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INSOLVENCY AND BANKRUPTCY JOURNAL

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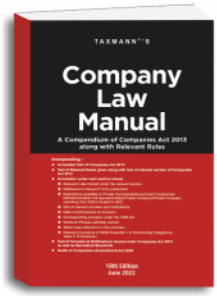
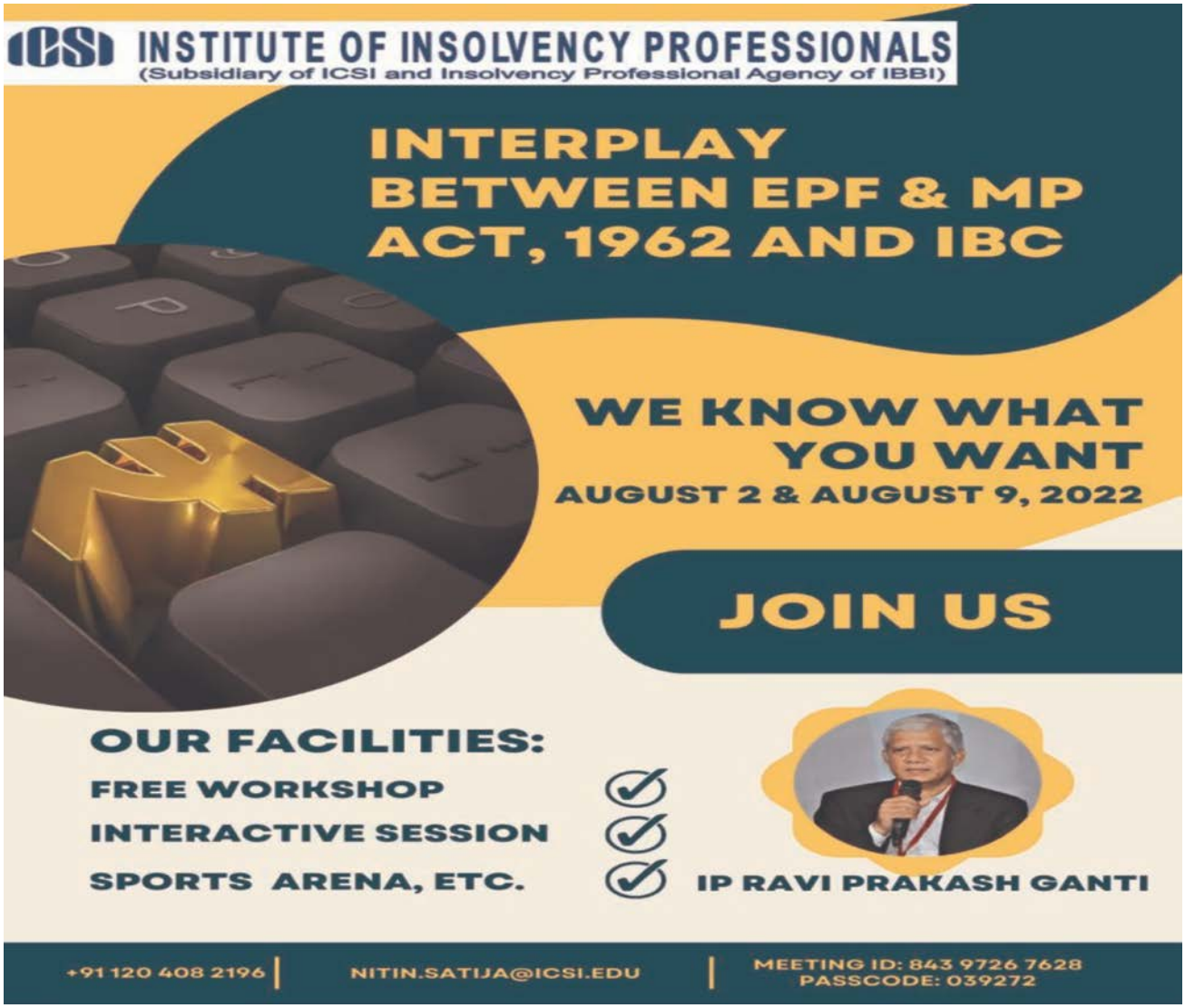


NEWS FROM THE INSTITUTE

◆ **This is part 1 of the workshop on 'interplay between EPF & MP Act, 1962 and IBC held on 2nd August 2022 with IP Ravi Prakash Ganti as the speaker/faculty**



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(IP's & CS)

Panel Discussion on

"Making IBC More Effective"

- **Changes / amendments required in the Code, Rules and Regulations**
- **Challenges & issues faced by CoCs and IPs**

Inaugural Session

Shri Sunil Mehta
Chief Executive Officer – IBA

Shri Ravi Mital
Chairperson - IBBI

Shri Sudhaker Shukla
Whole-time Member – IBBI

Panelists: IBBI, Banks and IPs

Virtual Mode
Tuesday, 23rd August 2022 @ 3.00 pm to 6.00 pm
Discussion Link: Join here

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At a Glance

No. 8 | Pg. 1-100 | August 2022

Section 7, read with Section 9 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Whether an application of an operational creditor for initiation of CIRP under section 9(2) is mandatorily required to be admitted if application is complete in all respects and in compliance of requisites of IBC

and rules and regulations thereunder, there is no payment of unpaid operational debt, if notices for payment or invoice had been delivered to corporate debtor by operational creditor and no notice of dispute has been received by operational creditor - Held, yes - Whether thus, provisions in IBC relating to commencement of CIRP at behest of an operational creditor, whose dues are undisputed, are rigid and inflexible while in case of a financial debt, there is a little more flexibility - Held, yes - Whether section 7(5)(a) confers discretionary power on Adjudicating Authority to admit an application of a financial creditor under section 7 for initiation of CIRP - Held, yes - Whether however, such discretionary power cannot be exercised arbitrarily or capriciously and if facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner - Held, yes - Whether ordinarily, Adjudicating Authority would have to exercise its discretion to admit an application under section 7 and initiate CIRP on satisfaction of existence of a financial debt and default on part of corporate debtor in payment of debt, unless there are good reasons not to admit petition - Held, yes (Paras 76, 79, 81, 86 and 87)

Asset Reconstruction Company (India) Ltd. *v.* **Tulip Star Hotels Ltd.**

(2022) 141 taxmann.com 61 (SC) • P-245

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Financial debt - Consortium of banks including Bank of India executed a loan agreement whereby it was agreed that banks would provide a loan to corporate debtor - Account of corporate debtor was declared as 'NPA' and subsequently, an assignment agreement was executed by Bank of India assigning its receivables to appellant-financial creditor - Later on, appellant filed an application under section 7 for initiating corporate insolvency resolution process (CIRP) against corporate debtor - NCLT by impugned order admitted said application - Corporate debtor filed an appeal that account of corporate debtor was declared as NPA on 1-12-2008 and, therefore, application under section 7 filed on 3-4-2018 was barred by time - NCLAT by impugned order set aside NCLT's order - Whether since corporate debtor acknowledged its liability in its financial statements from year 2008-09 till 2016-17, application under section 7 was filed well within extended period of limitation - Held, yes - Whether therefore, impugned order passed by NCLAT was to be set aside - Held, yes (Para 98)

Section 4, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Application of - Whether IBC is not just a statute for recovery of debts - Held, yes - Whether it is also not a statute which only prescribes modalities of liquidation of a corporate body, unable to pay its debts - Held, yes - Whether it is essentially a statute which works towards revival of a corporate body, unable to pay its debts, by appointment of a Resolution Professional - Held, yes (Para 55)

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 18 of the Limitation Act, 1963 - Corporate Insolvency Resolution Process - Limitation period - Whether entries in books of account and/or balance sheets of a corporate debtor would amount to an acknowledgement under section 18 of Limitation Act - Held, yes (Para 85)

Sanjay Sarin *v.* **Authorised Officer, Canara Bank**

(2022) 141 taxmann.com 407 (Delhi) • P-253

I. Section 33 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Initiation of - Petitioner, stood as a guarantor to a loan advanced by respondent-bank to borrower - Subsequently, corporate insolvency resolution proceeding was initiated against borrower/corporate debtor - A resolution plan, accepted by Committee of Creditors was approved by NCLT - Under approved resolution plan, resolution applicant was to make payment to respondent bank but it defaulted - Thereafter, proceedings were initiated by respondent

bank under section 13(4) of SARFAESI Act, and in furtherance thereto, proceedings were also instituted under section 14 of SARFAESI Act, for taking possession of security offered by Guarantor - Petitioner was aggrieved by such action of respondent bank - Whether if petitioner was not absolved of his liability, proceedings initiated by bank under SARFAESI Act could not be held to be unconstitutional or in derogation of Approval Order of NCLT - Held, yes - Whether respondent bank certainly had right to proceed against collateral securities for recovery of its dues, which were independent of resolution plan approved by NCLT - Held, yes - Whether if Parliament, in its wisdom, has only provided remedy of a liquidation process under section 33(3) as a consequence of non-implementation of resolution plan by concerned corporate debtor, High Court cannot create another remedy just because aforenoted remedy is not sufficient or suitable for petitioner - Held, yes - Whether therefore, petitioner's grievance regarding non-implementation of resolution plan could not be a ground for High Court to entertain instant writ petition - Held, yes (Paras 9 and 12)

II. Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether discharge of corporate debtor from a debt owed by it to its creditors, by way of an involuntary process such as insolvency proceedings, does not absolve guarantor of its liability since it arises out of an independent contract - Held, yes - Whether thus, passing of a resolution plan does not ipso facto discharge personal guarantor - Held, yes - Whether however, extent of liability of a personal guarantor is to be determined in light of agreement between borrower, i.e., corporate debtor, and personal guarantor, for which appropriate forum would be Debt Recovery Tribunal and not High Court - Held, yes (Para 9)

Hemant Mehta Resolution Professional of Pan India Utilities Distribution Co. Ltd. *v.* **Asstt. Commissioner of State Tax**
(2022) 142 taxmann.com 459 (NCLAT-New Delhi) • P-258

Section 60, read with sections 14 and 238A of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authorites - Adjudicating Authority - Corporate insolvency resolution process (CIRP) was initiated against corporate debtor and RP was appointed - Since RP had not received any expression of interest, CoC resolved by majority to go into liquidation - During liquidation process, R1-Assistant Commissioner of Tax and R2-Commercial Tax Officer had issued notices to corporate debtor's bank to freeze current account of corporate debtor towards clearance of outstanding dues/liabilities of CST/VAT - Appellant sent several communications to Government/bank authorities urging them to defreeze relevant current account, but as there was no progress in matter appellant filed application before NCLT seeking directions to be issued to respondents and set aside their notices - NCLT by impugned order disposed of said application and directed appellant to continue follow up exercise with relevant Government authorities to consolidate assets of corporate debtor - Whether since directions issued by respondents freezing accounts of corporate debtor during liquidation process was bad in law, it was within remit of NCLT to issue appropriate directions to respondents to set matter right and provide statutory relief to appellant - Held, yes - Whether NCLT, ought to have appreciated constrained faced by appellant and should have provided relief by exercising its residuary jurisdiction under section 60(5) rather than remanding appellant once again back in hand of Government authorities - Held, yes (Paras 15 and 17)

AJR Infra and Tolling Ltd. *v.* **Committee of Creditor of Rajahmundry Godavari bridge Ltd.**
(2022) 143 taxmann.com 16 (NCLT - Mum.) • P-261

Section 12A of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Withdrawal of application - Whether where applicant-corporate debtor submitted a settlement proposal under section 12A, which

was turned down by CoC in its commercial wisdom as they did not inspire confidence on conduct of applicant, NCLT had no power to give any directions to CoC to consider compromise proposal submitted by applicant as it is exclusive domain of CoC - Held, yes - Whether therefore, very prayer sought by applicant in instant application seeking directions to CoC to consider compromise proposal submitted by it under section 12A was impermissible in law and NCLT had no power to give such direction as sought by applicant - Held, yes (Para 3)

Cimco Projects Ltd. *v.* **Anup Kumar (Resolution Professional) Shivkala Developers (P.) Ltd.**
(2022) 143 taxmann.com 17 (NCLAT-New Delhi) • P-262

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - CIRP was initiated against corporate debtor - Resolution plan submitted by appellant was approved by CoC - Thereafter, Resolution Professional filed an application before NCLT for approval of resolution plan - Appellant, successful resolution applicant, was impleaded as a party to said application and NCLT directed him to submit performance guarantee - More than three years had passed from approval of resolution plan by CoC, resolution applicant had neither furnished performance guarantee nor shown any willingness to proceed with resolution plan - NCLT issued bailable and non-bailable warrants against resolution applicant but had failed to secure presence of resolution applicant and, therefore, rejected application for approval of resolution plan and ordered liquidation - Whether due to non-serious, casual and non-diligent conduct of resolution applicant, NCLT had rightly dismissed application for approval of resolution plan – Held, yes - Whether however, since application filed by appellant for cancellation of non-bailable warrant had been dismissed by NCLT without adverting to any of reasons given by appellant, application for cancellation of warrants was to be allowed - Held, yes (Paras 11 and 12)

Sumat Kumar Gupta, Resolution Professional, Vallabh Textiles Company Ltd. *v.* **Vardhman Industries Ltd.**
(2022) 143 taxmann.com 18 (NCLAT-New Delhi) • P-263

Section 25 of the Insolvency and Bankruptcy Code, 2016, read with regulations 12 and 13 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - CIRP was initiated against corporate debtor and appellant was appointed as Resolution Professional (RP) of corporate debtor - Respondent filed its claim as financial creditor - RP sent an e-mail seeking additional details and documentation by way of account statement of corporate debtor in books of financial creditor- Thereafter, RP rejected claim of financial creditor on ground that he had to decide claims within seven days from last date of receipt of claims as per regulation 13 and details sought for were not received from financial creditor within stipulated period - Financial creditor resubmitted claim but same was not entertained by RP on ground that earlier claim had already been rejected and no belated claim could be filed - Financial creditor filed an application before NCLT seeking for directions to be issued to RP to admit/verify claim - NCLT by impugned order directed RP to reconsider and evaluate claims of financial creditor afresh - It was noted that RP did not take adequate and credible effort on his part and rejected claims of financial creditor after sending a bare four-line mail requisitioning additional information pertaining to 12-year period having allowed only one day time to furnish information - Whether there was no negligence, or inaction or lack of bona fide on part of financial creditor to submit claim with proof to RP and, therefore, NCLT could not be faulted for coming to conclusion that there was no evidence of non-compliance on part of financial creditor when he submitted his claims - Held, yes - Whether RP by summarily rejecting belated claims at his own level without

presenting complete facts to CoC had misconstrued his role, duties and responsibilities - Held, yes (Paras 15, 20, 21 and 22)

Sudip Dutta @ Sudip Bijoy Dutta *v.* **State Bank of India**
(2022)143 taxmann.com 18 (NCLAT-New Delhi) • P-268

Section 5(22), read with section 95, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Personal Guarantor - Whether provision under section 60(1) makes it clear that residence of Personal Guarantor is not taken into consideration when proceedings against Personal Guarantor are initiated - Held, yes - Whether where a personal guarantee has been given by a person who is residing outside India or is a foreign national, in event personal guarantee is accepted, he shall be bound by personal guarantee - Held, yes - Whether there is no indication in statutory scheme that a personal guarantor can escape from his liability under guarantee deed only for reason that he has after execution of guarantee deed has obtained citizenship of a foreign country - Held, yes - Whether for Central Government to enter into an agreement as required under section 234-235 to enable NCLT to proceed against guarantor, a foreign citizen arises only in a case where assets or property of personal guarantor are situated at any place in a country outside India - Held, yes (Paras 23, 24 and 27)

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

From Chairman's Desk

Dear Professional Member(s),

Entrepreneurship is a quality of one's behaviour. It is also a manifestation of a desire to create something which can be put to beneficial use for the society and which serves the larger public interest. An entrepreneur is encouraged to work out his/her desire, and to also live it. His work cannot be limited to only making a living, but it must transcend beyond his personal ambitions and expand to greater levels. An entrepreneur would not need a push from outside, he is always self-propelled, wanting to push himself hundred per cent to the limits to do something big and useful for the society. If this has to happen, the fundamental incentive for one to create has to be to do something larger than oneself. A person can be called truly an entrepreneur if he has such an inherent urge, a need and a desire to create something which could add value to people's lives. If one wants to create something, money has to be definitely the facilitator, because without money, no activity would take place, especially in today's world. Money is thus one of the resources that we need to make things happen. There are multiple avenues available today for an entrepreneur to satisfy his business's finance needs, and, while Banks and FIs would always be willing to extend the financial facility to a viable business model, it ought to be taken as a bounden duty of the entrepreneur to ensure that he also lives up to his responsibility towards its creditors.

Coming to some of the important ruling of this month, in *Sundaresh Bhatt, Liquidator of ABG Shipyard* v. *The Central Board of Indirect Taxes and Customs* the facts of the case were that M/s ABG Shipyard ('ABG' in short) used to regularly import various materials as part of its operations for building ships that would eventually be exported. ABG stored some of its items in custom-bonded warehouses in Gujarat and Maharashtra container freight stations. Bills of entry for warehousing were submitted. Now, ABG also held EPCG License for warehousing of its goods and took the benefits from the Export Promotion Capital Goods Scheme. ABG also took advantage of other related schemes and notifications, but did not pay the required customs duty.

An application u/s 9, IBC got filed by ICICI Bank against ABG at NCLT, Ahmedabad seeking orders for initiation of CIRP against ABG (CD). The CD was accordingly admitted to CIRP on August 1, 2017, and Mr. Sundaresh Bhatt was appointed as the IRP. Further, a moratorium was also declared by the NCLT. Subsequently, on 25th April, 2019, NCLT passed an order for CD's liquidation u/s 33(2), IBC, and further declared that the earlier moratorium imposed u/s 13(1)(*a*) shall expire as a result of s. 14(4) of the IBC taking effect. But an order u/s 33(5) of IBC was passed prohibiting initiation of any lawsuit by or against ABG, and the IRP got appointed as the liquidator. The liquidator later filed an application before NCLT seeking directions for release of ABG's warehoused goods which came to be allowed *vide* NCLT orders dt. 25th Feb, 2020. Further, directions were also passed to the effect that the liquidator shall have unhindered access to remove material from customs-bonded warehouses without the need to pay the customs fee, and that customs department shall be entitled to file their claim with the liquidator concerning their pending dues from ABG. The goods stored in Surat were accordingly sold for a sum of Rs. 169.11 Crores. On an appeal before NCLAT, the appellate tribunal reversed NCLT's order and directed the warehoused goods to be released or disposed of as per applicable provisions of Customs Act by the proper officer. NCLAT found that ABG, which was the importer, had given up ownership of imported goods by failing to file the bills of entry. On a further appeal before Hon'ble SC, the NCLAT's order got set aside. The SC held that the act of sending out demand notices to seek enforcement of customs dues during the moratorium period violates ss. 14 and 33(5), IBC. The demand notices were taken as the beginning of a formal legal action against ABG. It was further clarified that the only action which the government can take against ABG is to figure out what taxes, interest, fines, or penalties are owed, and the authority is

not permitted to enforce a claim for recovery or levy interest on the tax due during the moratorium. Thus, the authorities could only start the assessment or reassessment of the duties and other levies, but could not begin a recovery since it violates ss. 14 and 33(5) of IBC. Resultantly, the abandoned imported goods in the custody and possession of customs warehouses was held to be a part of ABG's assets. Thus, in short, it can be deduced from this judgment that the provisions of IBC shall prevail over those of the Customs Act.

In another landmark ruling in *Kotak Mahindra Bank Ltd.* v. *Kew Precision Parts (P) Ltd.* (2022) 141 taxmann.com 147 (SC). Hon'ble SC has highlighted the distinction between an 'acknowledgment of debt' under the Limitation Act, 1963 and a 'promise to pay a time barred debt' under the Indian Contract Act, 1872, in respect of application to initiate CIRP under the IBC. The Court held that an application to initiate CIRP against a CD is maintainable in respect of a time barred debt, if the debtor has after the expiry of the limitation period, agreed to repay it. This ruling is important since in case of applications filed for initiating CIRP, the tribunals and courts have consistently held that acknowledgement of debt within the limitation period will create a fresh limitation period, and it is on this basis only that applications got admitted earlier. In this case, however, the SC has also applied the language of s. 25, Indian Contract Act, 1872 to hold that an agreement to pay a time barred debt creates a valid and enforceable debt, and in case there is a default in payment of such a debt, the same can form the basis for admitting the application and initiating CIRP against the debtor. The court also ruled that in case of a s. 7 application, the security documents can be filed at any time before the CIRP application gets dismissed. The SC also made some very important statements in its judgment concerning the nature of IBC as a statute. It said "the IBC is not just another statute for recovery of debts. Nor is it a statute which merely prescribes the modalities of liquidation of a Corporate body, unable to pay its debts. It is essentially a statute which works towards the revival of a Corporate body, unable to pay its debts, by appointment of a Resolution Professional."

Please take a very good care of yourself and your loved ones.

CS ALKA KAPOOR
COO (Designate)

COO's Message

There are numerous thorns in a rose plant, but we do not call it a thorn plant. A lot depends on the center of our focus!

