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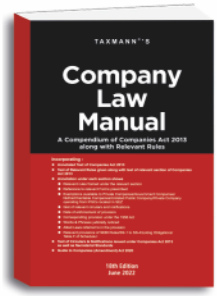

NEWS FROM THE INSTITUTE

"Webinar on Recent amendments to IBBI Regulations" by IP Vinod Kothari & CS Sikha Bansal.


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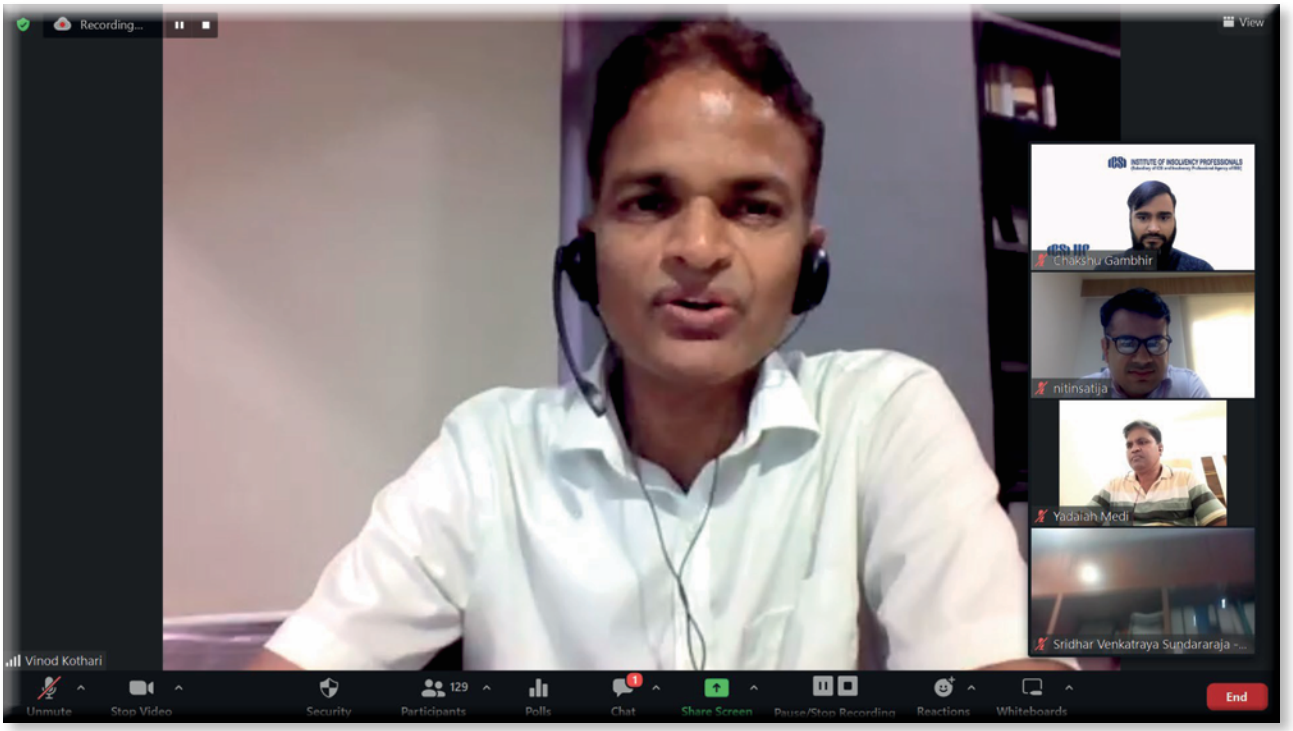
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At a Glance

No. 9 | Pg. 1-100 | September 2022

Section 238, read with section 53 of the Insolvency and Bankruptcy Code, 2016 and section 48 of the Gujarat Value Added Tax Act, 2003 - Overriding effect of Code - Whether section 48 of GVAT Act is not contrary to or inconsistent with section 53 or any other provisions of IBC - Held, yes - Whether under section 53(1)(b)(ii), debts owed to a secured creditor, which would include State under GVAT Act, are to rank equally with other specified debts including debts on account

of workman's dues for a period of 24 months preceding liquidation commencement date - Held, yes - Whether State is a secured creditor under GVAT Act - Held, yes - Whether section 3(30) defines 'secured creditor' as a creditor in favour of whom security interest is created and such security interest can be created by operation of law - Held, yes - Whether definition of 'secured creditor' in IBC does not exclude any Government or Governmental Authority - Held, yes - Whether thus, if a resolution plan approved by CoC ignores statutory demands payable to a secured creditor, which includes State under GVAT Act or any legal authority, NCLT is bound to reject said resolution plan and corporate debtor would necessarily have to be liquidated and its assets are to be sold and distributed in manner stipulated in section 53 - Held, yes - Whether Committee of Creditors, which includes financial institutions and other financial creditors, cannot secure their own dues at cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues - Held, yes (Paras 56 and 57)

- **K. Paramasivam *v.* Karur Vysya Bank Ltd.**
  (2022) 142 taxmann.com 158 (SC) • P276

Section 62, read with section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authorities - Supreme Court, appeal to - Whether an action under section 7 can be initiated against a corporate entity who has given a guarantee to secure dues of a non-corporate entity; guarantor is then, corporate debtor - Held, yes - Whether liability of guarantor is co-extensive with that of principal borrower and it is open to financial creditor to proceed against guarantor without first suing principal borrower - Held, yes (Paras 13 and 16)

- **Tech Sharp Engineers (P.) Ltd. *v.* Sanghvi Movers Ltd.**
  (2022) 142 taxmann.com 372 (SC) • P-278

