* (2003) 2 SCC 577 (para 10.2), *E. Palanisamy* v. *Palanisamy* (2003) 1 SCC 123 (para 10.2), *India House* v. *Kishan N. Lalwani* (2003) 9 SCC 393 (para 10.2) and *Teri Oat Estates (P.) Ltd.* v. *U.T. Chandigarh* (2004) 2 SCC 130 (para 11.2).

Maninder Singh, Sr. Adv., **Ranjan Kumar Pandey**, AOR and **Sandeep Bisht**, Adv. *for the Appellant.*

† Arising out of order passed by NCLAT *National Spot Exchange Ltd.* v. *Anil Kohli RP of Dunar Foods Ltd.* (2019) 109 taxmann.com 268

For Full Text of the Judgment See
(2021) 130 taxmann.com 229 (SC)



(2021) 131 taxmann.com 255 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

BKB Transport (P.) Ltd. *v.* **NTPC Ltd.**

JUSTICE ANANT BIJAY SINGH, JUDICIAL MEMBER

AND MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 122 OF 2021†

SEPTEMBER 8, 2021

Section 5(6), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Dispute - Operational creditor entered into a contract with corporate Debtor being National thermal power corporation-NTPC, to transport coal - Corporate debtor did not make payment of outstanding amount - In response to demand notice, corporate debtor alleged short supply of coal by operational creditor and claimed that operational creditor was liable to pay penalty as per contract - Allegations of short supply were strongly denied by 'Operational Creditor' - NCLT observed existence of dispute between parties - Further, citing existence of arbitration clause in agreement to resolve dispute between parties, NCLT dismissed CIRP - NCLT, however, in its order, observed that there was short supply of coal by operational creditor - Whether since NCLT, in its order, had made observations touching on merit of matter, part of its order containing this observation was to be expunged for reason that such comments would come in way of arbitration proceedings, if any invoked - Held, yes (Para 7)

CASE REVIEW

BKB Transport (P.) Ltd. v. *NTPC Ltd.* (2021) 131 taxmann.com 254 (NCLT - New Delhi) (Para 7) *partly affirmed* (*See annex*).

Sumeet Godadia, Kaushik Poddar and **Saurabh Jain,** Advs. *for the Appellant.* **Balbir Singh,** (*Addl.* Solicitor General of India), **R. Sudhinder, Adarsh Tripathi, Vikram Singh Baid** and **Naman Tandon,** Advs. *for the Respondent.*

JUDGMENT

Shreesha Merla, Technical Member. - Aggrieved by the Order dated 4-1-2021, in C.P.(IB) No. - 180(PB)/2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Principal Bench, Delhi) dismissing the Application filed under section 9 of the Insolvency and Bankruptcy Code (hereinafter referred to as the 'Code'), M/s. BKB Transport Private Limited (hereinafter referred to as the 'Operational Creditor') preferred this Appeal under section 61 of the Code.

2. By the Impugned Order, the Learned Adjudicating Authority while dismissing

the section 9 Application, has observed as follows:-

> "29. All these correspondences clearly indicate that the Operational Creditor failed to supply the requisite coal to the Siding as mentioned in the Purchase Order, therefore according to clause 3.2 of the Purchase Order, the penalty shall be paid towards the short supplies of the coal as required under the Purchase Order.
>
> 30. It is an admitted fact that from the Operational Creditor side that the Corporate Debtor replied to its Section 8 notice dated 12-4-2020, on 21-4-2020 *i.e.* within 10 days from the date of receipt of notice, in the reply, the Corporate Debtor has again disputed that the Operational Creditor is liable to pay penalty, therefore it could not be decided who is liable to pay whom, because if the penalty is more than the unpaid invoice amount retained by the Corporate Debtor, the Operational Creditor would be liable to pay the penalty remained due and payable by the Operational Creditor.
>
> 31. In all the three Volumes filed by the Operational Creditor, it has not included the Purchase Order which is binding upon the Operational Creditor. In the Reply notice dated 21-4-2020, the Corporate Debtor sated that as per the corporate debtor records, the amount payable to the operational creditor is 151,09,867, whereas the amount retained as penalty for short supply is 78,95,38,277 (penalty for 17rakes (January 18-2 rakes, Feb 18-3 rakes, March 18 and April 18-6 rakes each. Penalty @ double the rate of transportation).
>
> 32. The Operational Creditor counsel has filed rejoinder setting up a new case that since the Performance Bank Guarantee has not been retained, it is to be construed that no dues are outstanding against the Operational Creditor, therefore whatever defence taken up by the Corporate Debtor, the operational creditor says, could not be considered as dispute is in existence before receipt of section 8 notice by the Corporate Debtor.
>
> 33. Here the point for consideration at the time of admission of section 9 Petition is, it is to be seen whether any debt is in existence, whether default is in existence, if default is in existence, it is to be seen that if any dispute is pre-existing before receipt of section 8 notice by the Corporate Debtor.
>
> 34. In the backdrop of the factual scenario of this case, it is not the case of the Operational Creditor that it has not short supplied the coal and it is not also the case of it that penalty need not be paid in the event the Operational Creditor failed to supply coal to the Siding as mentioned in the Purchase Order 13-4-2016.
>
> 35. There are several letters from the Corporate Debtor that the Operational Creditor failed to supply 2.2 rakes of Coal per day and that the Corporate Debtor in the year 2018 itself wrote letter after letter that the Operational Creditor is liable to pay penalty for short supply, and

the Corporate Debtor indeed called upon the Operational Creditor stating that the final bill would be reconciled provided the Operational Creditor authorized representative come to the Corporate Debtor for finalization of the bill because the Penalty liable to be paid by the Operational Creditor would be discounted from the unpaid invoice amount retained with the Corporate Debtor.

36. The Operational Creditor, for the reasons best known to it, did not send its authorized representative to make the bill final, unless bill is made final, in case anything is to be paid, the Corporate Debtor cannot be called as defaulted in paying the bill of the Operational Creditor.

37. In a sense, it could be said, that the default is not in existence because final bill has not been prepared. In fact the Corporate Debtor itself called upon the Operational Creditor to clear this issue to discount the penalties from the unpaid invoice amount retained with the Corporate Debtor.

38. In any event, apart from raising dispute over penalties from the year 2018 itself, the Corporate Debtor timely replied *i.e.* within 10 days from the date of receipt of section 8 notice that the Operational Creditor is liable to pay penalty, therefore it cannot be called dispute is not in existence as on the date of receipt of section 8 notice.

39. On record it is evident that final bill has not been prepared, penalties not discounted, the operational creditor has not deputed its authorized representative for finalization of final bill, therefore due itself cannot be assumed unless final bill is prepared, therefore question of default will not arise, in any event, dispute is pre-existing between the parties as on the date section 8 notice the corporate debtor received, therefore it is a clear case hit by preexisting dispute.

40. In this case, both the parties relied upon *Mobilox Innovations Pvt. Ltd.* v. *Kirusa Software Pvt. Ltd.*, Civil Appeal no. 9405 of 2017, wherein the Honorable Supreme Court of India held that in the cases where dispute of fact arises, the same truly require further investigation and cannot be decided under the Insolvency and Bankruptcy Code.

41. From the Operational Creditor side contention is dispute is frivolous, from the Corporate Debtor side contention is dispute is pre-existing.

42. Nevertheless the sum and substance of the aforesaid judgment is, whenever any dispute is pre-existing, notwithstanding the merit of the dispute raised, the Petition shall be dismissed on the ground that Petition is hit by pre-existing dispute.