Dear Professional Member(s),

The interplay between provisions of IBC and Limitation Act continues to unfold. There have been a good number of judicial pronouncements from Hon'ble SC, and the law on the subject stands fairly settled. Issues like limitation period for initiating CIRP proceedings, application of ss. 14, 18 and 19 limitation Act to IBC proceedings *et al.* are all well-settled now. In a recent matter (ARCIL v. Tulip Star Hotels Ltd.) before Hon'ble SC, the Court has vide its judgment dt. 1st August, 2022 held that entries in CD's Books of Account/Balance sheet can be treated as an acknowledgement of liability for debt(s) payable to a financial credit. The Court distinguished its ruling in Babulal Vardharji Gurjar and observed that Babulal Gurjar is not an authority for the proposition that Books of Account of CD could not be treated as acknowledgement of liability to an FC. On the issue of limitation, SC relied on its earlier decision in Sesh Nath Singh, wherein it held that words 'as far as may be' appearing in s. 238A IBC would mean that Limitation Act, 1963 would not apply verbatim to IBC proceedings. The Court also clarified that period of limitation for making an

application u/s. 7 or s. 9, IBC is 3 years from the date of default. The Court also noted that since CD acknowledged its liability and proposed a settlement *vide* its letter dt. 7th February, 2011 and also subsequently sent a communication, the application u/s 7, IBC which was filed on 3rd April, 2018, would fall within the extended period of limitation of three years. The Court thus reiterated the settled legal proposition (Bishal Jaiswal's case), wherein entries in balance sheet were held to be an acknowledgement of liability, and made it clear that creditors whose debts are acknowledged in CD's balance sheet would be allowed to initiate proceedings under IBC against the CD.

In another matter *(Kotak Mahindra Bank Limited v. Kew Precision Parts (P) Ltd.* (2022) 141 taxmann.com 147 (SC) concerning a somewhat similar issue, the SC applied provisions of s. 25, Indian Contract Act, 1872 to conclude that an agreement to pay a time-barred debt would create a valid and enforceable debt. It also held that the default in payment could form a basis for admitting an application for CIRP initiating. Hon'ble Apex Court drew distinction between a case of acknowledgement of debt u/s 18, Limitation Act, 1963, and a case wherein a promise to pay a time-barred debt (u/s 25 Indian Contract Act, 1872) is made. It held that a CIRP application can thus be maintained w.r.t. a time-barred debt, if the debtor has, after expiry of limitation period, would execute an agreement to repay the debt. Section 25 (*supra*) provides for cases, wherein, despite absence of consideration, the agreement would stand as a legally binding contract. The SC thus held that u/s 25(3) (*supra*), the terms of settlement between the parties were enforceable within 3 years from the due date of payment thereunder, and since the due date under the settlement was 31st December 2018, the application filed in January, 2019 is within limitation period.

Another significant ruling (*Sundaresh Bhatt, Liquidator of ABG Shipyard* v. *The Central Board of Indirect Taxes and Customs*) which came this month from Hon'ble SC concerning IBC pertains to the interplay between provisions of IBC, 2016 and Customs Act, 1961. While considering the contention as to whether IBC provisions would prevail over the Customs Act, the SC noted that Customs Act and the IBC act in their own spheres. Section 142A of the Customs Act provides that the Custom Authorities would have first charge on the assets of an assessee under

Customs Act, except with respect to cases u/s 529A, Companies Act 1956, RD & BA Act 1993, SARFAESI Act, 2002 and IBC, 2016. Thus, an exception for IBC proceedings finds its place in the Customs Act provisions which is in line with the language of s. 238, IBC wherein an overriding power is given to IBC against any other law that may be inconsistent with it. The Court thus observed that IBC being a more recent statute would override Customs Act. The Court noted that one of the objectives behind enactment of IBC is to end conflicts between different statutes. In this case, since the demand notices which were issued by Customs Authorities were dated post CIRP initiation, SC held that the demand notices, seeking enforcement of custom dues, were violative of ss. 14 and 33(5) of IBC. The Custom authorities were thus held to be entitled to initiate assessment or re-assessment of its duties (and other levies), but not proceed to initiate recovery proceedings against CD since that would amount of transgressing boundaries of moratorium. In this case, the Court was also called upon to answer as to whether the Custom authorities could claim title over goods and issue notice to sell them in terms of Customs Act when the liquidation process got initiated against the CD. The SC answered the question in the negative and held that issuance of notice u/s 72, Customs Act (for non-payment of custom duty) would fall squarely within the ambit of initiating legal proceedings against CD, and even under the liquidation process, the liquidator is given the responsibility to secure assets and goods of CD u/s. 35(1)(*b*), IBC. Thus, the appeal was allowed. The Court also held that the moratorium u/s 33(5), IBC would not apply in case demand notices are issued prior to initiation of CIRP. The moratorium u/s 33(4) only bars 'initiation' of legal proceeding and not its 'continuation'.

I hope you all are enjoying this very exciting and eventful journey of IBC and are determined to make IBC a huge success.

INTERVIEW

JIGAR BHATT
CA, IP
Registered Valuer (Securities or Financial Assets)
Certified Forensic Accountant

1. What do you think have been the key achievements of Insolvency and Bankruptcy law since its inception?

There won't be any exaggeration in stating that the Insolvency and Bankruptcy Code, 2016 has brought a paradigm shift in the business market environment from the perspective of both lenders and borrowers. IBC has played a pivotal role in imparting more discipline in the corporate borrowers and personal guarantors as IBC has closed many escaping routes which otherwise defaulting borrowers were privy during erstwhile the pre-IBC regime. The fundamental change which IBC has brought is shift from "Debtor in Possession" to "Creditors in Control" approach and that has made a remarkable impact to the borrowers having illicit mindset. Another important aspect which IBC has addressed is providing a legal framework to entrepreneurs for allowing a systematic exit from the business which was not available during pre-IBC regime and non-availability of formal regulations related to exit was one of the apprehensions for otherwise capable entrepreneurs to venture into new business or industry. So, in my view, IBC has been a mile-stone event on the landscape of Indian Economy.

2. What made you pursue the field of IBC and become an Insolvency Professional considering it is relatively new field in the legal industry?

I had started my professional career as a Banker with leading private sector bank and have been a Corporate Banker for over a decade. I could meet numerous promoters, closely understood their business models and able to structure several debt products suitable to their business needs as a Banker. From the beginning, I always deeply believed that being an entrepreneur and running a successful business as an entrepreneur is the most tough, challenging and exiting things to do. During the course, I have also witnessed few business failures to whom we as a lender had funded and which compelled us for debt-restructuring and legal course of recoveries which further directed me to Stressed-Assets Management. Before 5 Years, when I decided to quit industry and start something on my own, the Insolvency and Bankruptcy Code, 2016 was newly enacted and since I had a deep exposure to several businesses and detailed understanding of Banking, I consciously made a choice to pursue Insolvency Resolution as a full-time profession and became an Insolvency Professional.

3. So far how was your experience as an Insolvency Professional?

Experience as an Insolvency Professional has truly been incredible. It is indeed a 360° Profession which gives you exposure to various facet of the eco system be it Government Offices, District Administration, Bankers, Judiciary and what not. As an Insolvency Professional, it gives us several opportunities for applying best of the skill sets on designing strategy, inter-personal skills, issue resolutions, collaborating with several professionals and many more. As an Insolvency Professional, every day is indeed a new day with new challenges, new experiences, new situations and ultimately at the end of the day, new learnings.

4. You also being a Chartered Accountant by profession, how has this been helpful in carrying out your duties as an Insolvency Professional?

Being a Chartered Accountant has made a strong premise as a professional and gave confidence to able to carry duties as an Insolvency Professional. My experience as Corporate Banker along with basic qualifications of LL.B. and Chartered Accountant has given a good platform and enabled in quickly adopting to the expectations of the Profession and Regulators as an Insolvency Professional.

5. Since, you have handled number of assignments, how has your experience been with the Promoters of the Corporate Debtors? What were the challenges/difficulties faced?

As said earlier, I always believed that being an entrepreneur is tough, challenging and exiting. There are few people whose illicit intentions resulted into business failures and ultimately default in repaying their dues

towards various stake-holders, however all promoters are not the same. I have had experiences of both set of the promoters. I have had taken possession of the assets of the corporate debtor with the protection of police squad of 15 police-man as well as have represented before the Adjudicating Authorities as a Resolution Professional in person for seeking approval of Resolution Plan of suspended management itself and got it approved. I strongly believe that as an Insolvency Professional, one has to remain composed and neutral while dealing with either of the types. When you perform your duties as an Interim Resolution Professional, Resolution Professional or Liquidator, always consider yourself as an "Insolvency Resolution Professional", so, ultimate objective is "Resolution", and accordingly if we made legal point of view and objective behind the process very clear to the promoters, usually we will get required co-operation from the them.

6. Do you think that the breakdown of Covid-19 has affected the growth and development of Insolvency process?

To some extent Yes. Impact of Covid-19 pandemic brought huge futuristic uncertainties everywhere in general and in business environment in specific. Resolution and Revival requires fresh capital commitments and when existing business ventures are facing uncertainties, new venture risk appetite would certainly be difficult to discover. Another set-back was Covid-19 restrictions effect on judicial functioning as for larger part of the period only urgent matters were heard by the Adjudicating Authorities and as a result the strongest pillar of the Insolvency and Bankruptcy Code, 2016 which was a time bound resolutions got adversely impacted. But now situation is back to normal and we are certainly looking forward for positive development in the process as many required process and procedure amendments are being under consideration by union cabinet.

7. How being an Insolvency Professional shaped your professional career from the time you got yourself registered?

Frankly speaking, I can't imagine what I would have been doing if I won't have been into the professional of Insolvency Resolution. I am truly passionate for the Insolvency and Bankruptcy Code, 2016 and it indeed suits my professional skill sets, my professional experience and above all, I actually enjoy what I am doing as it actually adds value to the system under which we are operating.

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

I would say, this is a full-time profession and not just a value-added degree/ profession along with your other primary profession. So, who so ever really wants to pursue full time career into Insolvency Resolution, it is for them. If I would say Passing a Limited Insolvency Examination is somewhat tough, in overall scheme of the profession, passing an exam is the easiest event as real journey as a professional start from there. Right from seeking Registration

Number, Empanelment with Banks and finally getting an assignment is a journey of its own which requires good amount of positive efforts and patience, but yes, if you give your 100% with positive intent and with true spirit, you will surely succeed.

9. What are the key elements in your opinion that can be addressed to make IBC more effective?

Though there are procedural and practical difficulties, but in my opinion if timelines getting invested into judicial process especially with respect to procedural aspects gets reduced and various authorities like District Administration, Revenue Authorities, Industrial Development Corporations, Persons at ROC/MCA, Bankers etc. are being made precisely aware of the provisions of the Insolvency and Bankruptcy Code, 2016, its overriding effect and its true-spirit, then implementation of the processes and resolutions would be far more effective and it will fetch more value discovering results as envisaged while designing this code.

10. Lastly, according to you what are your views on the future of this law?

The Insolvency and Bankruptcy Code, 2016 is like a bright kid who is undergoing its schooling. With proper nurture, training, learning, relearning and unlearning it will evolve and eventually turn into an accomplished professional. The Insolvency and Bankruptcy Code, 2016 is having very positive intent behind its spirit and implementation and the way Government is taking it seriously, I am sure over the period of next couple of years it will mature and settle and economy as a whole will benefit by unlocking of the locked capital and channelization for more productive usage, which will ultimately fuel our highly aspired GDP growth in our journey towards becoming a developed nation.

Insight!

Items to be Voted in the 1st CoC Meeting (Part - 1)

MANISH SUKHANI

(For many of my fellow Insolvency Professionals and others, especially ones who are not from the secretarial practice background, this article shares draft of some of the Explanatory Statements and Resolutions that are generally put before the Committee of Creditors in their First Meeting for their consideration and voting.

Due to word limit, this article does not cover all the matters that are generally present on the agenda of the 1st CoC Meeting but covers some of them. Part 2 of this article, covering some other items that are generally put to vote in the 1st Meeting of the CoC, will be published in the next edition of this journal)

Introduction

Reg 21 deals specifically with the Contents of the Notice. Point (*ii*) of sub-regulation 3 of Reg 21 requires Notice to contain a list of all items to be voted upon at the meeting and point (*iii*) of sub-regulation 3 of Reg 21 requires the Notice to contain

copies of all documents relevant to the matters to be discussed and the issues to be voted upon in the meeting. These copies are provided by way of Explanatory Statements with suggested draft of the Resolutions proposed to be voted upon and Annexures.

Following is a List of Issues that are generally to be voted upon at the 1st meeting of the Committee of Creditors -

i. To consider the reduction in the Notice period for convening meetings of CoC

ii. To consider the change in quorum required for conducting CoC Meetings

iii. To consider the adjournment of meeting sine die, for want of quorum

iv. To consider delegation of authority by Resolution Professional

v. To ratify expenses incurred on public announcement

vi. To approve the professional fees of the IRP (and his team)

vii. To ratify the estimated CIRP Costs incurred by the IRP

viii. To appoint the IRP as the Resolution Professional and fix his fees or to replace the IRP by another RP

ix. To approve raising of the Interim Finance

Explanatory Statements with draft Resolutions for item nos. i. to vi above will be covered in Part 2 of the article and those for item nos. vi. to ix above are covered in this Article and are hereunder considered item-wise.

Following Abbreviations are used in the Notice and the Explanatory Statements

AA Adjudicating Authority (NCLT, _____ Bench)

AR Authorised Representative

CD Corporate Debtor (*i.e.* _____ Private Limited)

CIRP Corporate Insolvency Resolution Process

CoC Committee of Creditors

Code Insolvency and Bankruptcy Code, 2016

FC Financial Creditor

FY Financial Year

IA Interlocutory Application

IU Information Utility

NCLAT National Company Law Appellate Tribunal, New Delhi

NCLT National Company Law Tribunal, _____ Bench)

OC Operational Creditor

IRP Interim Resolution Professional (*i.e. name of the IRP*)

Reg Regulation (of REG004)

REG004 Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016

RP Resolution Professional

Sec Section (of the Code)

VC Video Conferencing

EXPLANATORY STATEMENTS

Item No. vi - To ratify the estimated CIRP Costs incurred by the IRP

The amount of interim finance and the costs incurred in raising such finance by the IRP, the fees payable to the IRP and the costs incurred by the IRP in running the business of the corporate debtor as a going concern forms part of the insolvency resolution process costs by virtue of the provisions of Sec 5(13).All other costs incurred by the IRP to the extent ratified by the CoC forms part of the insolvency resolution process costs as per the provisions of Sec 5(13)(*e*) read with Reg 31(*c*) and Reg 33(4).

The IRP was so appointed *vide* Order of the Hon'ble NCLT dated (dd/mm/yyyy) passed in CP(IB)/1234/2022 (MB) and he took over the charge of the company on (dd/mm/yyyy). The members may note that the IRP has raised Rs. _____ (Rupees in words) as interim finance and incurred Rs. _____ (Rupees in words) in raising the interim finance and further incurred Rs. ____ (Rupees in words) in running the business of the corporate debtor as a going concern. Apart from these, the IRP incurred/estimates to incur out-of-pocket expenses of Rs. ____ (Rupees in words) and further Rs. ____ (Rupees in words) for running the corporate insolvency resolution process during the period between (dd/mm/yyyy) and (dd/mm/yyyy). The details of these expenses are provided in Annexure ( ) and Annexure ( ), respectively. The CoC will be asked to consider the reasonability of these expenses incurred by the IRP and pass, with or without any modification, the following resolutions -

Proposed Resolution (#6A):

> "**RESOLVED THAT**, pursuant to Regulation 33 (4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the out-of-pocket expenses incurred by Mr./Ms (name of the IRP), the Interim Resolution Professional, for the period between (dd/mm/yyyy) and (dd/mm/yyyy) amounting to Rs. _____ (Rupees in words) plus applicable taxes be and is hereby ratified/(is ratified to the extent of Rs. _____ (Rupees in words)."

Proposed Resolution (#6B):

"**RESOLVED THAT**, pursuant to Regulation 33(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the costs incurred by Mr./Ms (name of the IRP), the Interim Resolution Professional, for running the corporate insolvency resolution process during the period between (dd/mm/yyyy) and (dd/mm/yyyy) amounting to Rs. _____ (Rupees in words) plus applicable taxes be and is hereby ratified/(is ratified to the extent of Rs. _____ (Rupees in words)."

Item No. vii - To appoint the IRP as the Resolution Professional and fix his fees or to replace the IRP by another RP

As per the provisions of **Sec 22** of the Code, the CoC may either appoint the IRP as the RP and communicate its decision to the IRP, the CD and the AA, or replace the IRP with another RP and file an application before the AA for the appointment of the proposed RP, in the first meeting of the CoC. The CoC is also required to fix the expenses, including fees, of the RP.

Mr. (name of the IRP), Regn No. : IBBI/IPA-00N/IP/Pnnnnn/20nn-20nn/nnnnn, being eligible for the appointment as Resolution Professional (RP) offers himself for the appointment as Resolution Professional of the Company. His brief profile and other relevant documents, including his consent in Form AA, for consideration of his appointment as the RP of the CD by the CoC is attached with the Notice and marked as Annexure ( ).The members may note that the consent provided is subject to the passing of the Resolutions proposed hereunder.

Considering the requirements of Reg 34B and further considering the size and scale of business operations of the company, the business sector in which it operates, the level of its operating economic activity and complexities related to carrying out the CIRP, the monthly professional fee to (name of the IRP) for acting as the RP of the Company is proposed to be Rs. _____/- (Rupees _____only) plus applicable taxes and out of pocket expenses.

In terms of Reg 34B(4), the committee may pay performance-linked incentive fee, not exceeding five crore rupees, in accordance with clause 3 and clause 4 of Schedule-II of REG004 or may extend any other performance-linked incentive structure as it deems necessary, for the resolution plan approved by the committee.

Accordingly, the following Resolutions, with or without modifications, for consideration and passing of by the CoC will be put to vote:

Proposed Resolution(#7A):

"**RESOLVED THAT** the in pursuant to the provisions of Section 22(2) & 22(3)(*a*) of the Insolvency and Bankruptcy Code, 2016 and the Rules and Regulations made thereunder, Mr. (name of the RP), Insolvency Professional having Regn No. : IBBI/IPA-____is hereby appointed as the Resolution Professional in the Corporate Insolvency Resolution Process of (name of the CD)."

"**RESOLVED FURTHER THAT** (name of the RP), Resolution Professional of the Company appointed by the Committee of Creditors be and is hereby authorized to do all such acts, deeds and things, including informing NCLT about his appointment, as may be required."

Proposed Resolution (#7B):

"**RESOLVED THAT** the monthly professional fee for (name of the RP) for acting as the Resolution professional of (name of the CD) is fixed at Rs. _____/- (Rupees _____ Only) plus applicable taxes.

FURTHER RESOLVED THAT the Resolution Professional may be reimbursed out-of-pocket expenses incurred by him at actuals, subject to a maximum of Rs. _____ per month."

Proposed Resolution (# 7C):

"**RESOLVED THAT** (name of the RP), the Resolution professional of (name of the CD) will be entitled to a performance-linked incentive fee, in accordance with sub-regulation (4) of Regulation 34B read with clause (3) and clause (4) of Schedule-II of the Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016."

Item No. ix - To approve raising of the Interim Finance

It is a common commercial intelligence that a running business has higher value than a non-operational one. The Code and the Regulations made thereunder impose a duty on the resolution professional to conduct the CIRP process of the Corporate Debtor, to make every endeavour to protect and preserve the value of the property of the corporate debtor and to manage the operations of the CD as a going concern.

The conducting of the CIRP will statutorily require the RP to undertake various activities/ transactions like getting the business and assets valued, undertake audit of avoidance transactions, preparing the data room and the Information Memorandum, etc. Further, protecting and preserving the value of the assets/property of the CD will require deploying adequate security personnel, taking adequate insurance covers, etc. Operating the CD as a going concern will primarily require timely payments for key operational inputs, like power and fuel, labour and staff, raw materials, transportation, etc.

Estimates of the funds required for conducting the CIRP, for preserving and protecting the properties and for managing the operations of the CD as a going concern, respectively are provided in Annexure (). The participants may note that these are estimates made on best effort basis and is likely to change on

account of any unforeseen development, inadvertent missing of any cost head or assumption unfolding with a variance. Detailed working for arriving at these estimates or such modified estimates as on the date of the Meeting will be available during the meeting.

Considering the current liquidity available with the CD and the projected cash flows, the IRP projects a shortfall of Rs. ____ (Rs. in words) during the conducing of the CIRP. The current position of funds available with the CD and workings of the projected cash flows are provided in Annexure ( ). Lack of funds will frustrate the CIRP of the CD. Hence, the IRP urges the members of the CoC to consider and allow the IRP to raise interim finance, as required under Sec 28. The members may note that the amount of any interim finance and the costs incurred in raising such finance will form part of the insolvency resolution process costs, as per Sec 5(13).

Accordingly, the members will be asked to consider and if found fit, to pass with or without modification, the following Resolution -

Proposed Resolution

"**RESOLVED THAT** the Resolution Professional be and is hereby authorized to raise interim finance of upto Rs. _____ (Rupees in words) from the existing lenders or external market at an interest rate not exceeding__% per annum and processing costs not exceeding __% of the interim finance raised with an objective to meet the Corporate Insolvency Resolution Process Costs."

"**FURTHER RESOLVED THAT** (name of the RP), Resolution Professional appointed for the Corporate Debtor be and is hereby authorized to negotiate terms and conditions and sign all necessary documents for raising interim finance from lenders and/or external market."