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 - Pursuant to an agreement executed by and between corporate debtor and operational creditor, operational creditor let out on hire to corporate debtor, 150 MT crane for erection of equipment at site of Indian Oil Corporation Ltd. - Operational creditor raised invoices on corporate debtor - Corporate debtor committed default and, thus, operational creditor filed a petition for winding up of corporate debtor - Meanwhile, IBC came into force - Thereafter operational creditor filed an application to initiate CIRP - NCLT rejected said application on ground that default occurred in year 2013 and, thus, application on 30-3-2018 was barred by limitation - NCLAT by impugned order set aside NCLT's order on ground that right to apply accrued on 1-12-2016, when IBC came into force and, thus, said application was filed well within limitation period - It was noted that right to sue accrues when a default occurs and date of enforcement of IBC is not relevant in computation of limitation - Whether since in instant case default occurred in year June 2013 and there was no acknowledgement of liability after 7-11-2013, NCLAT's impugned order was unsustainable in law and, thus, was to be set aside - Held, yes (Paras 21, 24 and 30)

- **Ashok G. Rajani *v.* Beacon Trusteeship Ltd.**
  (2022) 142 taxmann.com 465 (SC) • P-282

Section 62, read with section 12A of the Insolvency and Bankruptcy Code, 2016 and rule 11, of the National Company Law Appellate Tribunal Rules, 2016 - Corporate Person's Adjudicating Authorities - Supreme Court, appeal to - Application filed by financial creditor under section 7 had been admitted by NCLT - NCLAT granted opportunity to parties to settle their dispute before NCLT and granted stay on constitution of CoC - Application for settlement under section 12A was pending before NCLT - It was a case of corporate debtor that though NCLAT by impugned order stayed formation of CoC, it however, declined to exercise its power under rule 11 of NCLAT Rules to take on record settlement and dispose matter and further permitted IRP to

issue publication and also handover all assets and proceed with CIRP - It was noted that order impugned was only an interim order, which did not call for interference - Further, there was no question of law which required determination by instant Court - Whether thus, appeal against order of NCLAT was to be dismissed - Held, yes - Whether however, considering investments made by corporate debtor and considering number of people dependant on corporate debtor for their survival and livelihood, NCLT was directed to take up settlement application and decide same - Held, yes (Paras 29 and 30)

- **Maitreya Doshi *v.* Anand Rathi Global Finance Ltd.**
  (2022) 142 taxmann.com 484 (SC) • P-287

Section 62 of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authorities - Supreme Court, appeal to - Whether if there are two borrowers or if two corporate bodies fall within ambit of corporate debtors, there is no reason why proceedings under section 7 cannot be initiated against both corporate debtors - Held, yes - Whether however, same amount cannot be realised from both corporate debtors - Held, yes - Whether if dues are realised in part from one corporate debtor, balance may be realised from other corporate debtor being co-borrower - Held, yes - Whether however, once claim of financial creditor is discharged, there can be no question of recovery of claim twice over - Held, yes (Para 37)

Section 62 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Supreme Court, appeal to - Loan borrowed by corporate debtor from financial creditor was secured under 'Pledge Deed' of shares owned by company 'D' in borrower company - Corporate debtor committed default in repayment - Financial creditor, thus, filed a petition under section 7 against borrower company as well as company 'D' - NCLT admitted said petition - Appellant, being suspended director of company 'D', challenged NCLTs order on ground that 'D' was merely a pledger of shares and, thus, said petition was not maintainable against it - NCLAT upheld NCLTs order on ground that company 'D' had been referred as borrower and pledger in loan-cum-pledge agreement and, thus, it was a party to agreement in dual capacity and petition was maintainable - Whether factual finding of NCLAT, which was final fact finding authority, was based on its interpretation of loan-cum pledge agreements and supporting agreements and interpretation given by NCLAT was definitely a possible interpretation and could not be interfered with in an appeal under section 62 - Held, yes - Whether thus, appeal against order passed by NCLAT was to be dismissed - Held, yes (Paras 34 and 38)

- **Axis Bank Ltd. *v.* Vidarbha Industries Power Ltd.**
  (2022) 144 taxmann.com 15 (SC) • P-291

Section 60, read with section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Petitioner filed instant petition for review of order passed by instant Court in Vidarbha Industries Power Ltd. v. Axis Bank Ltd. (2022) 140 taxmann.com 252/173 SCL 355 wherein it was held that 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 - It was submitted that instant Court had overlooked judgment of Supreme Court in E.S. Krishnamurthy v. Bharath Hi-Tech Builders (P.) Ltd. (2021) 133 taxmann.com 159/(2022) 169 SCL 644/(2022) 3 SCC 161 wherein it was observed that only two courses of action are available to Adjudicating Authority in a petition under section 7 i.e, Adjudicating Authority must either admit application under clause (a) sub-section (5) or it must reject application under clause (b) of sub-section (5) - However, question as to whether section 7 sub-section (5) is mandatory or discretionary was not in issue in any of judgments cited on behalf of review applicant - Whether therefore, there being no grounds for review of judgment and order, review petition was to be disposed of - Held, yes (Paras 4, 6 and 8)

- **Arun Mittal *v.* Sun Control Systems**
  (2022) 144 taxmann.com 18 (NCLAT - New Delhi) • P293

Section 5(6) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Dispute - Corporate debtor issued a work order to operational creditor to supply and install UPVC Profile of doors and windows - Operational creditor raised invoices - Corporate debtor defaulted in making payment of debt due - Operational creditor issued demand notice claiming operational debt and filed an application under section 9 to initiate CIRP in respect of corporate debtor - Said application was admitted by NCLT - Aggrieved by order of NCLT, corporate debtor had preferred instant appeal praying for termination of CIRP process initiated against corporate debtor on ground that there were defects in work executed and that 50 per cent work was not completed - It was noted that there was no exchange of correspondence raising any dispute prior to issue of demand notice - Whether, there was nothing credible to substantiate pre-existence of dispute - Held, yes - Whether corporate debtor had defaulted in payment of operational debt of an amount exceeding Rs. 1 lakh, i.e., Rs. 2,26,258, which amount had clearly become due and payable - Held, yes - Whether in absence of any pre-existing dispute, no error had been committed by NCLT in admitting application under section 9 and initiating CIRP and, therefore, impugned order passed by NCLT admitting application under section 9 did not require any interference - Held, yes (Paras 14, 15 and 17)