43. In view thereof, (IB)-810(PB)/2020 is hereby dismissed as misconceived."

Facts in brief:

3. The `Corporate Debtor', sought to set up a Super Thermal Power Project at Barh with a capacity of 330 MW and invited bids for `engagement of agency for transportation of Coal from Amrapali

Mine to Bandag Railway Siding and loading of Coal into Indian Railways wagons for NTPC Barh II (2x660MW) through RCR mode' from prospective bidders. The Appellant/'Operational Creditor' participated in the said bid and a Contract Agreement dated 30-6-2016 was entered into between the parties for the period 19-3-2016 to 18-3-2017 for a bid amount of Rs. 2,11,95,00,000/-. It is stated that the 'Operational Creditor' completed the contract on 26-4-2018, with the satisfaction of the Respondent and various invoices were raised for the work done. It is submitted by the Learned Counsel for the Appellant that an amount of Rs. 11,21,44,047.40/- excluding interest was 'due and payable' as on 29-2-2019, but the 'Corporate Debtor' alleged shortage of supply of Coal and the amounts were never paid. On 16-4-2019, a letter was addressed by the 'Corporate Debtor' to the Appellant herein to depute a representative for final payment but no amount was paid. The allegations of short supply were strongly denied by the 'Operational Creditor' and despite several reminders and an email dated 24-1-2020 addressed by the 'Corporate Debtor' admitting that an amount of Rs. 7,25,91,090.40/- is due as on 31-12-2019, made no payment. In the Reply to the email dated 24-1-2020, the Appellant informed that as per the books of account the amount 'due and payable' was Rs. 11,21,44,047.40/-.

4. The Leaned Counsel drew our attention to Clauses 5, 6 & 56 pertaining to Transit Time', '*Force Majeure*' and 'Arbitration'. He submitted that there was no dispute as on 3-3-2020 as the 'Corporate Debtor' has released the performance Bank guarantee provided by the Appellant under the terms of the Agreement.

5. At this juncture, the Learned Counsel for the Appellant submitted that the Adjudicating Authority in Paras 29 and 34 of the Impugned Order has made some observations touching on the merits of the matter. For ready reference, Paras 29 and 34 are reproduced as hereunder:-

"29. All these correspondences clearly indicate that the Operational Creditor failed to supply the requisite coal to the Siding as mentioned in the Purchase Order, therefore according to clause 3.2 of the Purchase Order, the penalty shall be paid towards the short supplies of the coal as required under the Purchase Order".....

> ".....34. In the backdrop of the factual scenario of this case, it is not the case of the Operational Creditor that it has not short supplied the coal and it is not also the case of it that penalty need not be paid in the event the Operational Creditor failed to supply coal to the Siding as mentioned in the Purchase Order 13-4-2016."

6. The Learned Counsel sought for these two Paragraphs to be expunged as the comments would come in the way of any Arbitration Proceedings, if invoked.

7. On a query from the Bench, Learned Counsel for the Respondent has fairly conceded that the observations in these two Paras do touch upon the merits of the case and that he has no objection to the same being expunged. Keeping in view the facts and circumstances of the case and the observation made in these

two Paras, we are of the considered view that the aforenoted Paras 29 and 34 of the Impugned Order be expunged and the same is ordered. We observe that we have not gone into merits of the matter with respect to any 'Pre-Existing Dispute' or otherwise. This Appeal is disposed of expunging Paras 29 and 34 from the Impugned Order dated 4-1-2021.

8. The Registry is directed to upload the Judgment forthwith on the website of this Appellate Tribunal and is also directed to send a Copy of this Judgment to the Adjudicating Authority to carry out the necessary deletion.

ANNEX

(2021) 131 taxmann.com 254 (NCLT - New Delhi)

NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI BENCH

BKB Transport (P.) Ltd. v. NTPC Ltd.

B.S.V. PRAKASH KUMAR, ACTG, PRESIDENT

AND HEMANT KUMAR SARANGI, TECHNICAL MEMBER

CP (IB) NO. 810 (PB) OF 2020

JANUARY 4, 2021

Rishabh Sancheti and **Neeraj Lalwani**, Advs. *for the petitioner*. **Balbir Singh**, Sr. Adv., **R. Sudhinder** and **Adarsh Tripathy**, Advs. *for the Respondent*.

ORDER

B.S.V. Prakash Kumar, Actg. President. - It is a Company Petition filed u/s 9 of the Insolvency and Bankruptcy Code by an Operational Creditor, namely BKB Transport Pvt. Ltd. against NTPC Limited (Corporate Debtor) stating that the Corporate Debtor defaulted paying an amount of Rs. 11,21,44,047.40 as on 29-2-2019 excluding interest @18% per annum, therefore the Operational Creditor sought for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor for the Corporate Debtor defaulted in paying the claim despite after receipt of section 8 notice served upon the Corporate Debtor.

2. The case of the Operational Creditor is, the Corporate Debtor at the time of setting thermal power plant with a capacity of 330MW invited bids for transportation of Coal from Amrapali Mine to Banadag Railway Siding and loading of Coal into Indian Railways Wagon at Banadag Railway Siding for NTPC Barh II (2 x 660MW) through RCR mode wherein the Operational Creditor being accepted as the highest bidder, the Corporate Debtor *vide* Purchase Order 4000164568-064-1028 dated 13-4-2016 awarded the contract to the operational creditor on the terms and conditions contained in the above purchase order.

3. Pursuant to the same, an agreement 30-6-2016 was entered into between the Corporate Debtor and the Operational Creditor with a duration of contract period from 19-3-2016 to 18-3-2017 for a total sum

of Rs. 211,95,00,000, later the contract was extended to the Operational Creditor up to 26-4-2018. As per the Purchase Order, the Operational Creditor is supposed to submit its bills on despatch of the rake as per the RR receipt. Upon receipt of the same; the Corporate Debtor is bound to release 90% payment within 7 days on receipt of the Bill and the balance 10% upon the receipt of the coal at the plant.

4. On the invoices raised by the Operational Creditor, the payment was done to some of the invoices, as to the invoices payment was not made, the said unpaid invoices have been referred in the calculation of default amount in the application filed by the Operational Creditor.

5. As to the dues payable towards unpaid invoices, the Operational Creditor sent e-mails dated 18-3-2019 and 18-4-2019 to which the Corporate Debtor *vide* its e-mail dated 24-1-2020 admitted that as per the books of account of the Corporate Debtor, an amount of Rs. 7,25,91,090.40 is due to the Operational Creditor as on 31-12-2019 with a request to the Operational Creditor to confirm that it is showing in the books of the Operational Creditor.

6. To which the Operational Creditor replied through its e-mail dated 24-1-2020 that the amount shown in the statement sent by the Corporate Debtor does not match with the books of the Corporate Debtor, therefore the Operational Creditor attached the statement as per its books and informed them that an amount of Rs. 11,21,44,047.40 is outstanding pending but not Rs. 7,25,91,090.40 as stated by the Corporate Debtor.

7. Thereafter, the Operational Creditor on 12-4-2020 sent a detailed demand notice u/s 8 of IBC to the Corporate Debtor demanding payment of Rs. 11,21,44,047.40 to which, the Corporate Debtor replied on 21-4-2020 raising dispute stating that the Operational Creditor is liable to pay penalty for short supplies of coal, therefore unless penalty is settled, final bill could not be prepared, while admitting from one side that the amount *i.e.* outstanding is more than Rs. 1 crore *i.e.* the threshold for filing company petition u/s 9 of IBC.

8. For the payment has not been made after section 8 notice was served upon the Corporate Debtor, the Operational Creditor has filed this Company Petition for initiation for CIRP against the Corporate Debtor.