Insolvency Resolution and Bankruptcy Proceedings of Personal Guarantors (PG) to Corporate Debtors: A Critical Analysis

SUNIL DUTT JAIN
CA, CS & IP

There are occasions when a corporate debtor (CD) takes a loan guaranteed by another corporate person (corporate guarantor to the CD) or an individual (personal guarantor to the CD). The lender may pursue a remedy against the guarantor or the CD, being principal borrower, when there is a default in repayment of the loan. The insolvency resolution of corporate guarantors to the CD and of personal guarantors to the CD complement insolvency resolution of the CD. Accordingly, the Code provides that where an application for insolvency resolution or liquidation proceeding of a CD is pending before a National Company Law Tribunal (NCLT), an application relating to insolvency resolution or liquidation or bankruptcy of a corporate guarantor or a personal guarantor shall be filed before the NCLT. It further provides that insolvency resolution, liquidation or bankruptcy proceeding of a corporate guarantor or a personal guarantor of the CD pending in any court or tribunal shall stand transferred to the NCLT dealing with insolvency resolution or liquidation proceeding of such CD.

The Code classifies individuals into three classes, namely, personal guarantors to CDs, partnership firms and proprietorship firms, and other individuals, to enable implementation of individual insolvency in a phased manner. The Central Government, *vide* a notification dated 15th November, 2019, appointed 1st December, 2019 as the date for commencement of the provisions of the Code relating to personal guarantors to CDs.

Subsequent to Notifications of above, there were various litigations, disputing the applicability of CIRP process in case of Personal Guarantors to Corporates.

The common question which arises in all these cases concerns the vires and validity of a notification dated 15-11-2019 issued by the Central Government.

Briefs of relevant cases, wherein Controversies were settled by the appropriate forums, are being discussed herein under:

Lalit Kumar Jain* v. *Union of India (2021) 127 taxmann.com 368 (SC)

The petitioners argued that the power delegated under section 1(3) is only as regards the point(s) in time when different provisions of the Code can be brought into effect and that it does not permit the Central Government to notify parts of provisions of the Code, or to limit the application of the provisions to certain categories of persons. The impugned notification, however, notified various provisions of the Code only in so far as they relate to personal guarantors to corporate debtors. It is therefore, *ultra vires* the proviso to Section 1(3) of the Code.

The petitioners also attacked the impugned notification on the ground that it suffers from non-application of mind, because the Central Government failed to bring into effect Section 243 of the Code, which would have repealed the Presidency Towns Insolvency Act, 1909 ("PTI Act" hereafter) and the Provincial Insolvency Act,1920 ("PIA" hereafter). Prior to issuance of the impugned notification, insolvency proceedings against an individual could be initiated only in terms of the said two Acts. After enactment of the Code, insolvency proceedings against personal guarantors to corporate debtors would lie before the Adjudicating Authority, in terms of Section 60 of the Code, although they would be governed by the said two Acts. With the enforcement of the impugned provisions, rules and regulations, insolvency proceedings can now be initiated against personal guarantors to corporate debtors under Part III of the Code, and also under the PTI Act and the PIA. Since Section 243 of the Code has not been brought into force, the petitioners contended that the impugned notification has the illogical effect of creating two self-contradictory legal regimes for in solvency proceedings against personal guarantors to corporate debtors.

It is argued that Part III of the Code does not create any distinction between an individual and a personal guarantor to a corporate debtor. Part III provides for "Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms", and there after refers to these two categories of persons simply as debtors.

The words "only in so far as they relate to personal guarantors to corporate debtors" forming a part of the impugned notification are attempted to be added like a rider to each of the sections mentioned in the impugned notification, clearly rendering such an exercise completely outside the scope and powers conferred under section 1(3) of the Code.

It was submitted that Parliament undoubtedly amended the Code in 2018, defining "personal guarantor" as a species of individuals to whom the

law applied. However, the manner of its application continued to be the same, *i.e.* to all individuals. Therefore, the resort to conditional legislation power under section 1(3) to bring into force certain provisions selectively, in respect of some individuals, *i.e.* personal guarantors and not all individuals, is *ultra vires*, and contrary to the power conferred on Parliament

Reliance was also placed on the judgment of the National Company Law Appellate Tribunal (NCLAT) in *Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd.* (2019) 101 taxmann.com 464/151 SCL 555, where it was held that "for the same set of debts, claim cannot be filed by same financial creditor in two separate corporate insolvency resolution processes."

Solicitor General of India, however, submitted that, different provisions were brought into force on different dates. He highlighted that Section 1(3) of the Code confers wide powers enabling the Central Government to operationalize the Code in a subject-wise and (not necessarily in a contiguous manner) - particular sections, provisions or parts. The Solicitor General pointed out that before the 2018 amendment, Section 2(e) was generic and that the amendment classified three distinct types of entities.

The Apex court in its opinion mentioned that, there was sufficient legislative guidance for the Central Government, before the amendment of 2018 was made effective, to distinguish and classify personal guarantors separately from other individuals. This is evident from Sections 5(22), 60, 234, 235 and unamended Section 60. In *State Bank of India v. Ramakrishnan (2018) 96 taxmann.com 271/149 SCL 107 (SC)* this court noted the effect of various provisions of the Code, and how they applied to personal guarantors.

The Apex court was clearly cognizant of the fact that the amendment, in so far as it inserted Section 2(e) and altered Section 60(2), was aimed at strengthening the corporate insolvency process. At the same time, since the Code was not made applicable to individuals (including personal guarantors), the court had no occasion to consider what would be the effect of exercise of power under section 1(3) of the Code, bringing into force such provisions in relation to personal guarantors.

The argument that the insolvency processes, application of moratorium and other provisions are incongruous, and so on, in the opinion of Apex court, are insubstantial. The insolvency process in relation to corporate persons (a compendious term covering all juristic entities which have been described in Sections 2 (a) to (d) of the Code) is entirely different from those relating to individuals; the former is covered in the provisions of Part II and the latter, by Part III.

It is clear from the above analysis that Parliamentary intent was to treat personal guarantors differently from other categories of individuals. The intimate connection between such individuals and corporate entities to whom they stood guarantee, as well as the possibility of two separate processes being carried on in different forums, with its attendant uncertain outcomes, led to carving out personal guarantors as a separate species of individuals.

It is held that approval of a resolution plan does not *ipso facto* discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee.

The Apex Court held that the so called, impugned notification, is legal and valid.

Few More Relevant Judgments in case of PG to Corporates:

(1) The NCLT, Kolkata Bench Consisting of Shri Rajasekhar V.K(Member Judicial) and Shri Balraj Joshi (Member Technical) while dismissing the application filed by the Financial Creditor/Bank of Baroda held that the application is not maintainable against legal heirs of the Personal Guarantor under the Code.

(2) NCLAT in its order dated 27-1-2022 allowed the appeal filed by the State Bank of India against the Order dated 5-10-2021 of NCLT Kolkata wherein NCLT Kolkata dismissed the application filed by SBI under section 95 of the code on the ground that since no CIRP or Liquidation is pending against the Corporate Debtor, application under section 95 is not maintainable before the NCLT. The NCLAT *set aside* the order and held that; The Adjudicating Authority erred in holding that since no CIRP or Liquidation Proceeding of the Corporate Debtor are pending the application under section 95(1) filed by the Appellant is not maintainable. The Application having been filed under section 95(1) and the Adjudicating Authority for application under section 95(1) as referred in Section 60(1) being the NCLT, the Application filed by the Appellant was fully maintainable and could not have been rejected only on the ground that no CIRP or Liquidation Proceeding of the Corporate Debtor are pending before the NCLT. In result, the NCLAT *set aside* the order dated 05th October, 2021 passed by the Adjudicating Authority. The Application filed by the Appellant under section 95(1) of the Code is revived before the NCLT, which may be proceeded in accordance with the law."

(3) The Supreme Court did stayed the order of the NCLAT *vide* its order dated 21.3.2022, in the matter of *State Bank of India v. Mahendra Kumar Jajodia (2022) 136 taxmann.com 371/171 SCL 232 (NCLAT)*, wherein the Appellate Tribunal had settled the widely contended position on whether Insolvency Resolution Process (IRP) can be initiated against the Personal Guarantor in the absence of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, and, held that cases not covered under section 60(2) will fall under section 60(1) of the Code.

(4) Supreme Court bench *vide* its order dated 6-5-2022 in the case of *Mahendra Kumar Jajodia v. State Bank of India (2022) 139 taxmann.com 350/172 SCL 665/233 comp. case 41*, dismissed the civil appeal filed against the

Judgement of National Company Law Appellate Tribunal (NCLAT) in the case of *Mahendra Kumar Jajodia (supra)*. NCLAT held that even in the absence of any pending Corporate Insolvency Resolution Processor Liquidation proceedings, the application under section 95(1) of the Insolvency Bankruptcy Code, 2016 against the personal guarantors of the Corporate Debtor is maintainable by the virtue of Section 60(1) of the Code before the National Company Law Tribunal having territorial jurisdiction over the place where the Registered office of the Corporate Person is located.

There was a confusion concerning as to where the insolvency proceedings will be filed against the Personal Guarantor and the NCLAT *vide* its order dated 27-1-2022 order cleared the same but the confusion continues as the Supreme Court *vide* its order dated 21-3-2022 by relying on the observations in the case of *Lalit Kumar Jain (supra)* stayed the operation of the judgment of the NCLAT.

The Supreme Court has now *vide* its order dated 6-5-2022 dismissed the appeal and upheld the NCLAT order dated 27-1-2022 by stating that the Apex Court find no cogent reason to interfere with the order of NCLAT and therefore, application under section 95 of the Code can be filed against personal guarantor of Corporate Debtor before NCLT even in the absence of any pending CIRP or Liquidation proceedings against the Corporate Debtor before such NCLT.

(5) In the Matter of *Vyomesh Shah v. Union of India* (2022) 141 taxmann.com 220 (SC), before the Hon'ble Supreme Court of India under Article 32, challenging constitutional validity of Sections 95(1), 96(1) , 97(5), 99(1), 99(2), 99(4), 99(5), 99(6), 100 and 101 of the IBC, 2016 on the grounds these provisions violate the fundamental and constitutional rights of the Personal Guarantors of a Corporate Debtor. The challenge primarily being that the said provisions do not provide any opportunity of hearing to the personal guarantor at any stage thereby excluding their right to defend themselves

in the proceedings initiating their personal insolvency, which leads to the divestation of their assets.

After hearing the submissions, the Hon'ble Supreme Court issued Notice(s) and granted stay on the proceedings seeking to initiate the personal insolvency of the Petitioners pending before NCLT and also directed that the report of the Resolution Professional shall not be acted upon. Also ordered that the petitioner(s) shall not transfer, alienate, encumber or dispose of any of their assets or legal rights or beneficial interest there in; But This Judgment of Apex Court in my opinion, is Applicable only to the writ Petitioner(s), not in General.

So, these are the few Judgments which led to lot of Controversy with respect to CIRP process of PG of Corporates.

Below is the sample Process Check List for IP, s in case of PG to Corporates:

Alternative Dispute Resolution (ADR)

AKHIL CHADHA

IP (B.Com, FCS, LLB, IP)

INTRODUCTION

Alternative Dispute Resolution (ADR) refers to settlement of disputes between the parties through involvement and help of third party/ies and without intervention of the courts of law. This method of resolving disputes is prevalent in Indian family system since ages where elderly people adjudicate the disputes in joint families. With the rapid increase of technology, where cross border business contracts and deals can be conveniently entered into sitting at different places of the world, ADRs gain a lot of importance as people can resolve the disputes in much lesser time without going through the cumbersome process of litigation which involves different jurisdictions and laws. ADRs are becoming popular globally because of paucity of time and cumbersome process of litigation.

Alternate Dispute Resolution.

The courts of law generally adjudicate the disputes between the parties in judicial systems of all countries. Alternatively, the disputes between the disputants can also be resolved through the help and intervention of the third parties. Third party means a neutral and independent person chosen mutually by the disputants who acts within the parameters of law and tries to arrive at a solution acceptable to the disputants. This involvement of third parties in resolving the disputes is referred to as Alternative Dispute Resolution (ADR) which also serves as a mechanism to reduce the burden of litigation on the courts while delivering a satisfying experience for the disputants.

Evolution of ADRs in India

In India, since long, disputes between the disputants were resolved by the village elders known as "Panch" which is popularly known as Panchayat Raj system in India. The decisions

of the Panchayat were binding on the disputants and were widely accepted too. In 1980, the Central Government constituted "Committee for implementing legal aid systems" and appointed the former Chief Justice of India, Mr. P.N. Bhagwati as its Chairman. On recommendations of this committee, in 1987, Legal services Authority Act 1987 was enacted by the Parliament. Under this Act, a system of Lok Adalats was introduced for fast resolution of disputes. The Parliament also enacted "The Family Courts Act 1984" to provide for speedy and efficient disposal of marriage and other family disputes. The presence of ADR in the Indian Judicial System was only in the form of Arbitration Act 1940. Major amendments and reforms in the arbitration Law were introduced with the enactment of Arbitration and Conciliation Act 1996 covering laws relating to domestic and international arbitrations. Subsequently, pursuant to the recommendations of Malimath Committee under the chairmanship of Dr. Justice V.S. Malimath , a new Section 89 along with Order X-IA to IC were incorporated in the Code of Civil Procedure 1908 *vide* Code of Civil Procedure (Amendment) Act 1999, w.e.f July 1, 2002. This newly inserted provision empowers the courts to refer a dispute to a) Arbitration b) Conciliation, c) Mediation or d) judicial settlement including settlement through Lok Adalat.

Section 89.Settlement of disputes outside the Court.—(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for -

(*a*) arbitration ;

(*b*) conciliation ;

(*c*) judicial settlement including settlement through Lok Adalat; or

(*d*) mediation.

(2) Where a dispute has been referred-

(*a*) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act ;

(*b*) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of Section 20 of the Legal Services Authority Act, 1987 3(39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat ;

(*c*) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 4(39 of 1987) shall apply as if the disputes were referred to a Lok Adalat under the provisions of that Act ;

(*d*) for mediation, the Court

shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

ORDER X-1A. ***Direction of the Court to opt for any one mode of alternative dispute resolution.—***After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of Section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

ORDER X-1B. ***Appearance before the conciliatory forum or authority.—***Where a suit is referred under Rule 1-A, the parties shall appear before such forum or authority for conciliation of the suit.

ORDER X-1C. ***Appearance before the Court consequent to the failure of efforts of conciliation.—***Where a suit is referred under Rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.

Types of ADRs

In this Article we will briefly discuss the various methods of ADRs prevalent in India.

(A) Arbitration

(*i*) Governing Law and Procedure

Arbitration is the most common method of ADR prevalent in India and is governed by the Arbitration and Conciliation Act 1996. Reference of disputes to arbitration is generally found in the dispute resolution clauses of the commercial agreements entered into between the disputants. These clauses lays down the detailed procedure to be followed including but not limited to constitution of the arbitral tribunal, language of the arbitration process, applicable law, seat of the arbitral tribunal etc., whenever a dispute arises between the disputants and refereed to arbitration. The arbitrator/s is/ are appointed by the mutual agreement of the disputants. According to the provisions of Section 11 of the Arbitration and Conciliation Act 1996, the arbitrator/s can be appointed by the Chief Justice of the concerned High Court or his designated judges in case of domestic arbitration and by the Chief Justice of India in case of an International Arbitration. The Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 which was brought in to effect from 23-10-2015 and through Arbitration and Conciliation (Amendment) Act, 2019 amending Section 11 and incorporating certain additional provisions.

(*ii*) Arbitrable and Non Arbitrable issues

The Most important attribute of Arbitration is adjudication of a dispute *i.e.* there should exist a dispute which can be referred to arbitration.

According to the provisions of Section 2(3) all disputes are not arbitrable as some disputes by their very nature cannot be left for adjudication by the third parties. There are separate forums to adjudicate non arbitrable disputes. Some examples of arbitrable disputes are Partnership Matters, breach of commercial contracts, disputes arising out of insurance contracts etc . Similarly some examples of non arbitrable disputes are insolvency matters, criminal proceedings, industrial disputes, family disputes etc.

(*iii*) **Types of Arbitral Proceedings**

Ad hoc Arbitration-In ad hoc arbitration, the disputants, with mutual agreement, determine the process of arbitration including the rules to be followed by the arbitrator or the arbitral tribunal.In case the disputants do not arrive at a consensus on appointment of an arbitrator**,** then the provisions of Arbitration and Conciliation Act 1996 come into force and arbitrator is appointed according to the provisions of Section 11 as stated above. In ad hoc arbitration fee of the Arbitrator is decided and agreed to between the disputants and the arbitrator. In case of ad hoc arbitration, generally there is lack of cooperation between the parties which cause delays and hindrances in adopting rules and procedure of Arbitration. Further infrastructure requirements are also an issue in ad hoc arbitration.

Institutional Arbitration- In institutional arbitration the process of arbitration is administered by a professional arbitral institution. The disputants may, in their agreement, mutually agree to refer the dispute between them to a arbitral institute which consists of a panel of professional arbitrators. In institutional arbitration, rules and processes are already formulated and the disputants have to follow these rules and processes. Infrastructure facilities are better in this type of arbitration. The fee of the arbitration and the total arbitration cost is fixed by the institution. Institutional arbitration is considered to be cheaper than the ad hoc arbitration. Substitution of arbitrators is simpler and quick in the case of institutional arbitration.

(*iv*) **Awards and enforceability:**

The decision of the arbitrator or arbitral tribunal are called 'Award' and is final and binding upon the disputants. The awards can be *set aside* by the courts of law on certain limited grounds only. An award can be *set aside* by the courts on the following grounds:

(*a*) Incapacity;

(*b*) Agreement being invalid;

(*c*) Notice being improper;

(*d*) Award exceeding the scope of reference to arbitration; and

(*e*) Composition of arbitral tribunal being bad.

According to the provisions of Sections 35 and 36 of the Arbitration and Conciliation Act 1996, the courts can enforce the arbitral awards and the execution proceedings of the arbitral award shall be as per the provisions of the Code of Civil Procedure 1908.

(B) Conciliation

Part III, Sections 61 to 81 of Arbitration and Conciliation Act 1996 deals with provisions relating to Conciliation. Conciliation is a form of ADR as provided in Section 89(1) of Arbitration and Conciliation Act 1996 where an impartial third party, who is called Conciliator helps the disputants arrive at a mutually agreed settlement. The disputants are at liberty to reject or accept the settlement suggested by the Conciliator. If the disputants accept the settlement mutually, it becomes binding on them and any settlement agreement arrived mutually in the Conciliation process shall have the status of decree of court of law and can be executed as a decree as per the provisions of the Code of Civil Procedure 1908.

(C) Mediation

Mediation is another method of Alternate Dispute Resolution (ADR) as provided in Section 89(1) of the Arbitration and Conciliation Act 1996. Mediation is a less formal mode of ADR where the Mediator, who is a neutral and impartial third party, only facilitates the discussions between the disputants and offers solutions. The Mediator does not have power to adjudicate upon the dispute and does not have the power to decide the issues between the disputants. Mediation is altogether a voluntary process where the mediator plays the role of facilitating communication between the disputants and arriving at a settlement of dispute on their own. Family matters like divorce and custody, disputes arising out of partnership agreements , management disputes between shareholders are generally resolved through mediation. Mediation can be either a) Mediation initiated by courts under section 89(1) and b) Mediation initiated privately by parties to the dispute. Courts initiated mediation is used in resolving family disputes such as matrimonial disputes where the courts generally refer the parties to mediation. Private mediation, on the contrary, is a voluntary

process where disputants submit their disputes to be resolved by a third party qualified mediator.

(D) Negotiation

Negotiation is the simplest method of Alternate Dispute Resolution system and van be seen in every day life. Negotiations are done by the disputants without the involvement of any third parties. The disputants initiate the discussions between themselves and explore the possibility of a mutually agreed settlement or outcome to the dispute. Negotiations are non binding and none of the disputants are bound by the outcome unless mutually agreed. Negotiations, as a method of ADR, is most commonly used in business disputes, family matters, issues among nations etc.

(E) Lok Adalats

Under Section 89 of the Arbitration and Conciliation Act 1996, courts are empowered to refer the disputes between the disputants for judicial settlement through Lok Adalats. Lok Adalats are set up under the Legal services Authority Act, 1987 and are headed by judicial officers. The main object of the Legal services Authority Act, 1987 was to provide justice to all sections of the society regardless of their financial and social standing. The provisions of the Legal Services Authority Act, 1987 apply in respect to the dispute referred to the Lok Adalat. The Lok Adalats are guided by the principles of equity, justice and fair play while adjudicating the disputes between the disputants. The disputants are also entitled to refund of the court fee paid if they arrive at a settlement without the intervention of the courts. Award of the Lok Adalats shall be deemed to be decree of a civil court and is binding upon the disputants.

Advantages of ADRs

(1) The ADRs offer flexibility in procedures which in turn saves time and resources. ADRs are cheaper as compared to litigation through courts.

(2) ADRs offer better satisfaction to the disputants in terms of the outcome of the dispute as the outcome is based on their mutual discussions, participation and negotiations.

(3) ADRs offer specialized assistance to the disputes in terms of professional arbitrators, mediators, conciliators etc.

(4) ADRs are helpful in preventing future disputes between the disputants.