- **Alok Kaushik Erstwhile Resolution Professional of Cheema Spintex Ltd. *v.* Cheema Spintex**
  (2022) 144 taxmann.com 71 (NCLAT-New Delhi) • P297

Section 18, read with sections 12A and 208, of the Insolvency and Bankruptcy Code, 2016 and rule 11 of the National Company Law Tribunal Rules, 2016 and regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Interim Resolution Professional - Duties of - R2-operational creditor filed an application against corporate debtor to initiate CIRP, and same was admitted by NCLT - Appellant was appointed as IRP of corporate debtor - Thereafter, corporate debtor entered into a settlement with operational creditor - Further, IRP was requested to proceed to file withdrawal application - IRP filed an application for withdrawal of CIRP application including discharge from duties as IRP and also filed expenses incurred on CIRP - NCLT vide impugned order held that IRP misconducted in not pursuing withdrawal application and unnecessarily adding to costs by carrying out non-essential activities - IRP submitted that mere filing of withdrawal application did not lead to automatic stay of CIRP proceedings and, therefore, as IRP he was duty bound under CIRP regulations to complete CIRP proceedings and for this purpose he had to engage other professionals and deploy resources thereby incurring expenses and, therefore, NCLT wrongly disallowed fees and expenses payable to IRP for conduct of CIRP and for making erroneous remarks about conduct of IRP - Whether since application under section 12A had already been filed by IRP before NCLT well before constitution of CoC, continuance of IRP with CIRP process without making adequate effort to seek point clarification from NCLT on whether to proceed with CIRP or not, did not reflect well on its conduct - Held, yes - Whether since IRP took advantage of fluid situation and unnecessarily added to costs by carrying out activities, which could have otherwise been put to hold, conduct of IRP was deprecatory and, therefore, impugned order passed by NCLT did not suffer from infirmities and same was to be affirmed (Paras 12 and 16)

- **NRC Ltd. *v.* State of Maharashtra**
  (2022) 144 taxmann.com 72 (Bombay) • P-302

Section 31, read with section 3(6), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Petitioner-corporate debtor had gone into CIRP and IRP was appointed - There were outstanding dues to Electricity Distribution

Company(EDC), which had every opportunity to present its claims before IRP within time/extended time - However, EDC did not present its claim before approval of resolution plan and appointment of successful resolution applicant - Thereafter, successful resolution applicant made an application for new electricity connection at its four premises, which was refused by EDC on ground that past dues had not been paid - Whether since claim for past dues of EDC stood extinguished as it had not presented its claims before IRP within time/extended time, it could not have refused new connection/restoration only on basis that its past dues had not been paid - Held, yes - Whether therefore, EDC was to be directed to process successful resolution applicant's application for new electricity connection at its four premises without insisting on payment of its demand for past arrears - Held, yes (Paras 31, 32 and 44)

- **Doha Bank Q.P.S.C *v.* Anish Nanavaty, Resolution Professional of Corporate Debtor Deloitte Touche Tohmatsu India LLP**
  (2022) 144 taxmann.com 75 (NCLAT - New Delhi) • P-313

Section 5(8) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Corporate debtor (RTL) had gone under CIRP based on company petition filed under section 9 and Resolution Professional (RP) was appointed - RP made a public announcement inviting claims from creditors of corporate debtor - Appellant-secured financial creditor of corporate debtor stated that R2 to R5 were not lenders of corporate debtor nor had corporate debtor extended any corporate guarantee in favour of R2 to R5 and only 'Deed of Hypothecation' was there as per which corporate debtor hypothecated its asset in favour of R-2 to R-5 to secure loans disbursed by them to its group company RCE - Based on 'Deed of Hypothecation' RP considered R2 to R5 - indirect lenders as financial creditor - NCLT by impugned order had held decision of RP as correct - It was noted that 'Deed of Hypothecation' is merely creation of security interest and a mere security of interest created by hypothecation or mortgage does not constitute a financial debt - Whether 'Deed of Hypothecation' discharges liabilities of other borrowers upon their default and is limited to realization value of those hypothecated assets and, hence, it cannot be construed as a contract of guarantee - Held, yes - Whether 'Deed of Hypothecation' cannot be a basis to declare parties as financial creditors - Held, yes - Whether thus, impugned order of NCLT was to be set aside and R-2 to R-5 were derecognized as 'financial creditors' - Held, yes (Paras 11 and 12)

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

From Chairman's Desk

'Being Progressive' requires one to think beyond the impossible and outside the obvious.

Dear Professional Member(*s*),

IBC is a dynamic law which has not only evolved based on evolving circumstances, but has also stood the test of time. Amongst different objectives of IBC, *promote entrepreneurship* in the world of commerce and industry is undoubtedly the prime one. Here, the meaning of the term *entrepreneurship* requires to be understood in its true spirit. In that sense, the term would require presence of a sense of equanimity and an ability to handle uncertainty. Being an *entrepreneur* opens up doors to great opportunities and possibilities. However, equally, alongside this, there are also uncertainties which invariably accompany these opportunities since the likelihood of things going wrong or counter to the plans can never be ruled out. Today, businesses have attained very high scales which is evident from the big size entities which exist today; to run such entities for their profitable outcome requires one to remain diligent to changing scenarios, both domestically and internationally. In the coming years, the likelihood of business and economic leaders dominating the world order is going to be very high, and thus, there is a definite need

for the business leaders to evolve their personal ambition to a larger ambition which not only takes into account personal good of some individuals, but also the public good. One of the qualities of a leader is that the person is willing to act for more people than himself/herself. If one acts for oneself (or for 2 to 3 people whom he/she has gathered in its family), then this is nothing more than being self-centered; but if one's identity traverses beyond a small group and it attains the attribute of being inclusive (with the larger segment of society/nation), we see qualities of a leader emanating out of such a character. A leader would thus mean that *one's sense of life is beyond oneself*. If we believe that by merely sitting on the perch we can become a leader, then this belief is nothing but a false impression which would attract disappointment for its holder as its natural outcome. In a nutshell, it is one's vision and mission which needs to be inclusive before one can gain the attributes of a leader/entrepreneur.