9. Invoices and date of default raised by the Operational Creditor is as follows:

INVOICE No. & DATE	***AMOUNT* (*IN Rs.*)**
2016-17/10-13 22-12-2016	1,37,059.00
2016-17/17 23-1-2017	1,57,863.00
2016-17/23 11-3-2017	1,327.40
BKB/17-18/004 28-8-2017	2,30,16,357.00
BKB/17-18/010 31-10-2017	7,79,976.00
BKB/17-18/018 15-2-2018	57,90,302.00

INVOICE No. & DATE	***AMOUNT (IN Rs.)***
BKB/17-18/019 15-2-2018	1,87,164.00
BKB/17-18/019 15-2-2018	44,84,253.00
BKB/17-18/019 15-2-2018	1,58,00,873.00
BKB/17-18/020 12-3-2018	37,07,504.00
BKB/17-18/023 31-3-2018	42,83,873.00
BKB/17-18/023 31-3-2018	1,05,33,915.00
BKB/17-18/024 31-3-2018	37,10,624.00
BKB/18-19/002 18-4-2018	2,78,33,508.00
BKB/18-19/003 24-4-2018	1,17,19,449.00
TOTAL	**11,21,44,047.40**

10. As against this Petition, the Corporate Debtor submits that this Petition shall be dismissed *in limine* for suppression of documents seminal to decide the penalty and correspondence exchanged long prior to issuing section 8 notice reflecting that the corporate debtor from time to time reminding the operational creditor that it was continuously failing to supply the requisite coal to the siding as per minimum loading per day mentioned in the purchase order and also reminding that the corporate debtor would impose penalty for short supplies as mentioned in the Purchase Order based on which the operational creditor supplying coal and raising invoices, therefore the corporate debtor submits that the Operational Creditor should not have assumed that the corporate debtor defaulted making payment looking at the auto generated Retention Statement supplied by the Finance Department of the Corporate Debtor disclosing the running bills till 31-12-2019, which is retained by the Corporate Debtor for adjustments during reconciliation against the short supplies and the penalties thereof.

11. In the e-mail dated 24-1-2020, the Corporate Debtor has mentioned that the Operational Creditor cannot, simply upon receipt of Retention Statement, assume the amount in the Running Bills retained as an admission of default of making payment of Rs. 7,25,91,090.40 by the Corporate Debtor.

12. The Corporate Debtor counsel further submits that through the Purchase Order aforementioned, the contract was awarded to the Operational Creditor for supply of 30 lakhs MT of coal, by which, the Petitioner was bound to supply 2.2 rakes per day in terms of the Contract, failing to perform the same, permits the Corporate Debtor to impose a penalty on the Operational Creditor at double the applicable rate of the shortfall quantity, to be applied with respect to 90% of the schedule quantity.

13. In addition to the aforesaid NTPC Barh Contract, another contract was awarded to the Corporate Debtor for supply of Coal to Bongaigaon which is entirely different from the contract awarded for NTPC Barh.

14. As the Operational Creditor failed to make timely supplies to Barh from Jan, 2018 to April, 2018, it has led to acute shortage of coal and also led to power generation loss at Barh, as to this issue, the Corporate

Debtor shared its concerns through letters dated 22-1-2018, 26-2-2018, 24-3-2018 and 19-4-2018 with the Operational Creditor, not only that, the Corporate Debtor has also made it clear to the Operational Creditor that coal transportation to Barh should be the first priority.

15. Owing to short supply of coal aforementioned, the Corporate Debtor imposed penalty on the Operational Creditor for the short supply to Barh for the period in which the operational creditor failed to commitment of supply of 2.2 rakes of coal per day.

16. The Corporate Debtor revealed the methodology for calculating the penalty in the Purchase Order dated 13-4-2016 and informed the Operational Creditor *vide* its letters dated 16-4-2019 and 30-4-2019 for deputation of an authorized representative from the operational creditor side to visit the Corporate Debtor office on 3-5-2019. Despite there being a call upon the Operational Creditor for deputation of authorised representative to complete the formalities for preparation of final bill so that the balance payment, if any payable could be processed, however, the Operational Creditor has not deputed any of its authorised representatives to complete the formalities with respect to preparation of the final bill.

17. The Corporate Debtor counsel submits that from the perusal of exchange of letters and the submissions thereupon, it is quite clear that the amount retained by the Corporate Debtor is largely on account of penalty against the short supplies, therefore the said amount cannot be released to the Operational Creditor. In view thereof, the counsel made it clear that the dispute is pre-existing between the parties since 2018 *i.e.*, well in advance before issuance of the demand notice by the Petitioner.

18. On perusal of the submissions aforementioned, now the point for consideration is as follows:

Whether or not dispute is pre-existing between the parties before issual of section 8 notice dated 12-4-2020?

To ascertain any dispute is in existence or not, we have to go through the various documents including exchange of letters between the parties.

19. Upon looking at the general conditions of the contract, it is categorically mentioned if the contractor has failed to maintain the required progress in completing the work assigned to it, the Contractor shall pay compensation amount calculated as stipulated in Schedule A of the general terms and the said compensation may be adjusted or set off against any sum payable to the Contractor under this or any other contract with the Corporation (Corporate Debtor *i.e.*, NTPC).

20. The contract that has come into existence between the Operational Creditor and the Corporate Debtor on issual of the Purchase Order dated 13-4-2016, which the Operational Creditor relied upon for all purposes, for supply of coal and raising invoices against the Corporate Debtor, therefore penalty clause present in the Purchase Order is also binding upon the Operational Creditor, of course it is not the case of the Operational Creditor that Penalty clause is not binding upon it.

21. The Corporate Debtor has annexed a letter dated 26-2-2018 written to the Operational Creditor, wherein the Corporate Debtor has observed that the Operational Creditor failed to maintain a stock of around 10000 MT of Coal at the Siding so as to enable the Corporate Debtor to take up strongly with the Railways and to meet the obligation in terms of the contract. It has been noted that the Corporate Debtor reiterated that fulfilling requirement of Barh from Banadag Railway Siding under the contract should be the first priority of the Operational Creditor.

22. Subsequently, the Corporate Debtor on 22-1-2018 wrote another letter to the Operational Creditor stating that the coal transportation to Barh STPP from Amrapali Mine of CCL under the subject contract (Contract dated 13-4-2016) has been well below the schedule. To prove the same, month-wise schedule vs. actual supply is enclosed as Annexure 1 to this letter. They have also quoted clause 3.2 of the subject contract provides for penalty for under performance from the Operational Creditor side, which is as follows:

"The agency shall supply the coal rakes as per the Schedule of Supply given by NTPC Barh from Banadag siding and ensure around 2.2 rakes per day on an average basis so as to meet the coal supply requirement of NTPC Barh on monthly basis. There will be a penal clause applicable if quantity execution is less than 90% of the monthly schedule given by NTPC @ double the applicable rate of short supplied quantity".

23. The Corporate Debtor has mentioned in its letters that it had been repeatedly conveying its concerns on less transportation in various discussions and also through many correspondences, therefore it is felt that sufficient efforts have not been put in from the Operational Creditor side to effect augmentation in coal transportation.

24. In this backdrop, the Operational Creditor was asked to explain as to why penalty in terms of clause 3.2 of the subject Purchase Order should not be imposed on the Operational Creditor.

25. Again on 24-3-2018, the Corporate Debtor wrote another letter to the Operational Creditor, which is as follows:

Ref. No. 400/Barh/RCR/2018 Date: 24-3-2018

The BKB Transport (P.) Ltd.

2F, Vatika Apartment

Line Tank Road

Ranchi - 834 001

Sub: Coal transportation for NTPC Barh from Amrapali, CCL through Banadag siding (PO No. 4000164568-064-1028 Version-4 dated 28-3-2017).