(5) ADRs help in restoring relations between the disputants as the disputants' grievances are addressed and the parties feel that there is no winning or lost side between them.

(6) ADRs help in reducing the burden on the courts which also improves access to justice and the quality of justice.

Online Dispute Resolution (ODR)-A new concept in evolution

As the name suggests, ODR is a method of resolving disputes through the use of technology. During the tough times of Covid

19, technology has immensely helped us in all spheres of life. In ODR, technology tools powered by Artificial Intelligence/ Machine Learning are used in the form of automated dispute resolution, scrip based solution and curated platforms that cater to specific categories of disputes. ODRs are also termed as e-ADR or ADR that is enabled through use of digital technology and methods. In India, the willingness to promote and use of ODRs is phenomenal. Reserve Bank of India has released an ODR policy on digital payments, introduction of SAMADHAN portal for MSME etc. However the Government and the judiciary have have to collaborate to give boost to the adoption of ODR in India.

Conclusion

ADRs have a great potential as means of dispute resolution between the disputants and this have been established by the fact that there is more awareness among the people regarding use of ADRs. However, this awareness for use of ADRs has to be increased in masses and in the rural areas. The ADRs are still believed to be the secondary methods of dispute resolution even by some legal professionals who generally prefer these proceedings to be held in late evening hours or on weekends. Legal professionals and the judiciary have to play a very important role in promoting the use of ADRs by the disputants. There is a need to set up ADR institutions at district level. Professional bodies like Bar Council of India should also be set up for mediators/conciliators. The positive development in use of ADRs as methods of dispute resolution has also helped India make advancement in Ease of Doing Business rankings worldwide. The future of dispute resolution revolve around ADRs and thankfully with the help of the executive and judiciary, we will see a phenomenal growth in ADRs in the years to come.

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INSIGHTS

Opening of A Pandora's box

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I. INTRODUCTION

The Hon'ble Supreme Court of India in the case of *Laxmi Pat Surana* v. *Union Bank of India and Another*[1] ("***Laxmi Pat Surana***"), has upheld the validity of an Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), against a corporate person who stood as a guarantor for the debt of a sole proprietorship firm. This article seeks to analyse the decision of the Hon'ble Supreme Court of India in the case of *Laxmi Pat Surana* (*Supra*) in the backdrop of the objective and the scheme of the IBC.

Prior to the enactment of the IBC, the Personal and Corporate Insolvency regime in India was scattered in different enactments. Personal Insolvency was regulated by the Presidency Towns Insolvency Act, 1909 ("**PTI Act, 1909**") (applicable to Mumbai, Kolkata, and Chennai) and the Provincial Insolvency Act, 1920 ("**PI Act, 1920**") (applicable to the rest of the country), and corporate insolvency was mainly governed by the provisions of the Companies Act, 2013, Limited Liability Partnership Act, 2008 and the Sick Industrial Companies (Special Provisions) Act, 1985.[2]

With the advent of IBC, the Legislature has enacted the repeal (not notified) of the PTI Act, 1909 and the PI Act, 1920[3], and provisions for personal insolvency are included in Part III of the IBC. Part III of the IBC is applicable to individuals and partnership firms. However, the provisions of Part III have not yet been notified even after more than 5 years of implementation of IBC. By a Press Release, the Ministry of Finance, Government of India clarified that as Part III of the IBC has not been notified till date, the stakeholders must pursue their insolvency cases under existing enactments before appropriate fora[4] and not

claim that their matters be dealt with provisions of the IBC which are in force.

II. RECENT AMENDMENT

The Insolvency and Bankruptcy (Second Amendment) Act, 2018[5] inserted the definition of '*corporate guarantor*' by insertion of sub-section 5A[6] after Section 5(5) in Part II of the IBC. The definition was inserted with the objective of enabling the NCLT to deal with proceedings initiated against a Corporate Debtor and "*its*" (*emphasis supplied*) Corporate Guarantor.[7] Section 60 of the IBC was also suitably amended with the same objective.

Though the definition of Corporate Debtor is found in Part II of the IBC which deals with debts payable by Corporate Persons, the Courts have interpreted the definition of Corporate Debtor to include guarantors of sole proprietorship firms, individuals and partnership firms to fall within its ambit. The problem posed by such a wide interpretation is that the intention of the Parliament while demarcating the insolvency resolution scheme in two separate parts of the IBC was to treat the debts payable by Corporate Persons as one class and individuals and partnership firms as another class. There are wide differences in the insolvency resolution processes provided under Part II dealing with Companies and Part III dealing with individuals and partnership firms. The Parliament introduced amendments to Section 60 and then introduced Section 5(5A) with a view to consolidate the proceedings which may be initiated at different fora against a Corporate Debtor and its guarantor being either an individual or a company in one proceeding before one NCLT.

Section 60(3) of the IBC provides that, "*An insolvency resolution process or (liquidation or bankruptcy proceeding of a **corporate guarantor or personal guarantor, as the case may be, of the corporate debtor**) pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.*" (Emphasis supplied)

In the case of *Ferro Alloys Corpn. Ltd.* v. *Rural Electrification Corpn. Ltd.*[8], the Financial Creditor filed an application under section 7 of IBC against the guarantor (being a company). The principal borrower was also a corporate person. The NCLAT held that such an application was maintainable as a Corporate Insolvency Resolution Process ("**CIRP**")can be initiated against a corporate guarantor before initiating a CIRP against the Principal Borrower. The Hon'ble Supreme Court upheld the order of the National Company Law Appellate Tribunal.[9] Pertinently this was a case where the Principal Borrower was also a corporate person.

In another case, *Dr. Vishnu Kumar Agarwal* v. *Piramal Enterprises Ltd.*[10] proceedings under Part II of the IBC were initiated against two companies as they were guarantors of a debt owed by All-India Society for Advance Education & Research, which is a society registered under the Societies Registration Act, 1860. The NCLAT had an opportunity to deal with two questions, the first one being relevant to the context hereof, whether the CIRP can be initiated against a 'Corporate Guarantor', if the 'Principal Borrower' is not a 'Corporate Debtor' or 'Corporate Person'?[11] However, the NCLAT relying upon a judgment of the

Hon'ble Supreme Court of India based on Section 128 of the Indian Contract Act, 1872[12] held that CIRP could be initiated against the guarantor before initiating any action against the Principal borrower.[13] Therefore, the NCLAT failed to answer the aforementioned question which was posed for adjudication having far reaching ramifications.

The NCLAT in the case of *K. Paramsivam* v. *Karur Vysya Bank and another*[14] upheld an order passed by the NCLT allowing an application under Section 7 of the IBC against a Company which had guaranteed a debt borrowed by Partnership firm and Sole proprietorship firm.

III. CASE

In the case of *Laxmi Pat Surana* (*supra*) the Hon'ble Supreme Court of India held that an application under Section 7 of IBC can be filed against a company being a corporate guarantor for a debt owed by a Sole Proprietorship firm under Part II of IBC. Therefore, opening floodgates for many such cases where albeit the principal borrower may be an individual, sole proprietorship firm or partnership firm their debt could be a subject matter of proceedings under Part II of IBC.

The factual matrix is as follows. M/s. Mahaveer Construction (being a Sole Proprietorship firm) had borrowed money against the payment of interest from the Bank and M/s. Surana Metals Ltd. (being a company registered under the Companies Act, 2013) stood as a guarantor in respect of the loan facilities availed by M/s. Mahaveer Construction. The Bank initiated an action against the principal borrower before the Debt Recovery Tribunal, Kolkata. During the pendency of the action against the principal borrower, the bank filed an application under Section 7 of the IBC against M/s Surana Metals Ltd. for the debt borrowed by M/s Mahaveer Construction.[15] The Supreme Court while handing down the judgment analysed various definitions under the IBC including that of "financial debt" under Section 5(8) under Part II of the IBC and arrived at the conclusion that an application under Section 7 of the IBC would be maintainable against the guarantor. The Court relied upon Section 128 of the Contract Act, 1872 to hold that as the liability of surety is co-extensive with the principal borrower, the creditor can maintain the application against the guarantor and concluded that on default of repayment of the loan amount the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code.[16] Further, the Hon'ble Court analysed Section 7 and held that an application can be filed against a corporate person assuming the status of corporate debtor by offering guarantee.[17]

IV. ANALYSIS

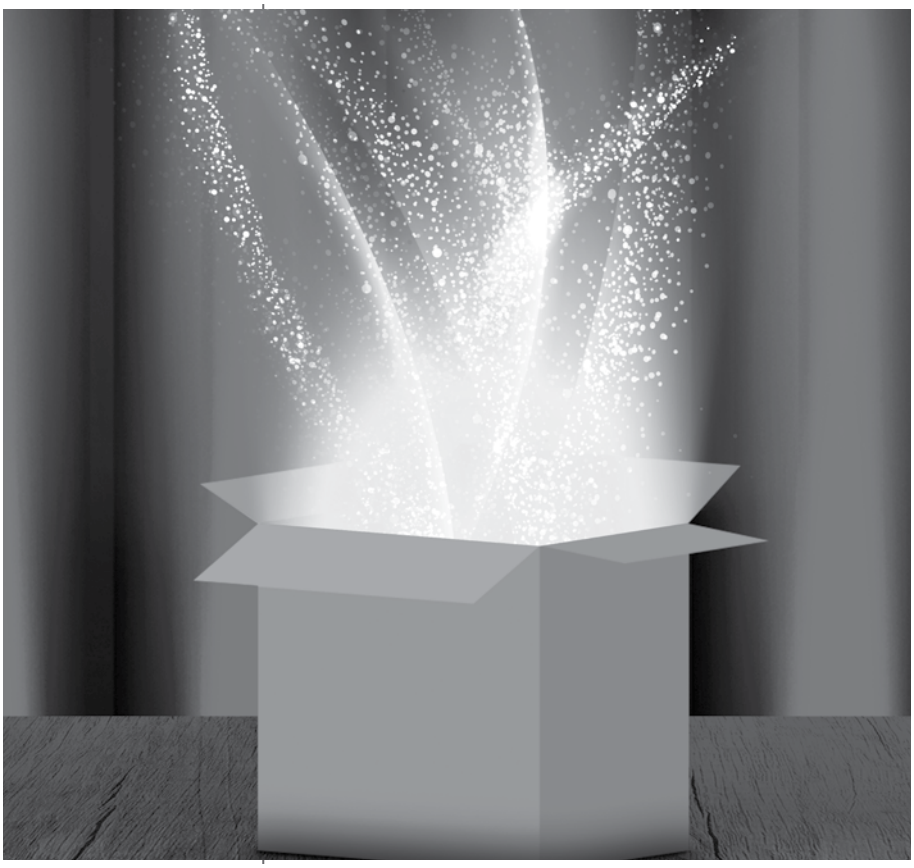
Contracts of guarantee are governed by Chapter VII of the Indian Contract Act, 1872. The liability of the surety is "*joint and several*" and "*co-extensive with that of the principal borrower*". The Hon'ble Supreme Court of India has emphasised that joint and several liability is the key feature of the contract of guarantee.[18] The liability of the surety and principal borrower is co-extensive and not in alternative.[19] The surety would be subrogated to the position

of the creditor once he pays off the debt for the principal borrower.[20] In India, the principle of subrogation is embodied in Section 140 of the Indian Contract Act, 1872.

It is submitted with greatest respect that by applying this principle to the facts of the case before the Apex Court in *Laxmi Pat Surana*, the guarantor being M/s. Surana Metals Ltd. would have to recover the debt from M/s. Mahavir Construction (being a sole proprietorship) after paying off the debt owed to the bank. However, as Part III has not been notified, M/s Surana Metals Ltd. would be unable to pursue the remedy under the IBC against M/s Mahavir Construction and would have to take steps under the already existing mechanism. In view thereof, the remedy under Part III is unavailable for the debt owed by the sole proprietorship firm. The end result would be to put the guarantors at peril of undergoing a CIRP or liquidation whilst letting the principal borrower go scot free under IBC.

It is noteworthy that the Courts have decided cases in teeth of the right of subrogation of the guarantors under the IBC. In the case of *Lalit Mishra* v. *Sharon Bio Medicine Ltd.*,[21] the National Company Law Appellate Tribunal rejected the contention of the promoters (personal guarantors) that the Resolution Plan violated the principles under Sections 133 and 140 of the Indian Contract Act, 1882 and therefore denied the personal guarantor the right of subrogation which is deeply embedded in the law of contracts in India. In the case of *Committee of Creditors of Essar Steel India Ltd* v. *Satish Kumar Gupta*,[22] the Hon'ble Supreme Court of India *inter alia* upheld the provision under the resolution plan providing for extinguishment of right of subrogation on the backdrop of the clean slate theory.[23]

Applying the aforesaid principles, the NCLT has recently allowed an Application under Section 95 of the IBC by a Financial Creditor against a Personal Guarantor after the approval of the resolution plan as the debt was not fully recovered.[24] The liability of Personal Guarantor to pay off on behalf of the principal borrower does not end even with the resolution



plan being approved. As opposed to the principal borrower who is let off in spite of creditors facing various hair cuts, the guarantor is in a precarious situation because the clean slate theory does not apply to the guarantors and therefore they are not discharged from the debts.

This leads to an absurd situation wherein a guarantor has to undergo CIRP merely because it is a company and has stood as a guarantor to a debt of a corporate person or an individual or a partnership firm or a sole proprietorship while there is no equally efficacious remedy against the principal borrower being the an individual or a partnership firm or a sole proprietorship because Part III of the IBC is not notified.

V. THE BOX

The division of debts borrowed by Corporate Persons under Part II and debts borrowed by individuals and partnership firms under Part III shed light on the intention of the legislature as IBC was originally enacted— to segregate claims against Companies/LLPs and claims against individuals/partnership firms into Part II and Part III of the IBC. However, time and again there have been several amendments made to the IBC which seem to create a daze over the strict bifurcation between the two classes of claims. Section 60 of the IBC was amended in 2018 with a view to allow the NCLT to exercise jurisdiction over the personal guarantors and corporate guarantors of corporate debtors and consolidate the proceedings which may be initiated at different forums against a Corporate Debtor.

Parliament wanted to deal with personal guarantors (under Section 2(*e*)), differently from partnership firms and proprietorship firms (under section 2(*f*),) and individuals other than persons referred to in Section 2(e) (under Section 2(*g*)).

The recent case laws have once again created a need for either an amendment or at least a revisit of the legal position under IBC relating to guarantors. The possibility of collateral proceedings being initiated against an individual, sole proprietorship firm or a partnership firm along with initiation of CIRP against the guarantor being a corporate person to any of them could result in *inter alia* inconsistencies and contradictions.

It is trite law that what cannot be done directly cannot be done indirectly.[25] Therefore, if action against individuals and partnership firms cannot be initiated under Part II of the IBC then initiation of action against the guarantor of debts owed by such individuals and partnership firms under Part II merely because they are companies must also be impermissible. A Press Release issued by the MCA also echoes the same sentiment.[26]

In the case of *Alpha and Omega Diagnostics (India) Ltd.* v. *Asset Reconstruction Co. of India Ltd.*[27] the NCLAT upheld the judgment of the NCLT wherein the NCLT interpreted the term "*its*" appearing in Section 14 of IBC to denote that moratorium shall be declared for prohibiting any action to recover or enforce any security interest created by the Corporate Debtor in respect of "*its*" property *i.e.* the Corporate Debtor's property only and not any other property.

The NCLT applied the doctrine of Noscitur A Sociis to arrive at the said conclusion.

The definition of Corporate Guarantor specifically lays down that it "*means a corporate person who is the surety in a contract of guarantee* ***to a corporate debtor***"[28] (emphasis supplied). By reading the plain language of the definition it follows that the intention of the Legislature in introducing the term corporate guarantors *vide* the 2018 Amendment was to make the Part II of the IBC applicable to Corporate Guarantors to Corporate Debtors.

In the case of *Laxmi Pat Surana*, the Supreme Court remarked that "*if the legislature intended to exclude a corporate person offering guarantee in respect of a loan secured by a person not being a corporate person, from the expression "corporate debtor" occurring in Section 7, it would have so provided in the Code (at least when Section 5(5A) came to be inserted defining expression "corporate guarantor").*"[29] As noted above, the Supreme Court in *Laxmi Pat Surana* relied upon definition of 'Corporate Debtor' and 'Financial Debt' to conclude that an application against a company which has offered guarantee would be maintainable under Part II of the IBC. In the author's humble opinion, the Legislature has expressed its intent by amending Section 60 and inserting Section 5(5A) in Part II of the IBC which is applicable to debts borrowed by Corporate Debtor. The Court has adopted a piecemeal approach of looking at few definitions in Part I and Part II whilst completely ignoring not only the provisions of Part III as though they don't exist on the statue book and but also the intent behind introducing a separate scheme for individuals and partnership firms. A harmonious construction of the scheme of IBC would aid in elucidating the true intent of the Legislature.

VI. CONCLUSION

The Courts have allowed a backdoor entry to the dealing with debts of individuals and partnership firms into the provisions of Part II of the IBC. Debts of partnership firms and sole proprietorship firms are separately provided for in Part III of in the IBC. Merely because Part III has not been enforced even after five years of the IBC coming into force cannot justify complete ignorance of the classification and fit them all under Part II. This would render this an instance of an indirect judicial legislation. This one size fits all approach adopted by the Courts has opened the pandora's box. As a result, cases for debts payable by Partnership firms and individuals may come before the already overburdened NCLT.

This would also create room for forum shopping when Part III is brought into force. If a creditor finds Part II more effective or NCLT more effective, it will prefer recovery against the guarantor and if the creditor finds Part III better or DRT more effective it will prefer recovery behind the firm or the individual.

As amendments were introduced to consolidate proceedings against personal guarantor and corporate debtors, amendments may become necessary when the DRT is in seisin of proceedings under Part III (when enforced) and applications are continued to be filed under Part II against the guarantor.

When the legislature amended the IBC to allow NCLT to have jurisdiction for corporate guarantors, its intention was to reduce or eliminate the possibility of multiplicity of proceedings resulting in conflicting decisions. However, the decision in the case of *Laxmi Pat Surana* has revived the debate on the possibility of multiplicity of proceedings and conflicting decisions and hence reintroduced the perplexity.

As a result of the opening of the Pandora's box, Corporates will have to be wary next time they intend to give guarantee for a debt owed by a promoter or promoter's proprietorship firm because the default could drag the guarantor company to the CIRP.

●●●

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15-17. *Laxmi Pat Surana*, (*supra*)

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SUPREME COURT OF INDIA

Vidarbha Industries Power Ltd. *v.* **Axis Bank Ltd.**

MRS. INDIRA BANERJEE AND J.K. MAHESHWARI, JJ.

CIVIL APPEAL NO. 4633 OF 2021†

JULY 12, 2022

Section 7, read with Section 9 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Whether an application of an operational creditor for initiation of CIRP under section 9(2) is mandatorily required to be admitted if application is complete in all respects and in compliance of requisites of IBC and rules and regulations thereunder, there is no payment of unpaid operational debt, if notices for payment or invoice had been delivered to corporate debtor by operational creditor and no notice of dispute has been received by operational creditor - Held, yes - Whether thus, provisions in IBC relating to commencement of CIRP at behest of an operational creditor, whose dues are undisputed, are rigid and infilexible while in case of a financial debt, there is a little more flexibility - Held, yes - Whether section 7(5)(a) confers discretionary power on Adjudicating Authority to admit an application of a financial creditor under section 7 for initiation of CIRP - Held, yes - Whether however, such discretionary power cannot be exercised arbitrarily or capriciously and if facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner - Held, yes - Whether ordinarily, Adjudicating Authority would have to exercise its discretion to admit an application under section 7 and initiate CIRP on satisfaction of existence of a financial debt and default on part of corporate debtor in payment of debt, unless there are good reasons not to admit petition - Held, yes (Paras 76, 79, 81, 86 and 87)

Words and Phrases : Word 'may' as occurring in section 7(5)(a) and word 'shall' as occurring in section 9(5) of Insolvency and Bankruptcy Code, 2016

FACTS

- The appellant, a Power Generating Company was awarded the contract for implementation of a Group Power Project (GPP) by the Maharashtra Industrial Development Corporation (MIDC). The GPP was later converted into an Independent Power Project (IPP). The Maharashtra Electricity Regulatory Commission (MERC), disallowed a substantial portion of the actual fuel costs as claimed by the appellant for the financial years 2014-15 and 2015-16 and also capped the Tariff for the financial years 2016-17 to 2019-20. Hence, the appellant filed an appeal before the Appellate Tribunal for Electricity (APTEL), challenging disallowance of the actual fuel cost for the financial years 2014-2015 and 2015-16.

- The APTEL allowed the appeal and directed MERC to allow the appellant the actual cost of coal purchased for Unit-1, capped to the fuel cost for Unit-2 in terms of the FSA that had been executed, till such time as a FSA was executed in respect of Unit-1. The appellant claims that a sum of Rs. 1,730 crores was due to the appellant in terms of the said order of APTEL.

- The appellant filed an application before the MERC for implementation of the directions contained in the order of APTEL. MERC however filed Civil Appeal in the Court, challenging the order of APTEL. The appeal was pending.

- In view of the pending appeal of MERC the Court, the appellant was unable to implement the directions of APTEL. The appellant was, for the time being, short of funds. According to the appellant, implementation of the orders of the APTEL would enable the appellant to clear all its outstanding liabilities.