A leader also needs to be *progressive* in its approach. In the present-day world, where competition and innovation is ruling the day, one cannot survive in commercial sense by being conservative. Challenges and opportunities are the two sides of the same coin and those who willingly face the challenges are the one's who get benefitted from the opportunities as well.

In other words, a true leader cannot desire to remain free of challenges; it is these challenges which would go-on to shape one's personality as well as destiny.One also has to remain *awakened* because most of the time, by mere awakening, we find solutions to many of our business problems. Infact, I would venture-in to say that it is in its nature to disappear when awakening arises.

The journey of IBC which is a vibrant and dynamic law and its key pillars on the strength of which it stands has been full of surprises.There have been many twists and turns on its way, every now and then. A trail of its journey till now bears a clear testimony to this fact, and it is on the strength of its objective and a firm resolve shown by the key stakeholders (Government, IBBI, et al) that the legislation has made its way forward despite all roadblocks which initially appeared but disappeared subsequently.

In India, we have the 'Legislature' which frames the law; there is 'Executive' which implements the law, and we also have

the 'Judiciary' which interprets the law. The three organs of the State are collectively responsible for framing, executing and implementing the law of the land. Therefore, while the three organs have their respective roles defined and respective mandate laid down under the Constitution of India, more often than not, we see some transgressions taking place which get settled subsequently either an Apex Court verdict or through a legislative intervention.

In the IBC law space, the role played by landmark judgments delivered by Hon'ble Supreme Court in providing clarity on meaning of IBC provisions is something that we all relished. The judiciary has, by and large, supported the amendments brought-in by the legislature in the IBC statute. This also paved the way for development of the law taking place through judicial judgments. For instance, on the subject of 'home buyers', it was the Supreme Court which was on the forefront trying to recognize and protect rights of home-buyers, and then subsequently clarifications were included in the statute to safeguard such rights.

This month we have seen a spate of regulatory amendments taking place, as also some thought-provoking landmark judgments (*State Tax Officer v. Rainbow Papers Ltd.*) delivered by Hon'ble Supreme Court. This judgment has compelled many of us to give a thought to the interpretation arrived-at by the Court. But what needs to be understood is that a judgment is always rendered on the basis of facts of a particular case, and thus, we cannot pick-up single sentences from a judgment and claim that to be the SC ruling without putting it in the complete context. In this judgment, there are some statements which have sort of unsettled many in the legal fraternity, but we must always appreciate that it has also highlighted the loopholes in the law which would need to be addressed. Some of the important findings of SC in this judgment are: (*a*) Timelines in IBC are directory; (*b*) Sales Tax Department was not required to file claim under unamended regulation 12(1) which required only 'proof of claim' to be submitted; (*c*) That it is an RP's duty to include the claims mentioned in CD's books of account and in case he/she wishes to seek further proof then such creditors are required to submit it; (*d*) Sales tax department is a secured creditor in view of the language of s. 3(30), s. 3(31) r/w s. 48 of Gujarat VAT Act; (*e*) No resolution plan can be accepted by

AA if it fails to comply with s. 30(2); (*f*) If a plan does not meet the requirements of s. 30(2), it cannot be binding of either the Government or Government Authority or even other creditors; (*g*) In case there are some outstanding statutory dues under a resolution plan, then, such a resolution plan shall not bind the State.

Looking forward to meet you all very soon.

CS ALKA KAPOOR
COO (Designate)

COO's Message

Doing well in life is success; success does not mean being better than somebody.

Dear Professional Member(*s*),

The month of September has been a very eventful month insofar as the regulatory amendments and landmark judicial pronouncements are concerned. There are amendments brought into the CIRP Regulations, Liquidation Process Regulations, Voluntary Process Regulations, IP Regulations, IU Regulations etc. The amendments have sent a clear signal hinting towards the next progressive step/curve that IBC regime has undertaken. IBC is a dynamic law and it has to capture the ever changing market realities. For the Professionals it is mandatory to keep themselves abreast of the legal developments, and for the regulator, it is their prerogative to keep a constant eye on the implementation process of the law and to plug the loopholes (through regulatory amendments) wherever shortcomings are discovered in the law. For the law like IBC to remain effective, the process needs to be tightened so that we are able to achieve faster resolutions and avoid liquidations as much as possible. In IBC, liquidation shall remain the last option, but where it is the only viable option, there, the release of funds needs to happen fast. In other words, endeavour is to ensure that the entity (CD), as far as possible, recovers from its state of

insolvency through a viable resolution plan, but if it undergoes liquidation process, then, the attempt has to be to make the process complete quickly such that the assets and funds are released from the entity sooner than later.

The abovementioned objective has been underlined not only in the BLRC report, but also in almost all landmark judgments delivered by Hon'ble SC. The legislation has now been put to practice for a good amount of time (~ 6 years) and our memories of the erstwhile legal regime (which was not very effective in terms of achieving its objectives) has completely faded away. We do not talk in terms of SICA, BIFR, AAIFR, Rehabilitation Plan, Operating Agency, JLF, CDR, SDR, S4A *et al.* The stakeholders have embraced this reform and are continuously on the task to strengthen it. But, the challenges are far from over and we still have a lot of distance to cover. The challenges are evident in the form of (*a*) some liquidation processes which have prolonged for very long; (*b*) some resolutions which are stuck in litigations, making the objective of time-bound resolution and liquidation somewhat challenging.