Dear Sir,

The coal transportation to Banadag siding under the subject contract has been very low during last few days. The details of trips received at Banadag since 16th March is as under:

Date	***No. of trips recd.***	***Rakes loaded***
16-3-2018	261	1
17-3-2018	186	0
18-3-2018	196	1
19-3-2018	136	0
20-3-2018	9	1
21-3-2018	17	0
22-3-2018	55	0
23-3-2018	19	1

It is observed that there has been no effort to augment the trips to the tune of requirement. The trips have been also affected by the coal transportation for Bongaigaon which has been increasing of late. It is once again requested that transportation to Banadag may be increased so as to meet the requirement of two rakes a day.

Thanking you,

Yours faithfully,

(N. Shekhar)

AGM (FM-FT)

26. Likewise on 19-4-2018, the Corporate Debtor wrote another letter to the Operational Creditor, which is as follows:

Ref No. 400/Barh/RCR/2018 Date: 19-4-2018

The BKB Transport (P.) Ltd.

2F, Vatika Apartment

Line Tank Road

Ranchi - 834 001

Sub: Coal transportation for NTPC Barh from Amrapali, CCL through Banadag siding (PO No. 4000164568-064-1028 Version-4 dated 28-3-2017).

Dear Sir,

The coal transportation to Banadag siding under the subject contract has been very

low during last few days. Against a requirement of 2.2 rakes a day, you have been averaging at about 0.6 rakes a day only. The details of trips received and rakes loaded at Banadag during last 10 days is as under:

Date	***No. of trips recd.***	***Rakes loaded***
09-04-18	73	0
10-04-18	192	1
11-04-18	44	0
12-04-18	220	1
13-04-18	291	0
14-04-18	180	1
15-04-18	257	2
16-04-18	223	0
17-04-18	223	0
18-04-18	288	1

It is observed that there has been no effort to augment the trips to the tune of requirement The trips have been also affected by the coal transportation for Bongaigaon. It is again requested that coal transportation to Banadag may be increased to the tune of requirement.

Thanking you,

Yours faithfully,

(N. Shekhar)

AGM (FM-FT)

27. In this correspondence, the Corporate Debtor wrote another letter dated 16-4-2019 to the Operational Creditor with respect to processing of final bill mentioning that in the discussions held between the parties, deductions have been proposed for days when rake has been loaded for Bongaigaon but less than 2 rakes have been loaded for Barh. In the same letter, the Corporate Debtor called upon the Operational Creditor for deputation of representative to sign acceptance for final payment under the subject purchase order.

28. Again on 30-4-2019, the Corporate Debtor wrote another letter reiterating the earlier request to depute the representative of the Operational Creditor for acceptance of the final bill payment so that it would enable closure of the contract and release of Performance Bank Guarantee submitted under the contract at the earliest.

29. All these correspondences clearly indicate that the Operational Creditor failed to supply the requisite coal to the Siding as mentioned in the Purchase Order, therefore according to clause 3.2 of the Purchase Order, the penalty shall be paid

towards the short supplies of the coal as required under the Purchase Order.

30. It is an admitted fact that from the Operational Creditor side that the Corporate Debtor replied to its section 8 notice dated 12-4-2020, on 21-4-2020 *i.e.* within 10 days from the date of receipt of notice, in the reply, the Corporate Debtor has again disputed that the Operational Creditor is liable to pay penalty, therefore it could not be decided who is liable to pay whom, because if the penalty is more than the unpaid invoice amount retained by the Corporate Debtor, the Operational Creditor would be liable to pay the penalty remained due and payable by the Operational Creditor.

31. In all the three Volumes filed by the Operational Creditor, it has not included the Purchase Order which is binding upon the Operational Creditor. In the Reply notice dated 21-4-2020, the Corporate Debtor stated that as per the corporate debtor records, the amount payable to the operational creditor is Rs. 51,09,867, whereas the amount retained as penalty for short supply is Rs. 8,95,38,277 (penalty for 17 rakes (January 18-2 rakes, Feb. 18-3 rakes, March 18 and April 18-6 rakes each. Penalty @ double the rate of transportation).

32. The Operational Creditor counsel has filed rejoinder setting up a new case that since the Performance Bank Guarantee has not been retained, it is to be construed that no dues are outstanding against the Operational Creditor, therefore whatever defence taken up by the Corporate Debtor, the operational creditor says, could not be considered as dispute is in existence before receipt of section 8 notice by the Corporate Debtor.

33. Here the point for consideration at the time of admission of section 9 Petition is, it is to be seen whether any debt is in existence, whether default is in existence, if default is in existence, it is to be seen that if any dispute is pre-existing before receipt of section 8 notice by the Corporate Debtor.

34. In the backdrop of the factual scenario of this case, it is not the case of the Operational Creditor that it has not short supplied the coal and it is not also the case of it that penalty need not be paid in the event the Operational Creditor failed to supply coal to the Siding as mentioned in the Purchase Order 13-4-2016.

35. There are several letters from the Corporate Debtor that the Operational Creditor failed to supply 2.2 rakes of Coal per day and that the Corporate Debtor in the year 2018 itself wrote letter after letter that the Operational Creditor is liable to pay penalty for short supply, and the Corporate Debtor indeed called upon the Operational Creditor stating that the final bill would be reconciled provided the Operational Creditor authorized representative come to the Corporate Debtor for finalization of the bill because the Penalty liable to be paid by the Operational Creditor would be discounted from the unpaid invoice amount retained with the Corporate Debtor.

36. The Operational Creditor, for the reasons best known to it, did not send its authorized representative to make the bill final, unless bill is made final, in case anything is to be paid, the Corporate Debtor cannot be called as defaulted in paying the bill of the Operational Creditor.

37. In a sense, it could be said, that the default is not in existence because final bill has not been prepared. In fact the Corporate Debtor itself called upon the Operational Creditor to clear this issue to discount the penalties from the unpaid invoice amount retained with the Corporate Debtor.

38. In any event, apart from raising dispute over penalties from the year 2018 itself, the Corporate Debtor timely replied *i.e.* within 10 days from the date of receipt of section 8 notice that the Operational Creditor is liable to pay penalty, therefore it cannot be called dispute is not in existence as on the date of receipt of Section 8 notice.

39. On record it is evident that final bill has not been prepared, penalties not discounted, the operational creditor has not deputed its authorized representative for finalization of final bill, therefore due itself cannot be assumed unless final bill is prepared, therefore question of default will not arise, in any event, dispute is pre-existing between the parties as on the date section 8 notice the corporate debtor received, therefore it is a clear case hit by pre-existing dispute.

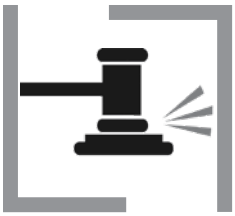
40. In this case, both the parties relied upon *Mobilox Innovations (P.) Ltd.* v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/144 SCL 37, wherein the Honourable Supreme Court of India held that in the cases where dispute of fact arises, the same truly require further investigation and cannot be decided under the Insolvency and Bankruptcy Code.

41. From the Operational Creditor side contention is dispute is frivolous, from the Corporate Debtor side contention is dispute is pre-existing.

42. Nevertheless the sum and substance of the aforesaid judgment is, whenever any dispute is pre-existing, notwithstanding the merit of the dispute raised, the Petition shall be dismissed on the ground that Petition is hit by pre-existing dispute.

43. In view thereof, (IB)-310(PB)/2020 is hereby dismissed as misconceived.

† Arising out of order of NCLT, New Delhi in *BKB Transport (P.) Ltd.* v. *NTPC Ltd.* [2021] 131 taxmann.com 254.