- Thereafter, the respondent, Axis Bank Limited, as financial creditor of the appellant, filed an application under section 7(2) before the NCLT for initiation of CIRP against the appellant.

- The appellant filed a Miscellaneous Application seeking stay of proceedings under section 7 in the NCLT, as long as Civil Appeal was pending in the Court.

- The Adjudicating Authority (NCLT) by order, dismissed the application filed by the appellant and refused to stay the CIRP initiated against the appellant. The NCLT simply brushed aside the case of the appellant with the cursory observation that disputes if any between the appellant and the recipient of electricity or between the appellant and the Electricity Regulatory Commission were inconsequential. The NCLT held that the imperativeness of timely resolution of a corporate debtor, who was in the red, indicated that

no other extraneous matter should come in the way of expeditiously deciding a petition under section 7 or under section 9.

- On appeal, the NCLAT affirmed the NCLT's finding while observing that NCLT was only required to see whether there had been a debt and the corporate debtor had defaulted in making repayment of the debt, and that these two aspects, if satisfied, would trigger the CIRP.
- On appeal to the Supreme Court:

HELD

- As per the Statement of Objects and Reasons of the IBC, and its preamble, the objective of the IBC is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals, in a time bound manner, *inter alia*, for maximization of the value of the assets of such persons, promoting entrepreneurship and availability of credit, balancing the interest of all the stakeholders and matters connected therewith or incidental thereto.(Para 45)
- Prior to enactment of the IBC, there was no single law in India that dealt with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies could be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and the Companies Act, 2013. These statutes provided for creation of multiple for a such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies was handled by the High Courts.(Para 46)
- The framework that had existed for insolvency and bankruptcy was inadequate, ineffective and resulted in undue delay. After a lot of deliberation and discussion and pursuant to reports of various committees including, in particular, the Bankruptcy Law Reforms Committee (BLRC), the IBC has been enacted to provide an effective legal framework for timely resolution of insolvency and bankruptcy.(Para 47)
- The new Insolvency and Bankruptcy framework has been designed, *inter alia*, to facilitate the assessment of viability of an enterprise at a very early stage, and to ensure a time bound Insolvency Resolution Process to preserve the economic value of the enterprise.(Para 49)
- Section 6 of the IBC provides that where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may

initiate the CIRP in respect of such corporate debtor.(Para 50)

- Under section 7(1), a financial creditor may, either by itself, or jointly with other financial creditors, file an application for initiating CIRP against a corporate debtor, before the NCLT when a default has occurred. Default includes a default in respect of a financial debt owed not only by the applicant financial creditor but to any other financial creditor of the corporate debtor.(Para 51)

- Under section 7(2), a financial creditor is required to make an application in the prescribed form and manner, along with the prescribed fee. Along with an application, the financial creditor is required to furnish record of the defaults recorded with the information utility or such other record or evidence of default as may be specified, the name of the Resolution Professional proposed to act as an Interim Resolution Professional and any other information as may be specified by the Board.(Para 52)

- From a perusal of the application filed by the respondent financial creditor under section 7(2) in the statutory form, it is apparent that the respondent financial creditor filed the application in the NCLT for initiation of CIRP against the appellant in its individual capacity and not as lead bank on behalf of the other creditors. The respondent financial creditor claimed that a total amount of Rs. 553.28 crores was due from the appellant corporate debtor to the respondent financial creditor, of which Rs. 42.83 crores was on account of the interest and further Rs. 11.22 crores towards penal interest. The principal outstanding amount was Rs. 499.23 crores. (Para 53)

- When an application is filed under section 7(2), the NCLT is required to ascertain the existence of a default from the records of the information utility or any other evidence furnished by the financial creditor under sub-section (3) of section 7, within 14 days of the date of receipt of the application. (Para 54)

- Section 7(5)(*a*), on which much emphasis has been placed both by the appellant and respondent, provides that where the NCLT is satisfied that a default has occurred and the application under sub-section (2) of the IBC is complete and there is no disciplinary proceeding against the proposed Resolution Professional, it may by order, admit such application. If default has not occurred, or the application is incomplete, or any disciplinary proceeding is pending against the proposed Resolution Professional, the NCLT may reject such application in terms of section 7(5)(*a*), but after giving the applicant opportunity to rectify the defect.(Para 55)

- Both, the NCLT and the Appellate Tribunal (NCLAT) proceeded on the premises that an application must necessarily be entertained under section 7(5)(*a*), if a debt existed and the corporate debtor was in default of payment of debt. In other words, the NCLT found section 7(5)(*a*) of the IBC to be mandatory. The NCLT was of the view that section 7(5)(*a*) did not admit any other interpretation, with which the NCLAT agreed.(Para 56)

- The NCLAT affirmed the finding of the NCLT that the Adjudicating Authority was only required to see whether there had been a debt, and the corporate debtor had defaulted in making the repayments. These two aspects, when satisfied, would trigger Corporate Insolvency. Since the NCLT did not consider the merits of the contention of the respondent corporate debtor, the only question in this appeal is, whether section 7(5)(*a*) is a mandatory or a discretionary provision. In other words, is the expression 'may' to be construed as 'shall', having regard to the facts and circumstances of the case.(Para 57)

- The NCLT held that the imperativeness of timely resolution of a corporate debtor, who was in the red, indicated that no other extraneous matter should come in the way of expeditiously deciding a petition under section 7 or under section 9. (Para 58)

- There can be no doubt that a corporate debtor who is in the red should be resolved expeditiously, following the timelines in the IBC. No extraneous matter should come in the way. However, the viability and overall financial health of the corporate debtor are not extraneous matters.(Para 59)

- The NCLT found the dispute of the corporate debtor with the Electricity Regulator or the recipient of electricity would be extraneous to the matters involved in the petition. Disputes with the Electricity Regulator or the Recipient of Electricity may not be of much relevance. The question is whether an award of the APTEL in favour of the corporate debtor, can completely be disregarded by the NCLT, when it is claimed that, in terms of the Award, a sum of Rs. 1,730 crores, that is, an amount far exceeding the claim of the financial creditor, is realisable by the corporate debtor. The answer, is necessarily in the negative. (Para 60)

- It is viewed that the NCLAT erred in holding that the NCLT was only required to see whether there had been a debt and the corporate debtor had defaulted in making repayment of the debt, and that these two aspects, if satisfied, would trigger the CIRP. The existence of a financial debt and default in payment thereof only gave the financial creditor the right to apply for initiation of CIRP. The NCLT was required to apply its mind to relevant factors including

the feasibility of initiation of CIRP, against an electricity generating company operated under statutory control, the impact of MERC's appeal, pending in this Court, order of APTEL referred to above and the over all financial health and viability of the corporate debtor under its existing management. (Para 61)

- As pointed out , Legislature has, in its wisdom, chosen to use the expression 'may' in section 7(5)(*a*). When an Adjudicating Authority (NCLT) is satisfied that a default has occurred and the application of a financial creditor is complete and there are no disciplinary proceedings against proposed resolution professional, it may by order admit the application. Legislative intent is construed in accordance with the language used in the statute.(Para 62)

- The meaning and intention of section 7(5)(*a*) is to be ascertained from the phraseology of the provision in the context of the nature and design of the IBC. This Court would have to consider the effect of the provision being construed as directory or discretionary.(Para 63)

- Ordinarily the word 'may' is directory. The expression 'may admit' confers discretion to admit. In contrast, the use of the word 'shall' postulate a mandatory requirement. The use of the word 'shall' raises a presumption that a provision is imperative. However, it is well settled that the *prima facie* presumption about the provision being imperative may be rebutted by other considerations such as the scope of the enactment and the consequences flowing from the construction.(Para 64)

- It is well settled that the first and foremost principle of interpretation of a statute is the rule of literal interpretation. If section 7(5)(*a*) is construed literally the provision must be held to confer a discretion on the Adjudicating Authority (NCLT). (Para 65)

- As argued, had it been the legislative intent that section 7(5)(*a*) should be a mandatory provision, Legislature would have used the word 'shall' and not the word 'may'. There is no ambiguity in section 7(5)(*a*). Purposive interpretation can only be resorted to when the plain words of a statute are ambiguous or if construed literally, the provision would nullify the object of the statute or otherwise lead to an absurd result. In this case, there is no cogent reason to depart from the rule of literal construction. (Para 69)

- Section 8 relates to the initiation of CIRP by an operational creditor. There are noticeable differences between the procedure by which a financial creditor may initiate CIRP and the procedure by which an operational creditor may apply for CIRP.(Para 70)

- The operational creditor is, on occurrence of a default, required

to serve on the corporate debtor, a demand notice of the unpaid operational debt, or a copy of an invoice demanding payment of the amount involved in the default of the corporate debtor. Within ten days of receipt of the demand notice or copy of the invoice, the corporate debtor may respond by drawing the notice of the operational creditor to the existence of a dispute, in relation to the claim or to the payment of the unpaid operational debt. (Para 71)

- Section 9 prescribes the mode and manner by which an operational creditor can make an application for initiation of CIRP. After expiry of ten days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the corporate debtor or notice of dispute, the operational creditor may file an application before the Adjudicating Authority (NCLT) for initiation of CIRP.(Para 72)

- Sub-section (5) of section 9 provides that the NCLT shall, within 14 days of the receipt of an application of an operational creditor under sub-section (2) of section 9, admit the application and communicate the decision to the operational creditor and the corporate debtor, provided, the conditions stipulated in clauses (*a*) to (*e*) of section 9(5)(*i*) are satisfied. The NCLT must reject the application of the operational creditor in the circumstances specified in clauses (*a*) to (*e*) of section 9(5)(*ii*).(Para 74)

- Significantly, Legislature has in its wisdom used the word 'may' in section 7(5)(*a*) in respect of an application for CIRP initiated by a financial creditor against a corporate debtor but has used the expression 'shall' in the otherwise almost identical provision of section 9(*5*) relating to the initiation of CIRP by an operational creditor. (Para 75)

- The fact that Legislature used 'may' in section 7(5)(*a*) but a different word, that is, 'shall' in the otherwise almost identical provision of section 9(5)(*a*) shows that 'may' and 'shall' in the two provisions are intended to convey a different meaning. It is apparent that Legislature intended section 9(5)(*a*) to be mandatory and section 7(5)(*a*) to be discretionary. An application of an operational creditor for initiation of CIRP under section 9(2) is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice has been delivered to the corporate debtor by the operational creditor and no notice of dispute has been received by the operational creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor. (Para 76)

- On the other hand, in the case of an application by a financial creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the corporate debtor. The Adjudicating Authority may in its discretion not admit the application of a financial creditor.(Para 77)

- The Legislature has consciously differentiated between financial creditors and operational creditors, as there is an innate difference between financial creditors, in the business of investment and financing, and operational creditors in the business of supply of goods and services. Financial credit is usually secured and of much longer duration. Such credits, which are often long term credits, on which the operation of the corporate debtor depends, cannot be equated to operational debts which are usually unsecured, of a shorter duration and of lesser amount. The financial strength and nature of business of a financial creditor cannot be compared with that of an operational creditor, engaged in supply of goods and services. The impact of the non-payment of admitted dues could be far more serious on an operational creditor than on a financial creditor. (Para 78)

- As observed above, the financial strength and nature of business of financial creditors and operational creditors being different, as also the tenor and terms of agreements/ contracts with financial creditors and operational creditors, the provisions in the IBC relating to commencement of CIRP at the behest of an operational creditor, whose dues are undisputed, are rigid and infilexible. If dues are admitted as against the operational creditor, the corporate debtor must pay the same. If it does not, CIRP must be commenced. In the case of a financial debt, there is a little more filexibility. The Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the financial creditor. If facts and circumstances so warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the financial creditor is not denuded of the right to apply afresh for initiation of CIRP, if its dues continue to remain unpaid. (Para 79)

- The IBC, as observed above, is intended to consolidate and amend the laws with a view to reorganize corporate debtors and resolve insolvency in a time bound manner for maximization of the value of the assets of the corporate debtor. (Para 80)

- The title 'Insolvency and Bankruptcy Code' makes it amply clear that the statute deals with and/or tackles insolvency and bankruptcy. It is certainly not the object of the IBC to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. Section 7(5)(*a*), therefore, confers discretionary power on NCLT to admit an application of a financial creditor under section 7 for initiation of CIRP.(Para 81)

- The NCLT failed to appreciate that the question of time bound initiation and completion of CIRP could only arise if the companies were bankrupt or insolvent and not otherwise. Moreover the timeline starts ticking only from the date of admission of the application for initiation of CIRP and not from the date of filing the same.(Para 82)

- Legislature has, in its wisdom made a distinction between the date of filing an application under section 7 and, the date of admission of such application for the purpose of computation of timelines. CIRP commences on the date of admission of the application for initiation of CIRP and not the date of filing thereof. There is no fixed time limit within which an application under section 7 has to be admitted.(Para 85)

- Even though section 7(5)(a) may confer discretionary power on the Adjudicating Authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.(Para 86)

- Ordinarily, the Adjudicating Authority would have to exercise its discretion to admit an application under section 7 and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the corporate debtor in payment of the debt, unless there are good reasons not to admit the petition.(Para 87)

- The Adjudicating Authority has to consider the grounds made out by the corporate debtor against admission, on its own merits. For example when admission is opposed on the ground of existence of an award or a decree in favour of the corporate debtor, and the awarded/decretal amount exceeds the amount of the debt, the Adjudicating Authority would have to exercise its discretion under section 7(5)(*a*) to keep the admission of the application of the financial creditor in abeyance, unless there is good reason not to do so. The Adjudicating Authority may, for example, admit the application of the financial creditor, notwithstanding any award or decree, if the award/decretal amount is incapable of realisation. (Para 88)

- In this case, the Adjudicating Authority has simply brushed aside the case of the appellant that an amount of Rs. 1,730 crores was realizable by the appellant in terms of the order passed by APTEL in favour of the appellant, with the cursory observation that disputes if any between the appellant and the recipient of electricity or between the appellant and the Electricity Regulatory Commission were inconsequential.(Para 89)

- It is viewed that the Adjudicating Authority as also the Appellate Tribunal fell in error in holding that once it was found that a debt existed and a corporate debtor was in default in payment of the debt there would be no option to the Adjudicating Authority but to admit the petition under section 7.(Para 90)

- For the reasons discussed above, the appeal is allowed. The impugned order passed by the Adjudicating Authority and the impugned order passed by the Appellate Authority dismissing the appeal of the appellant are set aside. The NCLT shall re-consider the application of the appellant for stay of further proceedings on merits in accordance with law. (Para 91)

CASE REVIEW

Vidharbha Industries Power Ltd. v. *Axis Bank Ltd.* (2021) 130 taxmann.com 125 (NCL-AT) (para 91) *set aside.*

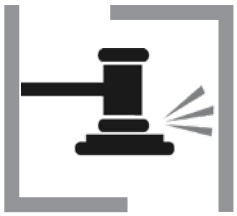
CASES REFERRED TO

Surendra Trading Co. v. *Juggilal Kamlapat Jute Mills Co. Ltd.* (2017) 85 taxmann.com 372/144 SCL 198 (SC) (para 31), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 35), *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 43), *Lalita Kumari* v. *Government of Uttar Pradesh* (2014) 2 SCC 1 (para 65), *Hiralal Rattanlal* v. *State of Uttar Pradesh* (1973) 1 SCC 216 (para 66) and *B. Premanand* v. *Mohan Koikal* (2011) 4 SCC 266 (para 67).

Mahesh Agarwal, **Prateek Seksaria**, **Ankur Saigal**, **Himanshu Satija**, **Venkatesh**, **Suhael Buttan**, **Ms. Divyanshu Garg**, **Kamakshi Saigal**, Advs. and **E.C. Agrawala**, AOR *for the Appellant.* **Syed Jafar Alam**, AOR, **Siddharth Ranade**, **Ms. Samrudhi Chothani** and **Ms. Harneet kaur**, Advs. *for the Respondent.*

† Arising out of order passed by NCLAT, New Delhi in *Vidharbha Industries Power Ltd.* v. *Axis Bank Ltd.* (2021) 130 taxmann.com 125.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 140 taxmann.com 252 (SC)



(2022) 141 taxmann.com 61 (SC)

SUPREME COURT OF INDIA

Asset Reconstruction Company (India) Ltd. *v.* **Tulip Star Hotels Ltd.**

INDIRA BANERJEE AND J.K. MAHESHWARI, JJ.

CIVIL APPEAL NOS. 84-85 OF 2020†

AUGUST 1, 2022

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Financial debt - Consortium of banks including Bank of India executed a loan agreement whereby it was agreed that banks would provide a loan to corporate debtor - Account of corporate debtor was declared as 'NPA' and subsequently, an assignment agreement was executed by Bank of India assigning its receivables to appellant-financial creditor - Later on, appellant filed an application under section 7 for initiating corporate insolvency resolution process (CIRP) against corporate debtor - NCLT by impugned order admitted said application - Corporate debtor filed an appeal that account of corporate debtor was declared as NPA on 1-12-2008 and, therefore, application under section 7 filed on 3-4-2018 was barred by time - NCLAT by impugned order set aside NCLT's order - Whether since corporate debtor acknowledged its liability in its financial statements from year 2008-09 till 2016-17, application under section 7 was filed well within extended period of limitation - Held, yes - Whether therefore, impugned order passed by NCLAT was to be set aside - Held, yes (Para 98)

Section 4, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Application of - Whether IBC is not just a statute for recovery of debts - Held, yes - Whether it is also not a statute which only prescribes modalities of liquidation of a corporate body, unable to pay its debts - Held, yes - Whether it is essentially a statute which works towards revival of a corporate body, unable to pay its debts, by appointment of a Resolution Professional - Held, yes (Para 55)

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 18 of the Limitation Act, 1963 - Corporate Insolvency Resolution Process - Limitation period - Whether entries in books of account and/or balance sheets of a corporate debtor would amount to an acknowledgement under section 18 of Limitation Act - Held, yes (Para 85)

FACTS

- The respondent were holding 50 per cent share in the corporate debtor company 'V'.
- A loan agreement was executed by and between a consortium of banks consisting of Bank of India, Punjab National Bank, Union Bank of India, Vijaya Bank, Canara Bank

and Indian Bank, led by Bank of India and the Corporate Debtor, pursuant to which the Consortium collectively sanctioned loan to the extent of Rs. 129,00,00,000 (Rupees One Hundred and Twenty-Nine Crore Only) to the Corporate Debtor.

- Corporate debtor failed to repay and Bank of India assigned debts in favour of appellant-ARC the corporate debtor proposed a settlement. The appellant revoked the settlement and in terms of the default obligations under the Settlement Agreement, the rate of interest under the Deed of Variation was revised to 22 per cent. By its letter dated 1-7-2013, the Corporate Debtor acknowledged its obligation to repay the aggregate assigned debt inclusive of interest.

- On 3-4-2018, the appellant, as financial creditor, filed an application under section 7(2) in the National Company Law Tribunal (NCLT), Mumbai for initiation of the Corporate Insolvency Resolution Process (CIRP) against the corporate debtor. The NCLT admitted the said application. The corporate debtor filed an appeal before NCLAT seeking dismissal of the application of the appellant. Corporate Debtor argued: that there was no debt due and payable from the Corporate Debtor to the appellant. The amounts advanced by the Consortium to the Corporate Debtor had been repaid. In the statutory notice issued by the appellant to the Corporate Debtor under section 13(2) of the SARFAESI Act, the appellant had claimed that principal amount of Rs. 90.35 crores was due from the Corporate Debtor to the appellant. It was also alleged that application of the appellant under section 7 was hopelessly barred by limitation, the same having been filed about eight/nine years after the account of the Corporate Debtor was declared NPA on 1-12-2008.