IBC is a legislation which is in a state of development, and therefore, its provisions ought to be interpreted in a manner which upholds its objectives. The legal propositions which are now well-established need to be followed and not tinkered with on the basis of some highly technical interpretation of its language. Here I refer to the recent rulings of Hon'ble SC in the matters of *Vidarbha Industries* and *Rainbow Papers* respectively. In *Vidarbha*, Hon'ble Apex Court drew a distinction between the pre-requisites (debt and default test) for initiation of CIRP proceedings u/s. 9 from that of initiation of proceedings u/s. 7. The conclusion arrived at is based on usage of the term 'may' in s. 7 and 'shall' in s. 9. Thus, this ruling now requires the NCLT to also get into the questions of 'reason for default' by the CD before ordering for initiation of CIRP u/s 7. Effectively, this judgment has changed the legal position and made 'debt and default method' insufficient. In *Rainbow papers* judgment (a judgment delivered in the month of September 2022 itself), the very basic question of ranking of state claims *vis-à-vis* secured creditors has found a new answer. The judgment relies on a provision in the Gujarat VAT Act (s. 48) which effectively states that "*any amount payable* (*tax, interest or penalty*) *to the Government shall be a first charge on property*", and concludes

that regardless of whether such charge was de facto created or not, as also whether or not a claim was filed-in within the prescribed time limit (under IBC) before the liquidator by the State VAT Department, its dues shall have to be counted-in by the liquidator. Experts have analysed this judgment and have expressed divergent views, but the predominant view is that the decision requires a re-consideration.

As regards the abovementioned amendment in the Regulations,*vide* the CIRP(Third Amendment) Regulations, 2022, a provision (Regulation. 34B r/s Schedule II) has been inserted which lays down a minimum fee to be paid to the IRP/RP based on the *quantum of claims*admitted by it.The purpose of this amendment essentially is not to lay down a scale for an IP's fee because that would still remain market-driven,subject to CoC's discretion. However, the table has been laid down to prescribe some kind of a minimum fee so that IPs do not quote unviable fee levels for the purposes of gaining the assignment. The regulations now also provided for performance-linked fee,which is again subject to CoC's discretion. The CIRP (Fourth Amendment) Regulations which are effective from 16th September 2022 require a communication to be made to all creditors besides the Public Announcement, and therefore, the IRP/RP shall have to go about informing the creditors whose addresses are available in CD's records.The amended regulations also permits to go for a partial resolution (instead of aiming for a complete resolution of the entire undertaking in one-go).This amendment would enable the RP to go for resolution of a big entity in a piecemeal manner. There are also amendments which *inter alia* lay down for inclusion of more informationin the IM, for instance, the information regarding avoidance application shall not have to be a part of the IM. The contents of an IM shall now be wider than earlier. There is also a provision now concerning marketing strategy to be evolved by the IP for sale of assets. Then, there is also an amendment providing that in case the CoC decides to go for an early liquidation (instead of resolution), the CoC may also make recommendations to the Liquidator to explore the option for compromise or arrangement with strict timelines thereof. Then, there is a provision laying down factors which shall guide the CoC to decide to go for an early liquidation. There is also an amendment which talks about the regulatory fee payable to IBBI based on the realisable value of assets.The

amendments pertaining to the IPs also provides that if there have been penalties or losses suffered on account of non-compliance with any provisions of law, then the IP cannot include that implication of non-compliance as a part of insolvency resolution process cost or liquidation cost, as the case may be.This is the cost that the IP shall have to bear. Further,an IP shall not accept anyshare of any fees or charges from any professional or service provider whois appointed by him under the process. The actual meaning of this is that if you have appointed any professionals or you have appointed any service provider, then you cannot expect any kind of share in the fee paid to those professionals. In liquidation proceedings, there is going to be a greater role of SCC. The liquidator can also be replaced by the SCC. The exclusive option of a going concern sale shall have to be dropped in case there is one failed auction, that is, one cannot stay limited to a going concern sale in several auctions, and so, with the first auction having failed, in the second round, one cannot exclusively go for going concern sale, and the option of other modes of sale (including piecemeal sale, slump sale etc.) shall also have to be explored.

I am fully cognizant of the need for conducting widespread discussions of professionals on all developments taking place in the IBC law space, and towards that end frequent discussions, round-table discussions, webinars have been organised and all constructive suggestions have been submitted to the IBBI for their consideration.

Please keep a good care of yourself. Take care!

INTERVIEW

MANISH PALIWAL

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

IBC has increased recovery for financial institutions. It has made the entire process of insolvency resolution more transparent. It has also brought cultural shift in Indian business environment where default used to be a norm. Bureaucratic and judicial hurdles have been reduced significantly after the implementation of code. To summarise overall predictability of the system has improved when we compare it with the earlier prevailing legislations. Due to institution of IBC the resolution is more speedier than before and also lead to higher recoveries. We have also seen that many business entities are paying up front before being declared insolvent. The success of the Act lies in the fact that many cases have been resolved even before it was referred to NCLT.

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

My interest and financial laws promoted me to study the code. I would prefer to call it the development of existing laws rather than a new field of studies because all these laws existed even prior to enactment of the code. Law is an evolving subject and enactment of the code is significant step in the evolution of the insolvency laws in India. It has brought in fundamental changes to the existing legislation and incorporated many new ideas which were not existing in the earlier laws. Every professional who has been dealing with a corporate entities can study fundamentals of the code. It will enable the professional to understand the nitty-gritty is of insolvency process and rights and remedies available to the parties in case a corporate entity faces insolvency.

3. You also being an Advocate by profession, how has this been helpful in carrying out your duties as an Insolvency Professional?

Study of the insolvency law allowed me to re-present the cases before the adjudicating authority in effective manner. As a lawyer it is always advantages to new perspective of both the parties. Qualifying the examination of insolvency professional allowed me to gain understanding of the process from the perspective of a resolution professional which helped me to represent all the stakeholders and effectively present their side of the perspective before the adjudicating authority.

4. 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?

One of the biggest challenges of representing the promoters of a corporate debtor is that people assume that something wrong has been committed by the promoters without looking at the facts and circumstances of the case. Outright disbelief and distrust in the promoters is the key challenge in representing them. As a society we must recognise the contribution of our businessman in the growth and prosperity of the nation. The businessmen should not be stigmatized for the reason that business has failed. They have a right to exit the system and re-enter it when they have the necessary capabilities. However, in most of the case there is a tendency to launch all sorts of proceedings and carry out hunt against a businessman if he has failed in his business.