(2021) 131 taxmann.com 236 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Dyanamic Engineers Ltd. *v.* **Muhlenbau Equipments (P.) Ltd.**

M. VENUGOPAL, JUDICIAL MEMBER

AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH) (INS) NO. 136 OF 2021†

SEPTEMBER 7, 2021

Section 9 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Application by operational creditor - Whether when a debt and default is proved, Adjudicating Authority has to admit application to initiate corporate insolvency resolution process against corporate debtor otherwise it is complete - Held, yes - Operational creditor supplied goods to corporate debtor and raised invoices - Corporate debtor accepted supplies and invoices without any demur but made only part payment - Operational creditor issued demand notice - Corporate debtor did not reply to same - Despite service of notice regarding CIRP application filed by operational creditor, corporate debtor failed to appear before NCLT either in person or through its representatives - NCLT noticed that corporate debtor wilfully avoided payment of its liability - But default and instead of admitting application to initiate CIRP against corporate debtor, NCLT disposed of application with a direction to corporate debtor to settle claim within a period of 3 months - Whether said order was illegal without application of mind and therefore, same was to be *set aside* and application of operational creditor was to be admitted - Held, yes (Para 18)

CASE REVIEW

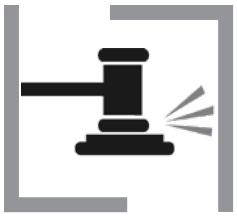
Dyanamic Engineers Ltd. v. *Muhlenbau Equipments (P.) Ltd.* (2021) 131 taxmann.com 235 (NCLT - Bengaluru) (para 18) *reversed* (***See annex***).

Rakesh Mohan Sharma, Practising Company Secretary *for the Appellant.*

† Arising out of order of Bengaluru in *Dyanamic Engineers Ltd. v. Muhlenbau Equipments (P.) Ltd.* (2021) 131 taxmann.com 235.

For Full Text of the Judgment see

(2021) 131 taxmann.com 236 (NCLAT - Chennai)



(2021) 131 taxmann.com 217 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Ergomaxx (India) (P.) Ltd. *v.* Registrar, National Company Law Tribunal, Bengaluru

M. VENUGOPAL, JUDICIAL MEMBER

AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH) (INS) NO. 133 OF 2021†

SEPTEMBER 7, 2021

Section 60 of the Insolvency and Bankruptcy Code, 2016, read with rules 150 and 152 of the National Company Law Tribunal Rules, 2016 - Adjudicating Authority for corporate persons - Whether procedure for pronouncement of order is governed by NCLT rules and as per rules 150 to 152, pronouncement of order is necessary and if it is not adhered to, then, such an order is a nullity - Held, yes - NCLT disposed off CIRP petition filed by operational creditor against corporate debtor by allowing parties to settle matter mutually within reasonable time - NCLT also granted liberty to operational creditor to file a fresh petition if no settlement was reached - However, NCLT had neither pronounced its ruling in an open Court nor listed for pronouncement - Apart from that, there was no communication that was received by operational creditor in regard to pronouncement of order - Whether, thus, such order was to be declared a nullity and appeal against said order was to be allowed - Held, yes (Para 26)

FACTS

- Appellant filed an application under section 9 against the respondent for an outstanding debt of Rs. 50.67 lakh praying for an admission of the respondent under the 'Corporate Insolvency Resolution Process'.
- NCLT by impugned order dispose off the petition filed by operational creditor by allowing both parties to settle the matter mutually within a reasonable time and to file a fresh petition if no settlement was reached a reasonable time.
- The plea taken on behalf of the appellant was that there was no communication of the order from the Registry of the NCLT through any of the mode prescribed under the NCLT Rules, 2016 and besides this, the Registrar NCLT, had failed to list the matter for pronouncement of orders. Moreover, the appellant was never admitted into any of the WhatsApp group of the NCLT for the purpose of pronouncement of order.

HELD

- Rule 150 of the NCLT Rules, 2016 provides for 'Pronouncement

of Order'. Rule 151 pertains to 'Pronouncement of Order' by any one Member of the Bench. As per rule 150(5). Every order or judgment or notice shall bear the seal of the 'Tribunal'. (Para 17)

- According to the appellant to its surprise, it found an 'Impugned order' dated 7-12-2020 on 6-2-2021, which was uploaded in the NCLT Website and hence it is the fervent plea of the appellant that the 'Impugned Order' was neither pronounced on 7-12-2020 nor listed for pronouncement nor finally heard on the said date. (Para 18)

- It cannot be gainsaid that if an order/judgment of a 'Tribunal' is not pronounced at all, the same is a nullity in the 'eye of law', considering the fact that the 'pronouncement' is primarily a judicial act, which is the 'Sanctum Sanctorum of any judicial proceedings' in 'justice delivery system'. (Para 21)

- It is to be relevantly mentioned that 'Pronouncement of Order' is quite distinct from communicating/informing/intimating a deliverance of an order. At any cost, 'Tribunal' cannot dispense with justice. In reality, it must discharge its duties/function with a sole aim and purpose of 'Dispensing Justice'. (Para 22)

- If an order/judgment is delivered by a 'Tribunal' ignoramus of rules, then, it will result in untold hardship, misery and unerringly leading to a miscarriage of justice. Moreover, 'expediency in pronouncement' of an 'Order'/'Judgment' by a 'Tribunal' is not desirable/palatable, in the earnest opinion of this 'Tribunal'. (Para 23)

- No wonder, a Judgment/Order of a Court of Law/'Tribunal'/'Appellate Tribunal' is to be written only after deep travail and positive vein. The term 'communication' means making known or sharing or imparting. In legal parlance, it means to officially or solemnly, to declare or affirm as affirm the pronouncement of an 'Order'/'Judgment'. It is to be remembered that pronouncement of an 'Order'/'Judgment' of a Court of Law/a Tribunal is not an empty ritualistic formality. (Para 24)

- It cannot be forgotten that if a particular act is to be performed in a particular manner, then, it has to be performed only in that way and not otherwise. Indeed, a procedural wrangle cannot be allowed to be shaked or shackled with. Also that the judicial function of a 'Tribunal' is to be transparent and per contra, it is not to be conducted/performed in an 'opaque' manner. (Para 25)

- In the light of the foregoings, it is concluded that when the petition under section 7 was listed on 7-12-2020, an 'interim order' was passed adjourning the main case to 11-12-2020. When the said final 'Impugned Order' dated 7-12-2020 was not to be found nowhere in the NCLT Website, as averred by the appellant, and only later it came

to know on 6-2-2021, then in law, it is held as that the `Impugned Order' dated 7-12-2020 was never pronounced by the `Adjudicating Authority' and hence it is declared nullity in the eye of law, apart from the crystalline fact is that the same was not listed for pronouncement and accordingly, said `Impugned Order' of the `Adjudicating Authority' dated 7-12-2020 is to set aside to prevent an aberration of justice and to promote substantial cause of justice. Consequently, the `Appeal' succeeds. (Para 26)

CASE REVIEW

Ergomaxx (India) (P.) Ltd. v. *Krueger International Furniture Systems (P.) Ltd.* (2021) 131 taxmann.com 216 (NCLT - Bengaluru) (para 26) *reversed* (***See Annex***).

CASES REFERRED TO

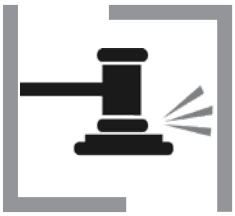
Kamal K. Singh v. *Union of India* (2019) 112 taxmann.com 267 (Bom.) (para 10).

K. Gaurav Kumar, (**PCS**) *for the Appellant.*

† Arising out of order of NCLT, Bengaluru *Ergomaxx (India) (P.) Ltd. v. Krueger International Furniture Systems (P.) Ltd.* (2021) 131 taxmann.com 216.