HELD

- Where any Corporate Debtor commits default, a Financial Creditor, an Operational Creditor or the Corporate Debtor itself may initiate Corporate Insolvency Resolution Process in respect of such Corporate Debtor, in the manner as provided in Chapter II of the IBC. (Para 45)

- The provisions of the IBC are designed to ensure that the business and/or commercial activities of the Corporate Debtor are continued by a Resolution Professional, upon imposition of a moratorium, to give the Corporate Debtor some reprieve from coercive litigation, which could drain the Corporate Debtor of its financial resources. (Para 46)

- Under section 7(2) read with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, hereinafter referred to as '2016 Adjudicating

Authority Rules' made in exercise of powers conferred, inter alia, by clauses (*c*) (*d*) (*e*) and (*f*) of sub-section (1) of section 239 read with sections 7, 8, 9 and 10, a financial creditor is required to apply in the prescribed Form 1 for initiation of the Corporate Insolvency Resolution Process, against a Corporate Debtor under section 7 accompanied with documents and records required therein, and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. (Para 47)

- Since a Financial Creditor is required to apply under section 7 in Statutory Form 1, the Financial Creditor can only fill in particulars as specified in the various columns of the Form. There is no scope for elaborate pleadings. An application to the Adjudicating Authority (NCLT) under section 7 in the prescribed form, cannot therefore, be compared with the plaint in a suit, and cannot be judged by the same standards, as a plaint in a suit, or any other pleadings in a Court of law. (Para 49)

- Section 7(3) requires a financial creditor making an application under section 7(1) to furnish records of the default recorded with the information utility or such other record or evidence of default as may be specified; the name of the resolution professional proposed to act as an Interim Resolution Professional and any other information as may be specified by the Insolvency and Bankruptcy Board of India. (Para 50)

- Section 7(4) casts an obligation on the Adjudicating Authority to ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor within fourteen days of the receipt of the application under section 7. As per the proviso to section 7(4) inserted by amendment, by Act 26 of 2019, if the Adjudicating Authority has not ascertained the existence of default and passed an order, within the stipulated period of time of fourteen days, it shall record its reasons for not doing so in writing. The application does not lapse for non-compliance of the time schedule. Nor is the Adjudicating Authority obliged to dismiss the application. On the other hand, the application cannot be dismissed, without compliance with the requisites of the Proviso to section 7(5). (Para 51)

- Section 7(5)(*a*) provides that when the Adjudicating Authority is satisfied that a default has occurred, and the application under sub-section (2) of section 7 is complete and there is no disciplinary proceeding pending against the proposed resolution professional, it may by order admit such application. As per section 7(5)(*b*), if the Adjudicating Authority is satisfied that default has not occurred or the application under sub-section

(2) of section 7 is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application, provided that the Adjudicating Authority shall, before rejecting the application under section 5, give notice to the applicant, to rectify the defects in his application, within 7 days of receipt of such notice from the Adjudicating Authority. (Para 52)

- The Corporate Insolvency Resolution Process commences on the date of admission of the application under sub-section (5) of section 7. Section 7(7) casts an obligation on the Adjudicating Authority to communicate an order under clause (a) of sub-section (5) of section 7 to the Financial Creditor and the Corporate Debtor and to communicate an order under clause (b) of sub-section (5) of section 7 to the financial creditor within seven days of admission or rejection of such application, as the case may be. Sections 8 and 9 pertain to Insolvency Resolution by an Operational Creditor and are not attracted in the facts and circumstances of this case. Section 10 pertains to initiation of Corporate Insolvency Resolution Process by the Corporate Debtor itself, and is also not attracted in the facts and circumstances of the case. (Para 53)

- Section 12(1) requires the Corporate Insolvency Process to be completed within a period of 180 days from the date of admission of the application to initiate such process. The period of 180 days is not extendable more than once. (Para 54)

- The IBC is not just a statute for recovery of debts. It is also not a statute which only prescribes the modalities of liquidation of a corporate body, unable to pay its debts. It is essentially a statute which works towards the revival of a corporate body, unable to pay its debts, by appointment of a Resolution Professional. (Para 55)

- IBC has overriding effect over other laws. Section 238 provides that the provisions of the IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law, for the time being in force, or any other instrument, having effect by virtue of such law. (Para 57)

- Unlike coercive recovery litigation, the Corporate Insolvency Resolution Process under the IBC is not adversarial to the interests of the Corporate Debtor. (Para 58)

- On the other hand, the IBC is a beneficial legislation for equal treatment of all creditors of the corporate debtor, as also the protection of the livelihoods of its employees/workers, by revival of the corporate debtor through the entrepreneurial skills of persons other than those in its management, who failed to clear the dues of the corporate debtor to its creditors. It only segregates the interests of the

corporate debtor from those of its promoters/persons in management. (Para 59)

- Relegation of creditors to the remedy of coercive litigation against the Corporate Debtors could be detrimental to the interests of the Corporate Debtor and its creditors alike. While multiple coercive proceedings against a Corporate Debtor in different forums could impede its commercial/ business activities, deplete its cash reserves, dissipate its assets, movable and immovable and precipitate its commercial death, such proceedings might not be economically viable for the creditors as well, because of the length of time consumed in the litigations, the expenses of litigation, and the uncertainties of realisation of claims even after ultimate success in the litigation. (Para 60)

- It is, therefore, imperative that the provisions of the IBC and the Rules and Regulations framed thereunder be construed liberally, in a purposive manner to further the objects of enactment of the statute. (Para 61)

- On a careful reading of the provisions of the IBC and in particular the provisions of section 7(2) to (5) the Adjudicating Authority Rules, there is no bar to the filing of documents at any time until a final order either admitting or dismissing the application has been passed. (Para 62)

- The time stipulation of fourteen days in section 7(4) to ascertain the existence of a default is apparently directory not mandatory. The proviso inserted by amendment with effect from 16-8-2019 provides that if the Adjudicating Authority has not ascertained the default and passed an order under sub-section (5) of section 7 IBC within the aforesaid time, it shall record its reasons in writing for not doing so. No other penalty is stipulated. (Para 63)

- Furthermore, the proviso to section 7(5)(*b*) requires the Adjudicating Authority to give notice to an applicant, to rectify the defect in its application within seven days of receipt of such notice from the Adjudicating Authority, before rejecting its application under clause (*b*) of sub-section (5) of section 7. When the Adjudicating Authority calls upon the applicant to cure some defects, that defect has to be rectified within seven days. However, in the absence of any prescribed penalty in the IBC for inability to cure the defects in an application within seven days from the date of receipt of notice, in an appropriate case, the Adjudicating Authority may accept the cured application, even after expiry of seven days, for the ends of justice. (Para 64)

- There is no specific period of limitation prescribed in the Limitation Act, 1963, for an application under the IBC, before the Adjudicating Authority (NCLT). An application for which no period of limitation

is provided anywhere else in the Schedule to the Limitation Act, is governed by article 137 of the Schedule to the said Act. Under article 137 of the Schedule to the Limitation Act, the period of limitation prescribed for such an application is three years from the date of accrual of the right to apply. (Para 68)

- There can be no dispute with the proposition that the period of limitation for making an application under section 7 or 9 of the IBC is three years from the date of accrual of the right to sue, that is, the date of default. (Para 69)

- As per section 18 of Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing a fresh period of limitation from the date on which the acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgement must be made before the relevant period of limitation has expired. (Para 83)

- It is well settled that entries in books of account and/or balance sheets of a Corporate Debtor would amount to an acknowledgement under section 18 of the Limitation Act. (Para 85)

- Section 18 of the Limitation Act speaks of an Acknowledgement in writing of liability, signed by the party against whom such property or right is claimed. Even if the writing containing the acknowledgement is undated, evidence might be given of the time when it was signed. The Explanation clarifies that an acknowledgement may be sufficient even though it is accompanied by refusal to pay, deliver, perform or permit to enjoy or is coupled with claim to set-off, or is addressed to a person other than a person entitled to the property or right. 'Signed' is to be construed to mean signed personally or by an authorised agent. (Para 93)

- To sum up, in our considered opinion an application under section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years. (Para 97)

- In this case, the amount of the Corporate Debtor was declared NPA on 1-12-2008. By a letter dated 7-2-2011, written well within three years, the Corporate Debtor acknowledged its liability and proposed a settlement. This

was followed by several requests of extension of time to make payment and revised settlements. On 6-4-2013, the Corporate Debtor sought extension of time to pay Rs. 239,88,27,673 outstanding as on 31-3-2013. On 19-4-2013, the Corporate Debtor made payment of Rs. 17,50,00,000 -. On 1-7-2013, the Corporate Debtor acknowledged its liability - this was after the Appellant Financial Creditor revoked the settlement invoking the default clause. The Corporate Debtor acknowledged its liabilities in its financial statements from 2008-09 till 2016-17. The application under section 7(2) was filed on 3-4-2018, well within the extended period of limitation. (Para 98)

- For the reasons discussed above, the impugned judgment and order is unsustainable in law and facts. The appeals are, accordingly allowed, and the impugned judgment and order of the NCLAT is set aside. (Para 99)

CASE REVIEW

NCLAT's order in company appeal No. 525 of 2019 dated 11-12-2019 (para 99) *reversed.*

Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 58) *followed.*

CASES REFERRED TO

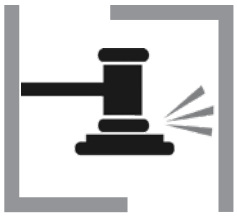
Asset Reconstruction Company (India) Ltd. v. *Bishal Jaiswal* (2021) 126 taxmann.com 200/166 SCL 82 (SC) (para 33), *Innoventive Industries Ltd.* v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 39), *Industrial Credit and Development Syndicate Now Called I.C.D.S. Ltd.* v. *Smithaben H. Patel* 2000 taxmann.com 1509 (SC) (para 40), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 56), *Sesh Nath Singh* v. *Baidyabati Sheoraphuli Co-operative Bank Ltd.* (2021) 125 taxmann.com 357/166 SCL 507 (SC) (para 67), *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* (2019) 109 taxmann.com 395/156 SCL 397 (SC) (para 69), *B. K. Educational Services (P.) Ltd.* v. *Parag Gupta and Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 70), *Jignesh Shah* v. *Union of India* (2019) 109 taxmann.com 486/156 SCL 542 (SC) (para 71), *Radha Exports (India) (P.) Ltd.* v. *K.P. Jayaram* (2020) 118 taxmann.com 560/163 SCL 210 (SC) (para 72), *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 118 taxmann.com 323 (SC) (para 73), *Vashdeo R. Bhojwani* v. *Abhyudaya o-operative Bank Ltd.* (2019) 109 taxmann.com 198/156 SCL 539 (SC) (para 74), *Balkrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan* (1959) Supp. (2) SCR 476 (para 74), *Laxmi Pat Surana* v. *Union Bank of India* (2021) 125 taxmann.com 394/166 SCL 318 (SC) 1236 (para 81), *Khan Bahadur Shapoor Fredoom Mazda* v. *Durga Prasad Chamaria* AIR 1961 SC (para 81), *Bengal Silk Mills Co.* v. *Ismail Golam Hossain Arif* AIR 1692 Cal. 115 (para 85), *Pandem Tea Co. Ltd.*, In re AIR 1974 Cal. 170 (para 85), *South Asia Industries (P.) Ltd.* v. *General Krishna hamsher Jung Bahadur Rana ILR* (1972) 2 Del. 115 (para 85), *Hegde Golay Ltd.* v. *State of India* ILR 1987 Kar. 2673 (para 85), *Reliance Asset Reconstruction Co. Ltd.* v. *Hotel*

Poonja International (P.) Ltd. 2021 SCC Online SC 289 (para 90), *Lakshmirattan Cotton Mills Co. Ltd.* v. *Aluminium Corpn. of India Ltd.* (1971) 1 SCC 67 (para 94), *Ferro Alloys Corporation Ltd.* v. *Rajhans Steel Ltd.* (1999) 22 SCL 138 (Patna) (para 95) and *Dena Bank (Now Bank of Baroda)* v. *C. Shivakumar Reddy* (2021) 129 taxmann.com 60 (SC) (para 96).

Siddharth Ranade, **Vividh Tandon**, **Ms. Priyashree Sharma PH**, **Ms. Samrudhi Chotani**, **Prakashal Jain**, **Ms. Saloni Gupta**, **Shankh Sengupta**, **Ms. Tina Abraham**, **Syed Faraz Alam**, Advs. and **Ms. Prerna Priyadarshini**, AOR *for the Appellant.* **Mrs. Shally Bhasin** and **E.C. Agrawala**, AOR's *for the Respondent.*

† Arising out of NCLAT's order dated 11-12-2019 in Company Appeal No. 525 of 2019.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 141 taxmann.com 61 (SC)



(2022) 141 taxmann.com 407 (Delhi)

HIGH COURT OF DELHI

Sanjay Sarin *v.* Authorised Officer, Canara Bank

SANJEEV NARULA, J.

W.P.(C) 2983 OF 2022
CM APPL. 8630 OF 2022

AUGUST 8, 2022

I. Section 33 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Initiation of - Petitioner, stood as a guarantor to a loan advanced by respondent-bank to borrower - Subsequently, corporate insolvency resolution proceeding was initiated against borrower/corporate debtor - A resolution plan, accepted by Committee of Creditors was approved by NCLT - Under approved resolution plan, resolution applicant was to make payment to respondent bank but it defaulted - Thereafter, proceedings were initiated by respondent bank under section 13(4) of SARFAESI Act, and in furtherance thereto, proceedings were also instituted under section 14 of SARFAESI Act, for taking possession of security offered by Guarantor - Petitioner was aggrieved by such action of respondent bank - Whether if petitioner was not absolved of his liability, proceedings initiated by bank under SARFAESI Act could not be held to be unconstitutional or in derogation of Approval Order of NCLT - Held, yes - Whether respondent bank certainly had right to proceed against collateral securities for recovery of its dues, which were independent of resolution plan approved by NCLT - Held, yes - Whether if Parliament, in its wisdom, has only provided remedy of a liquidation process under section 33(3) as a consequence of non-implementation of resolution plan by concerned corporate debtor, High Court cannot create another remedy just because aforenoted remedy is not sufficient or suitable for petitioner - Held, yes - Whether therefore, petitioner's grievance regarding non-implementation of resolution plan could not be a ground for High Court to entertain instant writ petition - Held, yes (Paras 9 and 12)

II. Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether discharge of corporate debtor from a debt owed by it to its creditors, by way of an involuntary process such as insolvency proceedings, does not absolve guarantor of its liability since it arises out of an independent contract - Held, yes - Whether thus, passing of a resolution plan does not ipso facto discharge personal guarantor - Held, yes - Whether however, extent of liability of a personal guarantor is to be determined in light of agreement between borrower, i.e., corporate debtor, and personal guarantor, for which appropriate forum would be Debt Recovery Tribunal and not High Court - Held, yes (Para 9)

FACTS

- The petitioner, stood as a guarantor to a loan of Rs. 34 crores advanced by respondent No. 1 bank to respondent No. 3, the borrower. Subsequently, corporate insolvency resolution proceedings were initiated against respondent No. 3 (which became the corporate debtor) in 2018. Respondent No. 1 participated in the said proceedings as a financial creditor, and filed its claim before the NCLT. A resolution plan, accepted by the Committee of Creditors (CoC) was approved by the NCLT vide approval order dated 20-2-2020. Under the approved resolution plan, the resolution applicant i.e. respondent No. 2 was to make payment of Rs. 10.35 crores to respondent No. 1 (Rs. 3 crores in FDR on the date of the approval order, and the remaining in 24 equal instalments), but it defaulted.

- Thereafter, proceedings were initiated by respondent No. 1 under section 13(4) of the SARFAESI Act, and in furtherance thereto, proceedings were also instituted under section 14 of the SARFAESI Act, for taking possession of the security offered by the Guarantor, being the dwelling unit of the petitioner as well as for appointment of a receiver.

- Petitioner being aggrieved with the recovery action initiated by the bank, against the borrower and himself, filed instant writ petition as according to him, once a resolution plan qua the borrower was approved under section 31, the bank's claims stood addressed and, thus, it could not have sought recovery for amounts over and above the amount approved by the NCLT and sought a mandamus to that effect.

HELD

- The law relating to maintainability of a writ petition in matters relating to SARFAESI Act is no longer res integra. The Supreme Court in Phoenix ARC (P.) Ltd. v. Vishwa Bharti Vidya Mandir (2022) 134 taxmann.com 138/171 SCL 145 (SC)/2022 SCC Online SC 44 has held that where proceedings are initiated under the SARFAESI Act, and the borrower is aggrieved by any of the actions of the bank for which the borrower has remedy under the SARFAESI Act, no writ petition should be entertained. Similar views have been expressed by the Court in Trinkeshwar Developers and Builders (P.) Ltd. v. North Municipal Corpn. 2022 SCC Online Delhi 415 wherein it was held that a petitioner cannot invoke the writ jurisdiction of the court under article 226 of the Constitution of India to indirectly seek the relief which the petitioner has failed to obtain otherwise. As noted above, the petitioner's challenge to the action of respondent No. 1 is already the subject-matter of challenge before the DRT, which is pending

adjudication and, therefore, the present writ cannot be entertained. (Para 7)

- The Petitioner has also raised a grievance regarding the proceedings being in derogation of the Approval Order of the NCLT, and implored for the Court's intervention on the ground that there is no other remedy available. This contention is founded on the plea that, with the approval of the resolution plan, the guarantors' liabilities are also discharged. This contention has been categorically negated by the Supreme Court in Lalit Kumar Jain v. Union of India (2021) 127 taxmann.com 368 (SC)/2021 SCC Online SC 396. (Para 8).

- The Supreme Court has, in very clear terms, held that discharge of the corporate debtor from a debt owed by it to its creditors, by way of an involuntary process such as insolvency proceedings, does not absolve the guarantor of its liability since it arises out of an independent contract. Thus, the passing of a resolution plan does not ipso facto discharge the personal guarantor. The judgment of the Supreme Court in State Bank of India v. V. Ramakrishnan (2018) 96 taxmann.com 271/149 SCL 107/2018 SCC Online SC 963 also puts forth the aforementioned principle, and is contrary to the proposition canvassed by the petitioner. As regards the extent of liability of a personal guarantor is concerned, the same would have to be determined in light of the agreement between the borrower, i.e., the corporate debtor, and the personal guarantor, for which the appropriate forum would be the Debt Recovery Tribunal and not High Court. Thus, if the petitioner is not absolved of his liability, the proceedings initiated by the bank under the SARFAESI Act cannot be held to be unconstitutional or in derogation of the Approval Order of the NCLT. (Para 9)

- In relation to the other grievance raised by respondent No. 1 qua non-implementation of the resolution plan, it must be noted that the aggrieved party is actually respondent No. 1, who has not been paid in terms of the resolution plan approved by NCLT. As pointed out by the respondent No. 1, there has been a default on the part of the resolution applicant in payment of instalments, and as per the counter affidavit, 15 instalments amounting to Rs. 4.54 crores remain pending. It is therefore for respondent No. 1 to now take action for recovery of its dues from the resolution applicant, as it may deem fit, utilizing any remedy available to it under law. (Para 10)

- One must also take note of section 33(3), which envisages a liquidation process in the event of contravention of a resolution plan. (Para 11)

- Under the aforenoted provision, respondent No. 1 certainly has the right to proceed against the

collateral securities for recovery of its dues which are independent of the resolution plan approved by the NCLT. If the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected, may make an application to the Adjudicating Authority for an order for liquidation. Where a resolution applicant succeeds as a corporate debtor, but fails to comply with its assurance in terms of the resolution plan, then subsequent step to be taken has been specified in section 33(3) of IBC. This is the scheme under the IBC, and if the Parliament, in its wisdom, has only provided the remedy of a liquidation process under section 33(3) of IBC as a consequence of non-implementation of the resolution plan by the concerned corporate debtor, instant Court cannot create another remedy just because the aforenoted remedy is not sufficient or suitable for the petitioner. Therefore, petitioner's grievance regarding non-implementation of the resolution plan, too, cannot be a ground for the Court to entertain the instant petition. (Para 12)

- In view of the above, this Court finds no merit in the present petition. (Para 13)
- Dismissed along with pending application. (Para 14)

CASES REFERRED TO

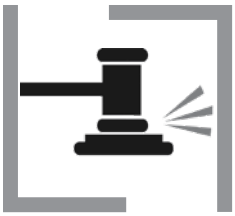
Canara Bank v. *Maple Realcon (P.) Ltd.* (Misc Crl. No. 101 of 2021) (para 4.3), *State Bank of India* v. *V. Ramakrishnan* (2018) 96 taxmann.com 271/149 SCL 107 (SC)/2018 SCC Online SC 963 (para 5.3), *Lalit Kumar Jain* v. *Union of India* (2021) 127 taxmann.com 368 (SC)/2021 Online SC 396 (para 5.3), *Phoenix ARC (P.) Ltd.* v. *Vishwa Bharti Vidya Mandir* (2022) 134 taxmann.com 138/171 SCL 145 (SC)/2022 SCC Online SC 44 (para 7), *Authorized Officer State Bank of Travancore* v. *Mathew K.C.* (2018) 89 taxmann.com 429/143 CLA 331/146 SCL 83 (SC)/2018 SCC Online SC 55 (para 7), *Agarwal Tracom (P.) Ltd.* v. *Punjab National Bank* (2017) 87 taxmann.com 296/(2018) 143 CLA 218/145 SCL 83 (SC)/2017 SCC Online SC 1368 (para 7), *General Manager, Sri Siddeshwara Cooperative Bank Ltd.* v. *Ikbal* (2013) 37 taxmann.com 6/122 SCL 132 (SC)/2013 SCC Online SC 755 (para 7), *United Bank of India* v. *Satyawati Tondon* 2010 SCC Online SC 776 (para 7) and *Trinkeshwar Developers Builders (P.) Ltd.* v. *North Municipal Corpn.* 2022 SCC Online Delhi 415 (para 7).

Mrinal Harsh Vardhan and **Kartik Sarin**, Advs. *for the Petitioner.* **Hitesh Sachar** and **Ms. Anju Jain**, Advs. *for the Respondent.*

1. Bearing SA No. 404/2021.
2. Reference is also made to: *Authorized Officer, State Bank of Travancore* v. *Mathew K.C.* (2018) 89 taxmann.com 429/143 CLA 331/146 SCL 83 (SC)/2018 SCC

Online SC 55; *Agarwal Tracom (P.) Ltd.* v. *Punjab National Bank* (2017) 87 taxmann.com 296/(2018) 143 CLA 218/145 SCL 83 (SC)/2017 SCC Online SC 1368; *General Manager, Sri Siddeshwara Cooperative Bank Ltd.* v. *Ikbal* (2013) 37 taxmann.com 6/122 SCL 132 (SC)/2013 SCC Online SC 755; and also in *United Bank of India* v. *Satyawati Tondon* 2010 SCC Online SC 776, in which case, it was also separately noted that "the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions".