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

It is correct that breakdown of Covid affected the growth and development of the insolvency process. Covid affected insolvency process in two ways. There was a significant delay in resolution of insolvencies pending before the adjudicating authority during the Covid period. During the covid period number of companies going insolvent because of non-commercial reasons and supervening circumstances also increase significantly. As a result of this the government was forced to increase the minimum threshold

limit for filing of the insolvency application before the adjudicating authority and impose a blanket ban on initiation of insolvency during the Covid period. Post increase of the threshold limit it became very difficult for the MSME to recover the dues using the code at the same time it also became difficult for the creditors to invoke insolvency proceedings for small amount of less than rupees one crore. Code being a financial Lao, the changes are inevitable. In short it can be said that law as well as jurisprudence developed during the Covid period which will have positive as well as far lasting impact on the resolution of insolvency. Only time will tell whether the code will be able to do course corrections during the volatile and unpredictable time to contribute in the growth of nation.

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

The understanding of the law and resolution process enable me to represent stakeholders better before the adjudicating authority. During the Covid period only NCLT was the tribunal which was functioning properly despite all the challenges. That made my life as a professional economically viable.

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

Insolvency professionals should first need to be extremely persuasive while dealing with creditors. They must deal with warring financial creditors and inform them clearly that they are gathering to develop and implement a resolution plan.

An IP should have a diverse set of management, financial, and legal skills, as well as knowledge of business and innovative ideas. A well-qualified and respected insolvency professional commands the respect of all stakeholders in the enterprise. The qualifications should include a good knowledge of the law (not only insolvency law, but also relevant commercial, financial, labour and business law) as well as adequate experience in commercial and financial matters, including, to some degree, accounting. An individual should have good interpersonal skills, an ability to communicate clearly, and the ability to reconcile the various stakeholder positions. They require strong management abilities. They will be required to strike a balance between commercial reality and legal requirements in order to protect the rights of stakeholders such as creditors, as well as to recognise issues to the public interest, where appropriate.

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

There is a lot of emphasis in the Code on timely completion of the process. The process depends upon accountability of professionals and marketability of distressed assets. It is the duty of the resolution professionals to preserve the value of the corporate debtor. The resolution professional is accountable to the stakeholders which includes creditors, shareholders, government and many other parties. At present the

process is less transparent and loopholes are being exploited by many. The process should be made transparent and people driving the process should be made accountable.

At present there is no systematic database where all the stakeholders can access the information in real-time basis. Such database can be used by stakeholders to make sure that person responsible for driving process follow the law.

In my considered opinion the value of the corporate debtor can be realised only when there is a proper creation of market of distressed assets and companies. Due to lack of publicly accessible database for distressed assets there is limited market for such assets. This is being exploited by few to their own advantage. There is no also clarity about actionable claims or not readily realisable assets. Due lack of information IBC is also used to recycle the assets and companies. In my considered opinion regulator can make some serious thinking over these issues.

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

Undoubtedly, the IBC has been effective to a great extent so far. The IBC is a crucial structural reform, which if implemented effectively and in a time bound manner can produce major gains for the corporate sector and the economy as a whole. After all, it played an indisputable role in improving India's Ease of Doing Business (EODB) ranking from 130 in 2016 to 63 in 2020.

Insight!

Items to be Voted in the 1st CoC Meeting (Part – 2)

MANISH SUKHANI
IP

(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 1 of this article, covering some other items that are generally put to vote in the 1st Meeting of the CoC, was published in the previous 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 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. i - To consider the reduction in the Notice period for convening meetings of CoC

CIRP is a time bound process, where exigencies may require meetings of CoC at a much shorter notice than the stipulated minimum 5 days in **Reg 19 (1)**. **Reg 19 (2) states** 'The committee may reduce the notice period from five days to such other period of not less than twenty -four hours, as it deems fit:

Provided that the committee may reduce the period to such other period of not less than forty-eight hours if there is any authorised representative.'

Making provision for such contingencies now will help addressing key issues on shorter notices later. Hence, the CoC may consider and if find appropriate decide to reduce the notice period and approve the following resolution, with or without any modification:

Proposed Resolution:

"**RESOLVED THAT** in pursuant to the provisions of Regulation 19 (2) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, the proposal for reducing the time limit of giving not less than 5 days' Notice for calling a meeting of the Committee of Creditors to not less than 48 (Forty-Eight) hours by the Resolution Professional, as placed before the members of Committee, be and is hereby approved."

Item No. ii - To consider the change in quorum required for conducting CoC Meetings

Reg 22 (1) states 'A meeting of the committee shall be quorate if members of the committee representing at least thirty three percent of the voting rights are present either in person or by video conferencing or other audio and visual means:

Provided that the committee may modify the percentage of voting rights required for quorum in respect of any future meetings of the committee.'

Considering the current constitution of the CoC, wherein 33% of the voting share rests with just (1/2) member(s) out of the total (5/10) members constituting the Committee, the CoC may consider and if find appropriate decide to modify the threshold limit required to be present, for meetings to be quorated and accordingly

approve the following resolution, with or without any modification:

Proposed Resolution:

> "**RESOLVED THAT** in pursuant to the provisions of Regulation 22(1) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, the percentage of voting rights, present either in person or by video conferencing or other audio and visual means, for all future meetings required for quorum shall be members of the committee representing at least (forty-five) percent of the voting rights."

Item No. iii - To consider the adjournment of meeting sine die, for want of quorum

Following is a regulatory requirement-

Reg 22 (2) 'Where a meeting of the committee could not be held for want of quorum, unless the committee has previously decided otherwise, the meeting shall automatically stand adjourned at the same time and place on the next day.'

It may not be practical to hold the meeting as per the requirement of the above Reg under certain circumstances, and this can lead to avoidable hardships for the participants. It is therefore recommended to consider and if deemed fit to resolve to adjourn the meeting sine die. Accordingly, the following resolution shall be put for voting -

Proposed Resolution:

> "**RESOLVED THAT** where a meeting of the committee could not be held for want of quorum, the meeting shall automatically stand adjourned sine die."

Item No. iv - To consider delegation of authority by Resolution Professional

Sec 28 (1) (h) of the Code restricts the RP from delegating his authority, without the approval of the CoC. In running the day-to-day operations of the CD, several activities are to be undertaken, which will require due delegation. For example, issuing of receipts and acknowledgements, issue or renewals of bank guarantees, cash withdrawal, disbursement of petty cash, payments for miscellaneous matters, etc. For smoother handling of the operations, it is proposed that the CoC approves delegation of authority by the RP to the extent overall responsibilities cast on the RP by the Code and related Regulations are not diluted or compromised.