For Full Text of the Judgment see

(2021) 131 taxmann.com 217 (NCLAT - Chennai)



(2021) 131 taxmann.com 234 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Fipola Retail (India) (P.) Ltd. *v.* **M2N Interiors**

M. VENUGOPAL, JUDICIAL MEMBER

AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH) (INS) NO. 89 OF 2021†

SEPTEMBER 1, 2021

Section 2, read with sections 3(23) and 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Application of code - NCLT admitted application filed by operational creditor under section 9 against corporate debtor - Corporate debtor alleged that said application would not be maintainable as application had been filed in name of proprietary concern and proprietary concern is not a 'person' for purpose of filing application under section 9 - Whether section 2(*f*) provides that provisions of Code shall apply to partnership firms and proprietorship firm - Held, yes - Whether proprietorship was through its proprietor and since, in instant case said section 9 application contained name of proprietorship firm as well as name of its sole proprietor, said application was maintainable and accordingly, appeal against order passed by NCLT was to be dismissed - Held, yes (Para 12)

CASE REVIEW

M2N Interiors v. *Fipola Retail India (P.) Ltd.* (2021) 131 taxmann.com 233 (NCLT - Chennai) (para 12) *affirmed* (***See Annex***).

Neeta Saha v. *Ram Niwas* (2020) 117 taxmann.com 706/160 SCL 454 (NCL - AT) (para 11) *followed*.

CASES REFERRED TO

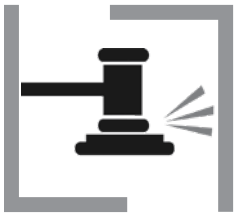
Neeta Saha v. *Ram Niwas Gupta* (2020) 117 taxmann.com 706/160 SCL 454 (NCL-AT).

Rohan Rajasekaran and ***N.V. Prakash,*** Advs. *for the Appellant.* **Manivannan J.** and **M. Govindaraju,** Advs. *for the Respondent.*

† Arising out of order of NCLT, Bengaluru in M2N Interiors *v.* Fipola Retail India (P.) Ltd. (2021) 131 taxmann.com 233.

For Full Text of the Judgment see

(2021) 131 taxmann.com 234 (NCLAT - Chennai)



(2021) 131 taxmann.com 237 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Jayesh N. Sanghrajka, Erstwhile R.P. of Ariisto Developers (P.) Ltd. *v.* Monitoring Agency nominated by the Committee of Creditors of Ariisto Developers (P.) Ltd.

JUSTICE A.I.S. CHEEMA, OFFICIATING CHAIRPERSON
AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 392 OF 2021†
SEPTEMBER 20, 2021

Section 25 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution Professional-Duties of - An application filed under section 9 in case of corporate debtor was admitted and Resolution Professional (RP) was appointed - While approving resolution plan submitted by successful resolution applicant, NCLT disagreed with CoC which had approved success fees to RP of an amount of Rs. 3 crores and thus, directed RP and CoC to proportionately distribute said amount of Rs. 3 crore among underpaid operational creditors - Grievance of RP was that approval of success fees was a commercial decision of CoC and NCLT could not have interfered with same - It was noted that quantum of fees payable to RP could be fixed by CoC but it would be subject to scrutiny by NCLT as what was reasonable fees; reasonableness of fees was not part of commercial decision of CoC - Further, manner in which, RP in last minute pushed before CoC to claim success fees without putting on record necessary particulars was improper and incorrect - Whether thus, impugned order passed by NCLT wherein it disallowed success fees to RP was justified - Held, yes (Para 38)

FACTS

- The Corporate Insolvency Resolution Process (CIRP) was initiated on in respect of corporate debtor. In the first CoC meeting, the appointment of appellant was approved by the CoC as Resolution Professional.
- While approving the resolution plan submitted by successful resolution applicant, the Adjudicating Authority disagreed with the Committee of Creditors (`CoC') which had approved `success fees' to the RP of an amount of Rs. 3 crores.
- Against above part of the impugned order, the present appeal had been filed. The grievance raised was that the approval of the success fees was a commercial decision of the CoC and the Adjudicating Authority could not have interfered

with the same while approving the Resolution Plan and directing distribution of the amount set apart for success fees.

HELD

- may be approving the fees but as it has to be reasonable under the provisions of the Code and Regulations, it is justiciable. The fees have to be on the basis of the case and work performed or to be performed, the reasonability or otherwise would be justiciable. By pushing in a big amount at last moment in the name of success fees for the Resolution Professional and making it part of CIRP costs at the time of approval of the Resolution Plan does not make the same a commercial decision of the CoC. The resolution applicant and other stakeholders, other than those present of CoC would not know what is being hived off from the beneficiaries of the Resolution Plan. Fees payable to IRP/RP have been made part of CIRP costs so as to safeguard interest of the IRP/RP. Section 30(2) provides that the resolution plan should provide for payment of Insolvency Resolution Process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor. The protection is to the CIRP costs validly incurred. The interest of IRP/RP cannot be equated with the interest of the corporate debtor and other stakeholders, creditors. Fees cannot be disproportionate to eat into the percentage of other claimants of the corporate debtor and the corporate debtor about to be resolved. Thus, no fault can be found with the impugned paragraph of the impugned order. (Para 36)

- Appellant claiming that he had done excessively well to deserve Rs. 3 crores of success fees, the Adjudicating Authority had made comments as to what was the scenario when it was supervising the CIRP. The Adjudicating Authority was at the ground level monitoring the progress of CIRP and its observations cannot be simply ignored. (Para 37)

- 'Success fees' which was more in the nature of contingency and speculative was not part of the provisions of the of IBC and the Regulations and the same was not chargeable. Apart from this, even if it was to be said that it was chargeable, we find that in the present matter, the manner in which, it was last minute pushed at the time of approval of the Resolution Plan and the quantum are both improper and incorrect. (Para 38)

- such reasons, there is no substance in the appeal. The appeal is dismissed. (Para 40)

CASE REVIEW

Jayesh Shanghrajka v. *Divine Investments* (2021) 127 taxmann.com 494/166 SCL 357 (NCLT - Mum.) (para 40) *reversed*.

CASES REFERRED TO

Dipco (P.) Ltd. v. *Ariisto Developers (P.) Ltd.* (2021) 129 taxmann.com 89 (NCLT - Mum.) (para 2), *Devarajan Raman, Resolution Professional Poonam Drum & Containers (P.) Ltd* v. *Bank of India Ltd.* (Company Appeal (AT) (Insol.) No. 646 of 2020) (para 22), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 22), *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 22) and *Alok Kaushik* v. *Bhuvaneshwari Ramanathan* (2015) 5 SCC 787 (para 36).

Dhruv Mehta, Sr. Adv., **Tishampati Sen, Ms. Riddhi Sancheti, Ashish Perwani, Devesh Juvekar, Ms. Jyoti Goyal** and **Dikshat Mehra,** Advs. *for the Appellant.* **Sumant Batra,** *Ld. Amicus Curiae.*

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† Arising out of *Jayesh Shanghrajka v. Divine Investments* (2021) 127 taxmann.com 494/166 SCL 357 (NCLT - Mum.).

For Full Text of the Judgment See

(2021) 131 taxmann.com 237 (NCLAT- New Delhi)

Code of Conduct for Insolvency Professionals

Professional Competence

An Insolvency Professional must attain and maintain professional knowledge and skill based on the latest developments in practice, legislation and techniques. The Insolvency Professional must ensure to accept the assignment only when he is competent to perform. Before acceptance of any assignment, an Insolvency Professional must ensure that he has adequate infrastructure, manpower, skill set, time, technologically literate and abreast with the latest developments under Insolvency Law. An Insolvency Professional should not accept too many assignment if he is unable to devote adequate time to each assignment. In order to achieve the objective of professional competence, IBBI introduced the concept of mandatory continuous professional education (CPE) by adding clause (*ba*) under regulation 7(2) of the IBBI (Insolvency Professional) Regulations, 2016. It provides that the registration of a person as an Insolvency Professional is subject to the condition that he undergo continuing professional

education, as may be required by the Board. As per the guidelines issued by IBBI, an Insolvency Professional shall undertake a minimum of 10 credit hours of CPE each calendar year and a minimum of 60 credit hours of CPE in each rolling block of three calendar years.