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 141 taxmann.com 407 (Delhi)



(2022) 142 taxmann.com 459 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Hemant Mehta Resolution Professional of Pan India Utilities Distribution Co. Ltd. *v.* **Asstt. Commissioner of State Tax**

JUSTICE ASHOK BHUSHAN, CHAIRPERSON

M. SATYANARAYANA MURTHY, JUDICIAL MEMBER

BARUN MITRA, TECHNICAL MEMBER

COMPANY APPEAL (AT)(INSOLVENCY) NO. 328 OF 2022†

AUGUST 5, 2022

Section 60, read with sections 14 and 238A of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authorites - Adjudicating Authority - Corporate insolvency resolution process (CIRP) was initiated against corporate debtor and RP was appointed - Since RP had not received any expression of interest, CoC resolved by majority to go into liquidation - During liquidation process, R1-Assistant Commissioner of Tax and R2-Commercial Tax Officer had issued notices to corporate debtor's bank to freeze current account of corporate debtor towards clearance of outstanding dues/liabilities of CST/VAT - Appellant sent several communications to Government/ bank authorities urging them to defreeze relevant current account, but as there was no progress in matter appellant filed application before NCLT seeking directions to be issued to respondents and set aside their notices - NCLT by impugned order disposed of said application and directed appellant to continue follow up exercise with relevant Government authorities to consolidate assets of corporate debtor - Whether since directions issued by respondents freezing accounts of corporate debtor during liquidation process was bad in law, it was within remit of NCLT to issue appropriate directions to respondents to set matter right and provide statutory relief to appellant - Held, yes - Whether NCLT, ought to have appreciated constrained faced by appellant and should have provided relief by exercising its residuary jurisdiction under section 60(5) rather than remanding appellant once again back in hand of Government authorities - Held, yes (Paras 15 and 17)

FACTS

- The Corporate Insolvency Resolution Process (CIRP) was initiated against the corporate debtor and Resolution Professional (RP) was appointed.
- Since the RP did not receive any expressions of interest the CoC resolved by majority to go with liquidation.
- Accordingly, the liquidation order was passed by the NCLT.
- During the liquidation process,

R1-Assistant Commissioner of Tax and R2-Commercial Tax Officer issued notices to bank and directed them to freeze the current account of the corporate debtor towards clearance of outstanding dues/ liabilities of CST/VAT.

- The appellant-liquidator sent several communications to the Govt./bank authorities urging them to defreeze the relevant current account, but as there was no progress in the matter, the appellant filed an application before NCLT seeking directions to be issued to R1 and R2 to set aside their notices and defreeze the bank accounts of the corporate debtor.
- The NCLT disposed of the said application and directed appellant to continue the follow up exercise with the relevant Govt. authorities to consolidate the assets of the corporate debtor.
- On appeal, the appellant praying to set aside the impugned order and direct respondents to defreeze the bank account of the corporate debtor.

HELD

- From a plain reading of section 60 and also given that the said section is prefaced with a non-obstante clause, the Adjudicating Authority is vested with residuary jurisdiction and it therefore casts a responsibility on the Adjudicating Authority to intervene in certain circumstances. The Adjudicating Authority could have exercised its residuary discretion under section 60(5) so as to ensure that the objectives of IBC are not frustrated including providing relief to the Liquidator in stalemate circumstances as the present. (Para 14)
- The directions issued by R1 and R2 freezing the accounts of the corporate debtor during liquidation process is bad in law and hence it was within the remit of the Adjudicating Authority to issue appropriate directions to the R1 and R2 to set the matter right and provide statutory relief to the appellant. (Para 15)
- Given that the persistent efforts on the part of the appellant to defreeze the accounts of the corporate debtor did not bear any result; given that there is sufficient proof of reluctance on the part of the R1 to R4 to defreeze the bank accounts of the corporate debtor; given that section 238 overrides anything inconsistent contained in any other enactment and also given that section 60(5) vests residuary jurisdiction on the Adjudicating Authority to intervene and, above all, keeping in mind that the cardinal objective of the IBC Code is to obviate uncalled for derailment of the insolvency resolution process, sufficient merit was found in the submission made by the appellant that the Adjudicating Authority ought to have appreciated the constraints faced by the appellant/

Liquidator and provided relief by exercising its residuary jurisdiction rather than remanding the appellant once again back in the hands of the Govt. authorities. (Para 17)

- In view of the discussions, facts and circumstances, it is held that the Adjudicating Authority erred in not exercising the residuary jurisdiction vested in it under section 60(5) and having failed to provide necessary relief to the appellant, the impugned order was to be set aside. (Para 18)

CASE REVIEW

Order of NCLT - New Delhi in 192/2021 in CP (IB)990/MB/2019,dated 31-1-2022 (Para 18) *reversed.*

Pr. CIT v. *Monnet Ispat and Energy Ltd.* (2019) 107 taxmann.com 481/2018 SCC Online SC 3465 (SC); *Tata Consultancy Services Ltd.* v. *Vishal Ghisulal Jain, Resolution Professional of SK Wheels (P.) Ltd.* (2021) 132 taxmann.com 232/170 SCL 153/2020 SCC Online SC 1254 (SC) and *Indus Biotech (P.) Ltd.* v. *Kotak India Venture (Offshore) Fund* (2021) 125 taxmann.com 393/166 SCL 129/2021 SCC Online SC 1254 (SC) (para 15) *followed.*

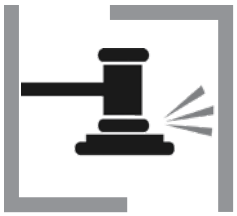
CASES REFERRED TO

Gujarat Urja Vikas Nigam Ltd. v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 14), *Pr. CIT* v. *Monnet Ispat and Energy Ltd.* (2019) 107 taxmann.com 481/2018 SCC Online SC 3465 (SC) (para 15), *Tata Consultancy Services Ltd.* v. *Vishal Ghisulal Jain, Resolution Professional of SK Wheels (P.) Ltd.* (2021) 132 taxmann.com 232/170 SCL 153/2020 SCC Online SC 1254 (SC) (para 15), *Indus Biotech (P.) Ltd.* v. *Kotak India Venture (Offshore) Fund* (2021) 125 taxmann.com 393/166 SCL 129/2021 SCC Online SC 268 (SC) (para 15) and *Pinakin Shah-Liquidator of Brew Bessy Hospitalities (P.) Ltd.* v. *Asstt. CST* (Co. Appeal (AT) (Insolveney) No. 32 of 2021, dated 25-2-2021) (para 16).

Devarajan Raman, Adv. *for the Appellant.* **Rahul Chitnis** and **Aaditya Pande**, Advs. *for the Respondent.*

† Arising out of order of NCLT - New Delhi in 192/2021 in CP (IB)990/MB/2019, dated 31-1-2022.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 142 taxmann.com 459 (NCLAT- New Delhi)



(2022) 143 taxmann.com 16 (NCLT - Mum.)

NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH

AJR Infra and Tolling Ltd. *v.* **Committee of Creditor of Rajahmundry Godavari bridge Ltd.**

H.V. SUBBA RAO, JUDICIAL MEMBER
AND SMT. ANURADHA SANJAY BHATIA, TECHNICAL MEMBER

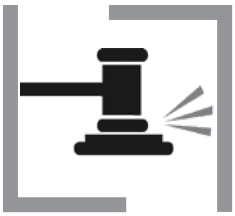
I.A. NO. 1148 OF 2022
C.P./IB/2677/MB/2018

AUGUST 10, 2022

Section 12A of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Withdrawal of application - Whether where applicant-corporate debtor submitted a settlement proposal under section 12A, which was turned down by CoC in its commercial wisdom as they did not inspire confidence on conduct of applicant, NCLT had no power to give any directions to CoC to consider compromise proposal submitted by applicant as it is exclusive domain of CoC - Held, yes - Whether therefore, very prayer sought by applicant in instant application seeking directions to CoC to consider compromise proposal submitted by it under section 12A was impermissible in law and NCLT had no power to give such direction as sought by applicant - Held, yes (Para 3)

Durgaprasad Poojari, Adv. *for the Applicant.* **Pulkit Sharma, Adv. and Sanjay Mishra** *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
[2022] 143 taxmann.com 16 (NCLT - Mum.)



(2022) 143 taxmann.com 17 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Cimco Projects Ltd. *v.* **Anup Kumar (Resolution Professional) Shivkala Developers (P.) Ltd.**

JUSTICE ASHOK BHUSHAN, CHAIRPERSON

M. SATYANARAYANA MURTHY, JUDICIAL MEMBER

AND BARUN MITRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 128 OF 2022†

AUGUST 1, 2022

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - CIRP was initiated against corporate debtor - Resolution plan submitted by appellant was approved by CoC - Thereafter, Resolution Professional filed an application before NCLT for approval of resolution plan - Appellant, successful resolution applicant, was impleaded as a party to said application and NCLT directed him to submit performance guarantee - More than three years had passed from approval of resolution plan by CoC, resolution applicant had neither furnished performance guarantee nor shown any willingness to proceed with resolution plan - NCLT issued bailable and non-bailable warrants against resolution applicant but had failed to secure presence of resolution applicant and, therefore, rejected application for approval of resolution plan and ordered liquidation - Whether due to non-serious, casual and non-diligent conduct of resolution applicant, NCLT had rightly dismissed application for approval of resolution plan – Held, yes - Whether however, since application filed by appellant for cancellation of non-bailable warrant had been dismissed by NCLT without adverting to any of reasons given by appellant, application for cancellation of warrants was to be allowed - Held, yes (Paras 11 and 12)

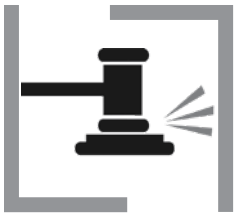
CASE REVIEW

Order of NCLT-Special Bench in CA 734 of 2018 dated 24-11-2021 (para 12) *partly reversed.*

Ashish Makhija and **Deep Bisht**, Advs. *for the Appellant.* **Abhijeet Sinha**, **Aditya Shukla** and **Ms. Shankari Mishra**, Advs. *for the Respondent.*

† Arising out of NCLT's order in CP No. (IB) 525(ND)/2017, dated 24-11-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 143 taxmann.com 17 (NCLAT- New Delhi)



(2022) 143 taxmann.com 18 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Sumat Kumar Gupta, Resolution Professional, Vallabh Textiles Company Ltd. *v.* Vardhman Industries Ltd.

JUSTICE ASHOK BHUSHAN, CHAIRPERSON

M. SATYANARAYANA MURTHY, JUDICIAL MEMBER
AND BARUN MITRA, TECHNICAL MEMBER

COMPANY APPEAL (AT)(INSOLVENCY) NO. 762 OF 2022†

JULY 27, 2022

Section 25 of the Insolvency and Bankruptcy Code, 2016, read with regulations 12 and 13 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - CIRP was initiated against corporate debtor and appellant was appointed as Resolution Professional (RP) of corporate debtor - Respondent filed its claim as financial creditor - RP sent an e-mail seeking additional details and documentation by way of account statement of corporate debtor in books of financial creditor- Thereafter, RP rejected claim of financial creditor on ground that he had to decide claims within seven days from last date of receipt of claims as per regulation 13 and details sought for were not received from financial creditor within stipulated period - Financial creditor resubmitted claim but same was not entertained by RP on ground that earlier claim had already been rejected and no belated claim could be filed - Financial creditor filed an application before NCLT seeking for directions to be issued to RP to admit/ verify claim - NCLT by impugned order directed RP to reconsider and evaluate claims of financial creditor afresh - It was noted that RP did not take adequate and credible effort on his part and rejected claims of financial creditor after sending a bare four-line mail requisitioning additional information pertaining to 12-year period having allowed only one day time to furnish information - Whether there was no negligence, or inaction or lack of bona fide on part of financial creditor to submit claim with proof to RP and, therefore, NCLT could not be faulted for coming to conclusion that there was no evidence of non-compliance on part of financial creditor when he submitted his claims - Held, yes - Whether RP by summarily rejecting belated claims at his own level without presenting complete facts to CoC had misconstrued his role, duties and responsibilities - Held, yes (Paras 15, 20, 21 and 22)

FACTS

- The appellant was appointed initially as Interim Resolution Professional and later confirmed as Resolution Professional of the corporate debtor, which was admitted for CIRP.

- The appellant/Resolution Professional made public announcement inviting claims on 13-4-2019 with the last date of filing claims fixed as 26-4-2019. Following the public announcement, respondent filed claim as financial creditor on 26-4-2019 in Form-C. The appellant/ Resolution Professional thereafter, sent an e-mail to financial creditor on 1-5-2019 seeking certain additional details and documentation by way of account statement of the corporate debtor in the books of the financial creditor for the period 2007 to 2019.

- The Resolution Professional rejected claim of the financial creditor on 2-5-2019 on ground that additional details sought for were not received from the financial creditor within seven days from the last date of the receipt of claims as stipulated by regulation 13 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016.

- The financial creditor thereafter resubmitted the claim on 24-5-2019 in Form-C under regulation 8 of CIRP Regulations. However, said claim was not entertained by Resolution Professional stating that since the earlier claim, submitted on 26-4-2019, within the period prescribed by the public announcement had already been rejected on 2-5-2019, no belated claim could be filed.

- The financial creditor filed an application before the Adjudicating Authority seeking for directions to be issued to the Resolution Professional to admit his claim and/or to verify his claim.

- The Adjudicating Authority directed the Resolution Professional to reconsider the claims including evaluating the claim to be classified as financial creditor and to reconstitute the CoC and made certain observations against the Resolution Professional in the discharge of his duties.

- On appeal:

HELD

- The financial creditor submitted his claims under rule 8 of CIRP Regulations in Form C well within the prescribed time limit in terms of the public announcement made by appellant/Resolution Professional on 13-4-2019. The last date of submission of claims, as provided in the public announcement was 26-4-2019 and the financial creditor had submitted on 26-4-2019 his claim details along with supporting documents as also found in the appeal paper book. (Para 10)

- The Resolution Professional is entitled to seek substantiation of claims under regulation 10 of CIRP Regulations. Invoking CIRP regulation 10, the application/Resolution Professional sent an e-mail on 1-5-2019 seeking additional information with respect to account statements spanning

over a period of 12 years from 2007 to 2019 from the financial creditor. The appellant/Resolution Professional was well within his rights to exercise the discretion of seeking additional information from the financial creditor. What, however, merits consideration is the reasonability on the part of the appellant/Resolution Professional to have allowed only just twenty-four hours to the financial creditor to submit additional information spanning order a period of 12 years (2007-19) and the propriety of his action of rejecting the claim of the financial creditor soon thereafter on 2-5-2019 after having allowed only one day time to furnish such additional information which entailed voluminous documentation. (Para 11)

- As to whether serious efforts were made by the appellant/Resolution Professional to verify the claims submitted by the financial creditor, from the documents available on record, it is agreed with the Adjudicating Authority that there is not much evidence to validate that the appellant/Resolution Professional undertook adequate and credible effort on his part to deep-dive into the account statements to distinguish between the operational and financial transactions but for sending a bald and bare four-line mail requisitioning additional information pertaining to 12-year period. The conduct of the appellant/Resolution Professional stands out in sharp contrast to that of the financial creditor whose bona fide in providing information at every stage to substantiate his claim cannot be doubted. The Adjudicating Authority after making an in-depth examination was justified in holding that appellant/Resolution Professional made no serious efforts to verify the claims of the financial creditor. (Para 13)

- There was no negligence, or inaction or lack of bona fide on the part of the financial creditor to submit claim with proof to the Resolution Professional both on 26-4-2019 and 24-5-2019. The Adjudicating Authority, therefore, cannot be faulted for coming to the conclusion that there is no evidence of non-compliance on the part of the financial creditor on both occasions when he submitted his claims. (Para 15)

- It is amply clear from a plain reading of CIRP Regulations that regulation 12(1) is subject to regulation 12(2) as expressed in the opening sentence of regulation 12(1). Furthermore, regulation 12(2) clearly permits a creditor who has failed to submit his claim with proof within the stipulated time of the public announcement to avail extended time period to submit such claims on or before the ninetieth day of the insolvency commencement date. It, therefore, does not stand to reason why any financial creditor who submits his claim under regulation 12(1) within the stipulated time line but failed

to satisfy the Resolution Professional can be denied the benefit of availing the extended time period available under regulation 12(2) to substantiate his claim. If this benefit is denied, it will disincentivize creditors from submitting claims under regulation 12(1) as it gives them a shorter window of time to substantiate their claims thereby running the risk of their claim being disregarded for want of time. (Para 18)

- Be that as it may, CIRP regulation 12 does not lay down any specific embargo on a creditor who on having failed to satisfy the Resolution Professional with respect to the claims submitted by him under regulation 12(1) from refiling his claim under regulation 12(2) as long as it is done on or before the ninetieth day of the insolvency commencement date. The appellant/Resolution Professional, therefore, ought not to have summarily rejected the claim refiled by the financial creditor on the standalone ground that his earlier claim under regulation 12(1) having been rejected, he cannot file a belated claim. This narrow and pedantic interpretation of the CIRP regulation 12 by the appellant/Resolution Professional has stymied the *bona fide* efforts on the part of the financial creditor to substantiate his claims. (Para 19)

- Section 18 of the IBC lays down the various duties of the IRP in respect of handling claim proposals. As regards the role of the Resolution Professional in this regard, section 25(*e*) lays down that he shall 'maintain an updated list of claims.' The Resolution Professional while examining claims is, therefore, expected to act in a manner which inspires confidence in the financial creditor so as to ensure the credibility of the insolvency process. In the present matter, therefore, the question is, therefore, whether a Resolution Professional is competent to decide or reject the claims of the financial creditor by himself without presenting the complete facts before the CoC on the admissibility of the claims. This aspect has already been settled by the Supreme Court in *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365, wherein it held that Resolution Professional has no adjudicatory power and that he is "really a facilitator of the resolution process, whose administrative functions are overseen by the CoC and by the Adjudicating Authority." The Resolution Professional has been vested with administrative as opposed to quasi-judicial power. Thus, the appellant/Resolution Professional by summarily rejecting the belated claims at his own level without presenting the complete facts to the CoC has misconstrued his role, duties and responsibilities. (Para 20)

- The Resolution Professional is an important instrumentality in the insolvency resolution process and his role is crucial and critical to

> fulfil the objective of the IBC. It is therefore incumbent upon him to discharge his responsibilities with the highest standards of processional excellence, dexterity, integrity, rectitude and good faith. The Adjudicating Authority based on the facts and documents presented before it, found lack of professionalism on part of the appellant/Resolution Professional in analyzing the admissibility of claims before him. There no reasons to disagree with the Adjudicating Authority and affirm the findings that there has been failure of duties on the part of the appellant/Resolution Professional. (Para 21)

Thus, there are no convincing reasons to interfere with the impugned order. Therefore, it is not possible to accept the contention of the appellant that the adverse remarks made by the Adjudicating Authority in impugned order be expunged. In the result, the appeal having no merit is dismissed. (Para 22)

CASE REVIEW

Order of NCLT, Chandigarh in *Vardhman Industries Ltd.* v. *Sumat Kumar Gupta* (IA 568 of 2019, dated 24-5-2022) (para 22) *affirmed.*

Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 20) *followed.*

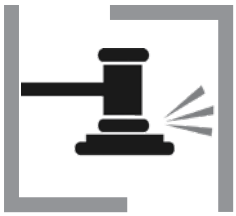
CASES REFERRED TO

Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 20).

Dr. Rajansh Thukral and **Ms. Surekha Thukral**, Advs. *for the Appellant.*

† Arising out of order passed by the NCLT, Chandigarh in *Vardhman Industries Ltd.* v. *Sumat Kumar Gupta* (CP (IB) No. 391/Chd/Pb/2018, dated 24-5-2022).

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 143 taxmann.com 18 (NCLAT- New Delhi)



(2022)143 taxmann.com 366 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Sudip Dutta @ Sudip Bijoy Dutta *v.* **State Bank of India**

JUSTICE ASHOK BHUSHAN, CHAIRPERSON
M. SATYANARAYANA MURTHY, JUDICIAL MEMBER
AND BARUN MITRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 807 OF 2021†

JULY 29, 2022

Section 5(22), read with section 95, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Personal Guarantor - Whether provision under section 60(1) makes it clear that residence of Personal Guarantor is not taken into consideration when proceedings against Personal Guarantor are initiated - Held, yes - Whether where a personal guarantee has been given by a person who is residing outside India or is a foreign national, in event personal guarantee is accepted, he shall be bound by personal guarantee - Held, yes - Whether there is no indication in statutory scheme that a personal guarantor can escape from his liability under guarantee deed only for reason that he has after execution of guarantee deed has obtained citizenship of a foreign country - Held, yes - Whether for Central Government to enter into an agreement as required under sections 234-235 to enable NCLT to proceed against guarantor, a foreign citizen arises only in a case where assets or property of personal guarantor are situated at any place in a country outside India - Held, yes (Paras 23, 24 and 27)

FACTS

- Respondent-bank had granted loans and various credit facilities to EDAL (corporate debtor) and numerous documents pertaining to the same had been executed since the date of sanction.
- The personal guarantor, viz., appellant had executed personal guarantee in favour of the bank to secure the repayment of the principal amount together with all interest, additional interest, liquidated damages, premium on pre-payments, reimbursement of all costs, charges and expenses and all other obligations payable by corporate debtor in respect of the term loan.
- Corporate debtor had failed to make payment of its dues and finally the account was declared as Non-Performing Asset. The bank issued a demand notice section 8 was send to the guarantor. Due to default in payment of dues by the

corporate debtor, an application had been filed under section 7. Said application was admitted by NCLT.