Proposed Resolution:

> "**RESOLVED THAT** approval of the Committee of the Company, be and is hereby granted to the Resolution Professional to delegate his authority to the extent that overall responsibilities cast on the Resolution Professional by the Insolvency and Bankruptcy Code, 2016 and the Regulations made thereunder are not diluted or compromised, for the purposes of smoother handling of the operations of the Company."

Item No. v - To ratify expenses incurred on public announcement

As per the requirements of **Reg 6** read with **Sec 15**, a Public Announcement in Form A was made as follows –

Sr.	Date of insertion	Location	Newspaper
1.			
2.			
3.			
4.			

The total amount spent, including taxes, for the above (four) insertions was **Rs. _____/-** (Rupees in words). A copy of the related invoices will be available during the meeting/ are provided as Annexure ( ) colly. **Reg 6 (3)** provides that the expenses borne by the Applicant for the public announcement shall be reimbursed to the Applicant to the extent it is ratified by the CoC. The ratification of this expense is now being put before the CoC for its consideration. Accordingly, the following resolution will be put before the CoC for voting -

Proposed Resolution

"**RESOLVED THAT**, pursuant to Regulation 6 (3) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and other applicable provisions, if any, of Insolvency and Bankruptcy Code, 2016 the payment of publication expenses amounting to Rs. _____/- (Rupees in words) towards Public Announcement in Form A be and is hereby ratified."

Item No. vi - To approve the professional fees of the IRP (and his team)

The name of the IRP was proposed by the Applicant/ FC/ OC/ CD (i.e., ABC Limited) in their application under Sec 7/ 9/ 10 before the AA. 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 professional fee of Mr. (name of the IRP) for acting as the IRP was fixed by the Applicant/ the Hon'ble Tribunal at Rs. _____ per month (Rupees in words). Accordingly, for the period starting the day the IRP took charge of the CD till the day of the 1st Meeting of the CoC {i.e. between (dd/mm/yyyy) and (dd/mm/yyyy)}, the professional fee of the IRP works out to be Rs. _____, plus applicable taxes.

Sec 5 (13) read with **Sec 5 (27)** provides that the fees payable to IRP/ RP forms part of the insolvency resolution process costs, whereas **Reg 33 (3)** provides that the amount of Fees of the IRP ratified by the committee shall be reimbursed to the Applicant.

The IRP is required to charge a remuneration which is a reasonable reflection of the work undertaken, as required by the IBBI (Insolvency Professionals) Regulations, 2016. CoC to consider and evaluate the reasonability of the fee charged and decide the extent to which it will ratify the IRP Fees. Accordingly, following resolution, with or without modification, will be put for voting -

Proposed Resolution

"**RESOLVED THAT**, pursuant to Regulation 33 (3) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and other applicable provisions, if any, of Insolvency and Bankruptcy Code, 2016, the professional fee of 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."

(Part 1 of this article, covering items vii to ix of the agenda that are generally put to vote in the 1st Meeting of the CoC, was published in the previous edition of this journal)

Tax Authorities as Secured Creditors: Liquidation Preferred Over Resolution

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The paramount objective of the Insolvency and Bankruptcy Code is to maximize the value of assets of the corporate debtor and ensure its revival. Keeping this in mind, the Code lays down a hierarchy for distribution of assets of the corporate debtor while laying down an intelligible differentia and gives primacy to financial creditors over the operational creditors. This has been substantiated by the judgment of *Swiss Ribbons (P.) Ltd.* v. *Union of India,* (2019) 101 taxmann.com 389/152 SCL 365/213 Comp Case 198 (SC) wherein the Supreme Court held that the claims of government and other state authorities are covered under operational debt. Accordingly, section 53 of the Code furthering the objective of the Code places the claims of Government and other operational creditors lower in the list of priority.

But, tax departments of the State such as Value Added Tax, Central GST, State GST have often been put to a quandary of opinions as to whether they should be classified as secured or unsecured creditors. Categorizing them as operational creditors, has rung them to the lowest rank in the waterfall mechanism. Even the Amendment to section 31(1) introduced in 2019 makes the approved resolution plan binding upon the central and state governments and local authority. As a result, claims not submitted within the stipulated time, claims not accepted by the RP and undisputed claims are not to be considered once the plan has been accepted and approved by the NCLT. Taking a clue from this, the Rajasthan High Court in *Ultra tech Nathwara Cement* v. *Union of India, (2020) 116 taxmann.com 152/37 GSTL 289* refused to accept the claims submitted by Rajasthan Commercial Tax Department after the approval of the resolution plan as the same was presumed to be binding upon all stakeholders even if there were pre-existing statutory dues. Through this judgment the Court promoted the idea of

clean slate theory by emphasizing upon the fresh start of the corporate debtor after successful completion of the CIRP.

On the contrary, the Jharkhand High Court in *Electrosteel Steels Ltd.* v. *State of Jharkhand,* (2021) 125 taxmann.com 421 opined in favour of the Jharkhand VAT Department by ordering the corporate debtor to deposit the outstanding tax dues from the money available in its bank account through a garnishee order. It applied the 2019 Amendment prospectively and not retrospectively. It is pertinent to mention that the Court relied upon Section 5(21) of the Code which considers the state to be an operational creditor and any tax department whether direct or indirect would be within the purview of operational debt.

Later in 2021, taking an opposite view again the Supreme Court in *Ghanshyam Mishra and Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237/227 Comp Case 251, held that all the dues including the statutory dues owed to the Central government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the NCLT grants its approval under section 31 could be continued. It is vital to mention that the abovementioned decisions have been a benchmark in deciding the claims of tax authorities under the Code. Until recently, when in September 2022, the Supreme Court took an opposite view in *STO* v. *Rainbow Papers Ltd.* (2022) 142 taxmann.com 157 by observing that if the resolution plan ignores the statutory demands payable to any state government or a legal authority, altogether, the Adjudicating Authority is bound to reject the resolution plan as per the provision contained in section 31 (4).