Credit hours may be obtained from the following:

- Participating in various learning activities offered by the IBBI, Insolvency Professional Agencies, Registered Valuer Organisations etc. such as Workshops, Conferences, Seminars, Training Programmes, Refresher Programmes, Certificate Courses, Conventions and Symposia and the like.
- Publishing articles/delivering lectures, in the areas relevant for Insolvency Professionals.

Similar practise is followed under the UK regime, wherein the Insolvency Practitioners are required to attain minimum 25 hours relevant structured Continuing Professional Development (CPD) during each year which may include attending or speaking at courses, conferences, seminars and lectures organised by the IPA etc.

Before accepting any assignment, an Insolvency Professional should ensure that he is satisfied that the following matters have been taken into consideration:

- Obtaining knowledge and understanding of the entity.
- Obtaining knowledge and understanding of entity's owners, managers and those responsible for its governance and business activities.
- Obtaining knowledge about the current financial position of the entity.
- Acquiring an appropriate understanding of the nature of the entity's business, the complexity of its operations, the specific requirements of the engagement and the purpose, nature and scope of the work to be performed.
- Acquiring knowledge of relevant industries or subject matters.
- Availability of sufficient staff with the necessary competencies.
- Access to experts where necessary.
- Complying with quality control policies and procedures designed to provide reasonable assurance that specific engagements are accepted only when they can be performed competently.
- Availability of adequate time to perform duties.

Code and Conduct

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

`An insolvency professional must maintain and upgrade his professional knowledge and skills to render competent professional service.'

UK Regime

In UK the fundamental principle of Professional Competence and Due Care is as follows:

- An insolvency practitioner shall comply with the principle of professional competence and due care, which requires an insolvency practitioner to:

  (*a*) Attain and maintain professional knowledge and skill at the level required to ensure that a competent professional service is provided, based on current technical and professional standards and relevant legislation; and

  (*b*) Act diligently and in accordance with applicable technical and professional standards.

- Professional competence requires the exercise of sound judgment in applying professional knowledge and skill when undertaking professional activities.

- Maintaining professional competence requires a continuing awareness and an understanding of relevant technical, professional and business developments. Continuing professional development enables an insolvency practitioner to develop and maintain the capabilities to perform competently within the professional environment.

- Diligence encompasses the responsibility to act in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis.

- In complying with the principle of professional competence and due care, an insolvency practitioner shall take reasonable steps to ensure that those working in a professional capacity under the insolvency practitioner's authority have appropriate training and supervision.

- Where appropriate, an insolvency practitioner shall make users of the insolvency practitioner's services or activities or their employing organisation aware of the limitations inherent in the services or activities.

REFERENCES

https://insolvency-practitioners.org.uk/authorisation-criteria/

INSOLVENCY CODE OF ETHICS-UNITED KINGDOM accessible at https://www.icaew.com/-/media/corporate/files/technical/ethics/insolvency-code-of-ethics.ashx?la=en

FAQs on Pre-packaged Insolvency Resolution Process

1. When can an application for initiating pre-packaged insolvency resolution process be made?

An application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor, who commits a default referred to in section 4, subject to the following conditions, that-

(*a*) it has not undergone pre-packaged insolvency resolution process or completed corporate insolvency resolution process, as the case may be, during the period of three years preceding the initiation date;

(*b*) it is not undergoing a corporate insolvency resolution process;

(*c*) no order requiring it to be liquidated is passed under section 33;

(*d*) it is eligible to submit a resolution plan under section 29A;

(*e*) the financial creditors of the corporate debtor, not being its related parties have proposed the name of the insolvency professional to be appointed as resolution professional and the financial creditors of the corporate debtor, not being its related parties, representing not less than sixty-six per cent in value of the financial debt due to such creditors, have approved such proposal in such form as may be specified;

(*f*) the majority of the directors or partners of the corporate debtor, as the case may be, have made a declaration, in such form as may be specified;

(*g*) the members of the corporate debtor have passed a special resolution, or at least three-fourth of the total number of partners, of the corporate debtor have passed a resolution, approving the filing of an application for initiation of the process.

2. What are the other requirements to be made along with the application made for initiation of pre-packaged insolvency resolution process of Corporate Debtor?

The corporate applicant shall, along with the application, furnish—

(*a*) the declaration, special resolution or resolution, as the case may be, and the approval of financial creditors for initiating pre-packaged insolvency process

(*b*) the name and written consent, in such form as may be specified, of the insolvency professional proposed to be appointed as resolution professional

(*c*) a declaration regarding the existence of any transactions of the corporate debtor that may be within the scope of provisions in respect of avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, in such form as may be specified

(*d*) information relating to books of account of the corporate debtor and such other documents relating to such period as may be specified

3. What is the time-limit for completion of pre-packaged insolvency resolution process?

The pre-packaged insolvency resolution process shall be completed within a period of one hundred and twenty days from the pre-packaged insolvency commencement date.

4. What is the time-limit for submission of resolution plan as approved by the committee of creditors to the Adjudicating Authority?

The Resolution Professional shall submit the resolution plan, as approved by the committee of creditors, to the Adjudicating Authority within a period of ninety days from the pre-packaged insolvency commencement date.

Where no resolution plan is approved by the committee of creditors within the time period specified the resolution professional shall, on the day after the expiry of such time period, file an application with the Adjudicating Authority for termination of the pre-packaged insolvency resolution process.

5. Within how many days committee of creditors shall be constituted by the Insolvency Professional?

The resolution professional shall, within seven days of the pre-packaged insolvency commencement date, constitute a committee of creditors, based on the list of claims confirmed.

6. When shall the first meeting of Committee of Creditors shall be held under pre-pack?

The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

7. Whether Committee of Creditors (CoC) initiate corporate insolvency resolution process once pre-packaged insolvency process has already been initiated?

As per Sec 54-O(1) the committee of creditors, at any time after the pre-packaged insolvency commencement date but before the approval of resolution plan by a vote of not less than sixty-six per cent of the voting shares, may resolve to initiate a corporate insolvency resolution process in respect of the corporate debtor, if such corporate debtor is eligible for corporate insolvency resolution process under Chapter II.

8. What are the various forms under pre-packaged insolvency process?

S. No.	Form	Purpose
1.	P1	Written Consent to act as an IRP
2.	P2	List of Creditors of the Corporate Debtor
3.	P3	Approval of Terms of Appointment Of Resolution Professional
4.	P4	Approval for initiating Pre-Packaged Insolvency Resolution Process
5.	P5	Written consent to act as Authorised Representative
6.	P6	Declaration by Directors/ Partners
7.	P7	Declaration regarding existence of Avoidance Transaction(*s*)
8.	P8	Report of the Insolvency Professional
9.	P9	Public Announcement
10	P10	List of Claims
11.	P11	Invitation of Resolution Plans
12.	P12	Compliance Certificate
13.	P13	Application for termination of pre-packaged insolvency resolution process
14.	P14	Application for vesting management with resolution professional

9. When shall invitation of Resolution Plan be made by the Resolution Professional?

As per Regulation 43(1), of the IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021, the Resolution Professional shall publish brief particulars of the invitation for resolution plans in Form P11 not later than twenty-one days from the pre-packaged insolvency commencement date.

10. What is time-limit for giving notice of the meeting of Committee of Creditors under Pre-Pack?

As per Regulation 28, of the IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021, a meeting of the committee shall be convened by giving

not less than three days' notice in writing to every participant, at the address provided to the resolution professional by the creditor.