- It was a case of appellant that NCLT committed error in admitting section 95(1) application filed by the Bank against the appellant who was no more within the jurisdiction of the NCLT he having obtained the citizenship of Singapore with effect from 18-6-2018. It was submitted that the appellant being a citizen of Singapore, a foreign national, the I&B Code was not applicable.

HELD

- Application under section 7 has already been admitted by the NCLT against the corporate debtor. (Para 7)
- Corporate Person has been defines in sub-section (7) of section 3. In the present case, 'EDAL' is the Corporate Person who is the corporate debtor. (Para 18)
- Section 3(24) defines 'person resident in India' and section 3(25) defines 'person resident outside India'. (Para 19)
- Definition of expression 'person' is an inclusive definition as the person residing outside India is also covered by the said definition. Section 2 provides for application of provisions of the Code. By the virtue of sub-clause (*e*) of section 2 of the I&B Code is fully applicable to Personal Guarantors to corporate debtors. (Para 20)
- The Code specifically has been made applicable on the Personal Guarantors of the corporate debtors. Whosoever may be the Personal Guarantors of the corporate debtor is covered by section 2(*e*). (Para 21)
- Section 60(1) categorically provides that the NCLT, in relation to insolvency resolution for corporate persons including corporate debtors and Personal Guarantors shall be the NCLT having territorial jurisdiction over the place where the registered office of the corporate persons locate. Hence, the insolvency resolution process is to be initiated before the NCLT within whose territorial jurisdiction registered office of the Corporate Person is located. The provision under section 60(1) makes it clear that the residence of Personal Guarantor is not taken into consideration when proceedings against the Personal Guarantor are initiated. The Personal Guarantor, who is whether residing in India or residing outside India, when an application is filed against the Personal Guarantor the jurisdiction shall be before the NCLT in whose territorial jurisdiction the registered office of the Corporate Person is located. The mere fact that the appellant now claims to be citizen of Singapore and has given an address of Singapore is wholly irrelevant for initiating proceedings against the

appellant. The registered office of the corporate debtor i.e. 'EDAL' being within the territorial jurisdiction of NCLT, application for initiating insolvency proceedings against the Personal Guarantor shall be initiated at NCLT. The 'personal guarantors' as used under section 60(1) are personal guarantors irrespective of the fact as to whether they are Indian citizen or foreign nationals. In event for a corporate debtor a personal guarantee has been given by a person who is residing outside of India or is a foreign national, in event personal guarantee is accepted, he shall be bound by the personal guarantee. (Para 23)

- Further, there is no indication in the statutory scheme that a Personal Guarantor who has given guarantee to a corporate debtor can escape from his liability under the Guarantee Deed only for the reason that he has after execution of the Guarantee Deed has obtained citizenship of a foreign country. In event, such Personal Guarantors are allowed to wash off from their obligation under the Guarantee Deed, the easiest way for a Personal Guarantor is to run away out of the country and say that now he is not liable to perform his obligation under the Deed of Guarantee since he is no more Indian citizen. (Para 24)

- The NCLT is well within its jurisdictions to initiate insolvency resolution process against the appellant, the Personal Guarantor of the corporate debtor, in accordance with the scheme of section 95(1) read with section 60. The NCLT in its order has taken note of the facts and submissions of the appellant and after considering submissions of the parties has rightly rejected the submission raised on behalf of the appellant while admitting the application under section 95(1). The direction issued in order are consequential to admission of application under section 95(1). (Para 31)

CASE REVIEW

NCLT's order in CP (IB) No. 54/KB/2021, dated 3-8-2021 (para 31) *affirmed*.

CASES REFERRED TO

Ravi Ajit Kulkarni v. *State Bank of India* (2021) 130 taxmann.com 442 (NCL - AT) (para 5), *Lalit Kumar Jain* v. *Union of India* (2021) 127 taxmann.com 368 (SC)/(2021) 9 SCC 321 (para 25) and *A. Navinchandra Steels (P.) Ltd.* v. *SREI Equipments Finance (P.) Ltd.* (2021) 125 taxmann.com 50 (SC)/(2021) 4 SCC 435 (para 29).

Dhruba Mukherjee, Sr. Adv., Raja Ratan Bhura and Shwetank Singh, Advs. *for the Appellant*. Ashwini Kr. Singh, Joydeep Mukherjee, Ms. Rubina Khan, Advs. and Prashant Jain *for the Respondent*.

† Arising out of CP (IB) No. 54/KB/2021, dated 3-8-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 143 taxmann.com 366 (NCLAT- New Delhi)

IBBI Suspended the Registration of an Insolvency Professional for a Period of Three Years

CASE NO	IBBI/DC/124/2022
DATE OF ORDER	18th August, 2022

Contravention-1

Withdrawal of excess remuneration as Liquidator's fee

An Insolvency Professional (IP) drew fee of Rs. 83,04,764 (Rupees Eighty-three lakh four thousand seven hundred and sixty-four) in excess of the fees that was payable to him in accordance with the Liquidation Regulations due to wrong calculation.

The Insolvency Professional submitted that he had already voluntarily offered to refund the amount of Rs. 85,59,962 immediately.

Observations of the Disciplinary Committee of IBBI

The IP has not taken due care in interpreting his entitled fee as per sub-regulation (3) of Regulation 4 of the Liquidation Regulations. Though he had taken mitigating steps by refunding the amount of 92,44,758 in the liquidation account of the CD, when mistake was told to him, however, fact remains that he has withdrawn the excess amount; whether it was unintentional or not is a subject matter of interpretation.

Drawing excess amount as fee is akin to overcharging at the expense of all the creditors of CD, whose liquidation estate he is holding as a fiduciary. Mere negligence, oversight or mis-interpretation cannot be discernable possible reasons for this over-drawl, particularly in the context that over-drawl for which he was not entitled to, would have remained with IP, had this fact was not come to the notice of the IBBI.

Provisions Referred

The IP violated section 34(8) of the Code, Regulation 4(3) of Liquidation Regulations read with clauses 10, 14 and 25 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

As per the clause 25 of the Code of Conduct, an IP must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken and is not inconsistent with the applicable regulations.

Contravention-2

Hiring of related party without proper identification of scope of work with wrong manner of determination of fee.

The IP is partner of an LLP say "X LLP". The IP appointed "X LLP" *vide* work order dated 28th August, 2018, to assist him in taking control and managing affairs of the CD and other obligations as the Liquidator of the CD. The work order mentioned that "The cost of services of LLP to liquidator will be as per mutually agreed". It is, thus, observed that IP engaged a related entity for helping him in the liquidation process of the CD at vague terms and conditions and without specifying the amount of fee payable to such entity.

The amount of fees paid to "X LLP" was more than double than what was paid to IP as Liquidator.

Observations of the Disciplinary Committee of IBBI

- Minutes of CoC Meeting indicated that while getting approval of CoC for engaging "X LLP" for rendering support services during CIRP process, selection criteria for identifying "X LLP" was not disclosed.
- The services of "X LLP" were hired neither on the basis of well laid out terms of reference nor remunerations were fixed in relation to services rendered by them.
- It is found that "X LLP" has billed the amount equivalent to Rs. 50 lakh per month less the amount of fees billed by the liquidator. Support services charging amount depending on the fee of liquidator has created unprecedented situation devoid of any commercial wisdom or professional ethics. Due to fusion of fee of Liquidator with that of residual entitlement of the support services to arrive at a total charges being billed against these two entities is bad in law as the provisions of the statute provide for distinct manner in which fee of liquidator is to fixed independent of consideration whether or not support services are being hired.

- Clause 23B of the Code of Conduct provides that an IP shall not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment. Though this regulation explicitly was included on 23-7-2019, post the award of professional services to "X LLP", however in the structure of the Code, the requirement of keeping an arm's length wherever there is possibility of conflict of interest is very much implicit. If intension was not to extend unreasonable payments to "X LLP", at least it was within his rights to stop the dealings and payments to the related party firm from the date when revised regulations putting restrictions on such dealings became effective.
- An IP has to take due diligence while deciding the fee payable to him but also other expenses incurred by him. In the present case, IP has paid "X LLP" a fee more than double of his own fee as liquidator on the basis of open ended contract which is neither reasonable nor justified.

Provisions Referred

Regulation 7(2) of the Liquidation Regulations provides that the liquidator shall not appoint a professional under sub-regulations (1) who is his relative, is a relative party of the corporate debtor or has served as an auditor to the corporate debtor in the five years preceding the liquidation commencement date.

Section 7(1) states that a liquidator may appoint professionals to assist him in the discharge of his duties, obligations and functions for a reasonable remuneration and such remuneration shall form part of the liquidation cost. It is pertinent to note here that Circular No. IBBI/IP/013/2018 dated 12-06-2018 provides in para 3 thereof that an IP is obliged under section 208(2)(*a*) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. IP must, therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable.

Contravention-3

Failure in filing avoidance application

The IP appointed a professional to conduct the transaction review audit of the CD, however, he failed to initiate action as required under regulation 35A(2) and 35A(3) of CIRP Regulations.

Provisions Referred

Regulation 35A(2) of the IBBI (CIRP) Regulations provides that if an IP is of the opinion that CD has been subjected to any PUFE transaction. He shall make determination on or before the one hundred and fifteenth day of insolvency commencement date. Regulation 35A(3) provides timelines for filing of necessary applications before AA for orders after determination of such transactions.

The IP violated Regulation 35A of CIRP Regulations read with clauses 1, 2, 3 and 14 of the Code of Conduct.

Observations of the Disciplinary Committee of IBBI

The AA passed the order for liquidation

of CD on March 10, 2021. In between the initiation of CIRP and the order of liquidation, IP had enough window of opportunity to complete the audit and get filed the requisite application. Incidentally, IP himself is a chartered accountant, he needed no assistance from audit firm to do the transaction audit for establishing the PUFE transactions.

Sections 35A of the Code requires an IP to timely identify and form an opinion about the transactions covered under sections 43, 45, 50 and 66(2) of Insolvency and Bankruptcy Code. It is pertinent to note that timely identification and reversal of avoidance transactions can result in better recovery to the creditors. In the instant case, IP as Resolution Professional has failed to comply with these provisions.

DECISION

In view of the aforesaid contraventions, IBBI suspended the registration of IP for a period of three years.

The Disciplinary Committee of IBBI imposed a penalty on IP to deposit amount equivalent to payments made to "X LLP" after 23rd July 2019 (the date on which clause 23B was included under regulations) till now directly to the Consolidated Fund of India (CFI) under the head of "penalty imposed by IBBI".

KEY TAKEAWAYS

Similar contravention of engaging related party was observed by IBBI in its order dated 12th April, 2022, wherein IP worked as advisor of a LLP and appointed the same LLP to provide support services in the CIRP of the CD. The Disciplinary Committee noted that "related party", in relation to an individual, means a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual. When a firm engages a professional, usually the advice given by the individual is acted upon as it is from a professional person and it gives authenticity to the advice and for that purpose, a consultant fee is also paid. Thus, the DC found that IP has contravened the provisions of the Code by engaging the said LLP as its support service provider.

In view of the aforesaid, an IP must not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment. He must clearly identify the scope of work on engagement of any professional. He must ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable.

An IP must timely identify and form an opinion about the transactions covered under sections 43, 45, 50 and 66(2) of Insolvency and Bankruptcy Code. Timely identification and reversal of avoidance transactions can result in better recovery to the creditors.

FAQs on Information Utilities

1. What is an Information Utility?

Information Utility (IU) as the name suggests is designed to be a national utility of information pertaining to financial sector. Even though Information Utility is new to India the concept of collecting, storing, sharing, and analysing credit related data is a well-established concept. However, no country has established an institution where credit related financial data is stored for helping companies during insolvency and bankruptcy proceedings. The fact that the Code has established such an institution in the form of IU for easing insolvency proceedings makes it one of a kind and unique institution having no parallel in the world, thereby making it impossible to conduct any jurisdictional or institutional comparisons.

IU constitutes a key pillar of the insolvency and bankruptcy ecosystem of India, the other three being the Adjudicating Authority, the Insolvency and Bankruptcy Board of India (IBBI) and Insolvency Professionals (IPs).

An IU is required to maintain electronic database of information and provide authentic information to eliminate delays and disputes relating to claims and defaults. It is mandated to provide core services, such as:

(*a*) acceptance of electronic submission of financial information;

(*b*) safe and accurate recording of financial information;

(*c*) authentication and verification of financial information; and

(*d*) providing access to information stored with them to specified persons.

An IU is required to provide core services in respect of financial information, which include:

(*a*) records of the debt of a person;

(*b*) records of liabilities when a person is solvent;

(*c*) records of assets of a person over which security interest has been created;

(*d*) records, if any, of instances of default by a person against any debt;

(*e*) records of the balance sheet and cash-flow statements of a person, and

(*f*) such other information as may be specified.

2. What are the registered Information Utilities in India?

NeSL is India's first Information Utility and is registered with the Insolvency and Bankruptcy Board of India (IBBI) under the aegis of the Insolvency and Bankruptcy Code, 2016 (IBC). The company has been set up by leading banks and public institutions. The primary role of NeSL is to serve as a repository of legal evidence holding the information pertaining to any debt/claim, as submitted by the financial or operational creditor and verified and authenticated by the parties to the debt.

3. What is the legal framework of Information Utilities?

Information Utilities are regulated by Insolvency and Bankruptcy Board of India under Insolvency and Bankruptcy Code, 2016. IBBI (Information Utilities) Regulations, 2017 and its bye laws govern the conduct of IU.

4. What all services are offered by Information Utilities (IU)?

IU systems can be advantage by the Insolvency Resolution Professionals as it play very important role to make greater eco-system using information technology and bring transparency in the Insolvency and Bankruptcy process thereby making the resolution process quick and smooth. Existing services of NeSL IU:

1. **Credit repository:** The creditor submits the debt information to NeSL. After review of all the documents submitted, NeSL accepts and send authentication request to debtor. The debtor may authenticate/ dispute the information. The registered users may get the reports including the record of default.

2. **IP Module**: NeSL IU has launched IP module for the Insolvency professionals to leverage the information available with IU. This will ease the process of IRP to take the decision quick and smoothly especially in the initial days of assignment like claim verification, forming of CoC etc. IU system can be advantage for storage purpose also like IRP/IP/Liquidator can store the workings, sheets, Minutes of meetings, information memorandum, important communications etc. against the debtor on IU system, which can be access later on.

Further, only specified Users can access the information from IU system. For accessing available information from IU system, IP/ liquidator are required to get link with the debtor. For submitting request of linking, IP needs to upload copy of the proceedings/orders issued by AA (NCLT)

appointing him IRP/IP/Liquidator. Once IP/ Liquidator is linked with the debtor, he/ she may access all information available in the IU system uploaded by financial creditor or operational creditor. IRP can gauge the composition of COC from the available authenticated data. This can be help in claims verification too because digital signed information is uploaded on the IU system.

Within the IP module, VDR, auction, invitation of EOI etc all such facilities are available for the IPs.

3. DDE (Digital document execution) Platform : DDE is a mode for paperless execution and storage of financial contracts, which will result in superior enforcement, thereby enhancing the 'Ease of Doing Business' especially in times where quick financing is the need of the hour for businesses.

The concept was formulated under the guidance of Ministry of Finance and IBBI for NeSL to serve the financial sector in facilitating dematerialization of financial contract

- To save substantial resources in Digital E-stamping within a few minutes and
- by affixing of digital signatures by parties to the contract on NeSL's platform.

The services provided by NeSL are chargeable and the fees structure may be downloaded from its website.

Regulatory updates

- IBBI issued a circular dt. 31st August, 2022 to notify regarding revision of fees applicable for Limited Insolvency Examination and Valuation Examination respectively. The circular can be accessed @ **https://ibbi.gov.in//uploads/legalframwork/7276801f262f3523dae0d0c838fcc1eb.pdf**

Directive on Preventive Restructuring Frameworks

THE EU DIRECTIVE

On 26 June 2019 a new European Union (EU) Directive on preventive restructuring frameworks on discharge of debt and disqualifications, and measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt (the Directive) was published under number 2019/1023. All 27 EU member states must implement the European Restructuring Directive of 20 June 2019 by 17 July 2021. The Directive was in part a reaction to the phenomenon observed with continental European companies in a financial crisis to restructure their debt under an English Scheme of Arrangement. The Scheme of Arrangement, which is not an insolvency process, offers the possibility to implement a debt restructuring on the basis of a majority decision by the creditors. Under these rules, a single "hold-out" creditor is unable to block a reasonable restructuring plan if the majority of creditors approves it.

The COVID-19 crisis appears to have accelerated the drive to implement the Directive, and the need to facilitate rescues rather than insolvency has become of global importance. The key elements of the Directive, namely (*a*) providing access to preventive proceedings including a stay on creditor action; (*b*) a cross-class cram down mechanism; and

(*c*) safe harbour provisions for new and interim finance, have meant there has been significant change across the EU.

Many European countries did not offer such a valuable possibility outside of an insolvency procedure. In many cases, insolvencies are value-destructive and lower the prospects of recovery for creditors.

The new Directive emphasises the European legislators' determination to establish, within all State members, preventive restructuring procedures for companies facing financial struggles without being insolvent, and thus hopes to reinforce the culture of anticipation and prevention of insolvency. Simultaneously, the Directive undertakes to rebalance bankruptcy laws in favour of creditors.

The Directive made it mandatory for EU Member States to offer a "preventive restructuring framework" for companies in a financially distressed situation when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the company. Distressed companies should be given the possibility to restructure their debt under the protection of individual enforcement actions on the basis of the majority of the creditors' decisions. Moreover, according to the Directive, new financing, interim financing and other restructuring-related transactions should be protected against avoidance actions in case the restructuring fails and the companies still file for insolvency.

The Directive represents the first major step in the process of harmonizing Europe's diverse insolvency laws. It has three main aims:

- Enterprises in each member state should have access to a preventive restructuring framework which enables them to avoid insolvency and to continue operating.
- Insolvent or over-indebted entrepreneurs should benefit from a full discharge of debt within a reasonable period of time.
- The efficiency of procedures involving restructuring, insolvency and the discharge of debt should be improved.

PREVENTIVE RESTRUCTURING FRAMEWORK

A restructuring which prevents a debtor's insolvency, is achieved by means of a restructuring plan. The Directive provides for certain rules relating to negotiation of the plan, its content and the process of its adoption.

The COVID-19 crisis appears to have accelerated the drive to implement the Directive, and the need to facilitate rescues rather than insolvency has become of global importance. The key elements of the Directive, namely (*a*) providing access to preventive proceedings including a stay on creditor action; (*b*) a cross-class cram down mechanism; and (*c*) safe harbour provisions for new and interim finance, have meant there has been significant change across the EU.

There are a number of incentives that can encourage early entry into restructuring negotiations to ensure the preservation of assets and value and to maximise the potential for rescuing the company

from its financial distress. The earlier that a company engages with this process when it foresees financial difficulties, the more assets it is likely to have to support a turnaround and to convince creditors to cooperate for the benefit of the collective and equitable satisfaction of creditors. If a company waits too long and must enter into an official procedure due to an event of insolvency, even though that procedure may lead to a restructuring of a sort, procedural cost will be incurred and information about the debtor's condition will circulate, to which some degree of reputational stigma will be attached. If the restructuring eventually fails, the debtor has to carry the procedural and reputational costs without the benefit of a reorganised capital structure. Therefore, the availability in general of restructuring procedures at an early stage of financial distress is a key incentive for their utilisation.

Another key element for the debtor to enter into a restructuring procedure is that the debtor stays in possession. To incentivise early recourse to restructuring mechanisms, the preventive restructuring allows the debtor's shareholders to retain a stake in the restructured company or, even more importantly for directors, the chance to stay on the company's the board after having manoeuvred the company out of the rapids. The preventive restructuring is designed as a debtor-in-possession (DiP) framework, where the debtor should remain fully or at least partially in control of its assets and the day-to-day activities.

Negotiation of the restructuring plan is facilitated by provisions which provide for the debtor to remain in total or partial control of its assets and the day-to-day operation of its business. A restructuring practitioner only needs to be appointed where (*i*) a general stay of enforcement actions is granted and the judicial authority determines that the appointment of a practitioner is necessary to safeguard stakeholders' interests; (*ii*) a restructuring plan needs to be confirmed by means of a cross-class cram-down; or (*iii*) the appointment is requested by the debtor or the majority of creditors. Otherwise, the need to appoint a practitioner is decided on a case-by-case basis, although member states may provide for additional circumstances where the appointment of a practitioner is mandatory.

Importantly, the Directive provides for rules preventing creditors from withholding performance, or terminating, accelerating or modifying essential executory contracts to the detriment of the debtor for debts that come into existence prior to the stay. Essential executory contracts are executory contracts which are necessary for the continuation of the day-to-day operations of the business, including supply agreements. The Directive allows for exemptions to be made with respect to netting and close-out arrangements in financial, energy and commodity markets.

A restructuring-friendly environment in which the entry into a restructuring procedure is not perceived as failure but as a chance for a 'fresh start' has significant value for a firm in financial distress. In a restructuring-hostile environment, where the debtor is branded with the stigma of insolvency, the chance is higher that customers, creditors, business partners, and employees will leave the debtor than in a restructuring-friendly environment.

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