However, the committee may reduce the notice period from three days to such other period of not less than twenty-four hours, as it deems fit. Further, provided that the committee may reduce the period to such other period of not less than forty-eight hours if there is any authorised representative in the committee.

Policy Update

Vide its notification dt. 3rd September 2021, IBBI has extended validity of Insolvency and Bankruptcy Board of India (Online Delivery of Educational Course and Continuing Professional Education by Insolvency Professional Agencies and Registered Valuers Organisations) Guidelines, 2020 till 31st December, 2021. Detailed circular thereof can be accessed @

https://ibbi.gov.in/uploads/legalframwork/2021-09-03-164223-yfas8-af68aec6a9ff864bb2ea1a13ec1ac66f.pdf

Vide its notification dt. 30th September 2021, IBBI has amended the IBBI (Liquidation Process) Regulations, 2016. This amendment expands the scope of stakeholders' consultation committee (SCC) consultation to liquidator to cover all aspects related to sale of assets and appointment of professionals, and provides for the manner of selection of representatives of stakeholders in SCC. Amendment details can be accessed @

https://ibbi.gov.in//uploads/press/7d2e741e1de66880b3b9fbbed3c94410.pdf;

Vide its circular dt. 30th September 2021, IBBI has designated an electronic platform for hosting public notices of auctions of liquidation assets under the IBBI (Liquidation Process) Regulations, 2016. With effect from 1st October, 2021, all liquidators are required to upload public notice of every auction of any liquidation asset at www.

ibbi.gov.in on the day of its publication in newspapers, through their designated login page. The circular can be accessed @

https://ibbi.gov.in/uploads/legalframwork/2021-09-30-233009-xotyz-7c4b58c1affd6a9e028a8348cc2f91be.pdf

Vide its notification dt. 30th September 2021, IBBI has introduced amendment to Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2021. The notification can be accessed @

https://ibbi.gov.in/uploads/legalframwork/57c7722e3ebb1364eac924f213111814.pdf

Vide its notification dt. 30th September 2021, IBBI has introduced amendment to Insolvency and Bankruptcy Board of India IBBI (Liquidation Process) Regulations, 2021. The notification can be accessed @

https://ibbi.gov.in/uploads/legalframwork/dd230e9f5c38a981e646a3eba1354713.pdf

Concept of 'Centre of Main Interests'

Centre of Main Interests (COMI) is a complex concept in the cross border insolvency arena. The meaning of the term COMI means the jurisdiction with which a person or company is most closely associated for the purposes of cross-border insolvency proceedings. The concept of COMI is used to determine the degree to which the courts of one jurisdiction are obliged to recognize and assist insolvency proceedings commenced in a different jurisdiction. This term is used in the UNCITRAL Model Law on Cross Border Insolvency (UNCITRAL Model Law).

The Model Law was designed to ensure a consistent approach to cross-border insolvencies, coordinated via the main insolvency proceeding taking place where the debtor's COMI is located. As the UNCITRAL Guide to Enactment and Interpretation of the Model Law makes clear, one of the aims of the Model Law was to 'facilitate and promote a uniform approach to cross-border insolvency'.

As per Article 16(3), UNCITRAL Model Law, COMI is generally the place where the debtor conducts the administration of his interests on a regular basis as ascertainable by third parties. There is in most cases a rebuttable presumption that a corporate debtor's COMI is

the location of its registered office. The critical question, in determining whether a foreign proceeding (in respect of a corporate debtor) should be characterized as "main" is whether it is taking place "in the State where the debtor has the centre of its main interests". In the case of a natural person, the "centre of main interests" is presumed to be the person's "habitual residence".

The Model Law allows recognition of foreign proceedings and provision of remedies by domestic courts based on such recognition. Relief can be provided if the foreign proceeding is either a main or a non-main proceeding. If domestic courts determine that the debtor has its centre of main interests ("COMI") in the foreign country, such a foreign insolvency proceeding is recognized as the main proceeding. If domestic courts determine that the debtor has an establishment (applying a test based on carrying on of non-transitory economic activity), such a foreign insolvency proceeding is recognized as the non-main proceeding. Recognition as a main proceeding will result in automatic relief, such as a moratorium on transfer of assets of the debtor, and allow the foreign representative greater powers in handling the estate of the debtor. For non-main proceedings, such relief is at the discretion of the domestic court.

The legal assumption is that the centre of main interest of a corporation or establishment is where it has its statutory seat. This legal assumption may only be set aside; if there are objective circumstances that can be recognized by a third party and which establish a different centre of main interest deviating from the jurisdiction of the statutory seat of the relevant corporation or establishment. While this seems to be a reasonably practical starting point, this legal assumption may either (*i*) not be required at all in the case where the centre of main interest is without doubt (*e.g.*, the only factory building in state X) or (*ii*) relatively easy to be *set aside* in a case where the statutory seat is in state X while all business, assets etc. are located in state Y.

Unless all criteria indicate the same centre of main interest, a court and/or insolvency lawyer needs to weigh the different criteria objectively and come to a conclusion in light of the relevant criteria. If for example the corporate address is moved from state X to state Y, which may be a matter of fact given the change of address, this may still be insufficient where this could not be clear to a third party, eg. having one's business address moved to the location of a subsidiary residing on a large industrial site with various buildings and other structures may not be sufficient to identify where the business is conducted now. Similarly, having one's business address in state X but management decisions constantly adopted in state Y should indicate that the centre of main interest of such holding is in state Y. For an enterprise having its business address in state X, management decisions being adopted in state Y but all factory buildings located in state Z the outcome may however be different.

Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption can be rebutted only if factors which are both objective and ascertainable by

third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated.

The main insolvency proceedings opened by a court of a Member State must be recognized by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State. The rule of priority provides that insolvency proceedings opened in one Member State are to be recognized in all the Member States from the time that they produce their effects in the State of the opening of proceedings.

There are two sets of factors necessary to determine the proper location of the COMI of a subsidiary. The first set of factors is the location where a debtor regularly administered its own interests, as ascertainable by third parties, and the country in which it is incorporated. The second set of factors arises from the location of the parent company which, by virtue of its ownership and power to appoint directors, is able to control the policy decisions of the subsidiary. Where these factors point to different countries for the location of the CoMI, the court must determine the relative weight to give to each factor. The criteria are required to be both objective and ascertainable by third parties, typically the debtor's major creditors. , Third parties may have undertaken considerable effort in exercising due diligence to assure themselves as to the location of the debtor's COMI.

Recommendations by the Justice Eradi Committee and N.L. Mitra Advisory Group on Bankruptcy Laws:

The Eradi Committee Report: Recommended that the Model Law be implemented in India; Amendment of Part VII of Companies Act, 1956 in-bound and our-bound requests for recognition of foreign proceedings, co-ordination of proceedings in two or more States and participation of foreign creditors in insolvency proceedings.

The N.L. Mitra Committee: Recommended that Indian laws on cross border insolvency are outdated and are not comparable to international legal standards in the event of an international insolvency proceeding involving an Indian company, Indian courts are unlikely to provide any aid or assistance to a foreign liquidator Proposed a Comprehensive Bankruptcy Code.

The Insolvency Law Committee also submitted its second report to the Ministry of Corporate Affairs on October 16, 2018 recommending amendments in the Insolvency and Bankruptcy Code, 2016 with respect to cross-border insolvency. The Code provides a time-bound 180-day process to resolve insolvency of companies and in The Committee proposed a draft 'Part Z' in the Code, based on an analysis of the UNCITRAL Model Law on Cross-Border Insolvency, 1997. The Model Law provides a legal framework that states may adopt in their domestic legislation to deal with cross-border insolvency issues including COMI.

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