While such an interpretation would allow state authorities to recover their belated statutory dues, it has completely ignored its earlier judgments. Further, the Supreme Court declared the Gujarat state tax (VAT) department as included within the ambit of section 3(30) of the Code. It relied upon the fact that since the definition of secured creditor under the Code does not exclude any government or governmental authority, therefore the government will have a statutory first charge over the property of the

corporate debtor. This in turn, would include them within the scope of security interest u/s 3 (31). Additionally, the Court overlooked the provisions of section 238 of the Code and even went against its intent. It stated that section 48 of GVAT Act, 2013 is not inconsistent with the Code whereas a bare reading of the section makes it clear that the government will have first charge over a dealer's property for any amount which he is liable to pay to the government. Even the waterfall mechanism provided u/s 53 of the Code gets disrupted as granting the status of secured creditor to the government authorities puts them u/s 53(1)(*b*)(*ii*) from 53(1)(*e*) and hence invalidating the intent of the legislature.

Whilst having far reaching implications, this judgment has again put the Code under a quandary of interpretations by shifting the focus from resolution to liquidation as it results in classifying financial creditors as secondary to government dues. This is also supported by the amendment carried out u/s 26E of the SARFAESI Act, 2002 wherein debt due to the secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the central, state government and local authority.

A pot of gold at the end of rainbow for Tax Authorities: Implications of Supreme Court Judgment in the case of Rainbow Papers Ltd.

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The enactment of the Insolvency and Bankruptcy Code, 2016 ("**Code**") was aimed at uniformization and consolidation of the insolvency and bankruptcy regime in India, by providing an adequate framework for resolution or liquidation in a time bound manner.

In contrast with the earlier legislations, the Code exhaustively provides for the manner of distribution of assets to stakeholders in case of liquidation of the Corporate Debtor.[1] The order of priority specified in Section 53 of the Code is commonly termed as the 'waterfall mechanism', which determines the sequence in which the dues of various stakeholders, such as workmen, secured and unsecured creditors, employees other than workmen, Central Government and State Governments etc. would be prioritized in case of liquidation of the Corporate Debtor.

A perusal of the objectives and provisions of the Code, particularly Section 53 thereof signifies the intention of the legislature to place dues of the Central and State Government below the financial creditors. This is consistent with the view of Bankruptcy Law Reforms Committee ("**BLRC**"), in its Report given in November 2015. The rationale behind this was perhaps to promote entrepreneurship and faster economic growth, which will in turn increase the revenues for the Government.

The scope and applicability of the Code has, and is continuing to, evolve via several judgments of the Hon'ble Supreme Court, such as judgments upholding the constitutional validity of

several provisions of the Code,[2] discussing the applicability of Limitation Act, 1963 to the Code,[3] and interpreting the provisions while aligning them with the objectives of the Code, and thus settling the otherwise unsettled legal position. However, in some cases, the judgments have created a dilemma by unsettling the prevailing legal position and understanding.

In a recent judgment of the Hon'ble Supreme Court, in the case of *State Tax Officer* v. *Rainbow Papers Ltd.*, (2022) 142 taxmann.com 157 (SC) the findings of the Court appear to be in contradiction with the view which was holding the field by virtue of its judgment in the case of *Ghanshyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237/227 Comp. Cas. 251 (SC)/(2021) 9 SCC 657. The observations disturb the prevailing understanding of the order of priority of debts among different classes of creditors in the event of liquidation and appear to be contrary to the scheme and provisions of the Code.

In the case of *Rainbow Papers Ltd.* (*supra*), the Court considered a crucial aspect pertaining to the Code as to whether the tax authorities qualify to be a secured creditor under the provisions of the Code. While doing so, the Court *set aside* the orders of the National Company Law Appellate Tribunal ("**NCLAT**") and National Company Law Tribunal ("**NCLT**"), Ahmedabad Bench passed in relation to Rainbow Papers Limited, being the corporate debtor in question ("**Corporate Debtor**").

The NCLT and NCLAT had observed in their orders that the Government cannot claim the first charge over the property/assets of the Corporate Debtor on account of demands arising under the tax statutes, as the State is not a 'secured creditor' under the Code. It was observed that Section 48 of the Gujarat Value Added Tax Act, 2003 ("**GVAT Act**"), which provides for tax to be the first charge on the property of the dealer, cannot override Section 53 of the Code, which provides the mode and manner for distribution of proceeds of the sale of assets in cases of liquidation.

For the purpose of the present article, the authors have restricted the discussion to the issue of tax authorities being considered as a 'secured creditor' under the provisions of the Code, as the other issue dealt with in the matter concerning the admission of a belated claim by the Resolution Professional is procedural in nature and has been settled through a catena of judgments.[4]

In the appeal before the Supreme Court, it was contended by the State that, by virtue of Section 48 of the GVAT Act, it shall have first charge on the property of the dealer which is liable to pay tax, interest and/or penalty, and will thus, be a secured creditor under the Code. Accordingly, the outstanding dues, for which recovery proceedings had already been initiated by the State prior to the date of initiation of the Corporate Insolvency Resolution Process ('CIRP'), and immovable property attached by the State ought to have been considered by the Resolution Professional. It was argued that it was the correct approach especially when the State had made its claim before approval of the Resolution Plan by the Committee of Creditors ('CoC'). This was based on

the premise that the Resolution Plan must conform to the parameters/requirements laid down in the Code, particularly Sections 30 and 31 of the Code[5] and Regulation 36[6] of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**Regulations**"). Further, it was argued that the mere fact that a creditor might be an operational creditor would not result in loss of status of that operational creditor as a secured creditor.

Observations of the Supreme Court

While considering the appeal preferred by the State Government, the Court observed that the NCLT ought to have considered the grievance with regard to the correctness of the resolution plan when it was specifically contended. It was the duty of the Resolution Professional to examine the books of the account of the Corporate Debtor which would have reflected the liability arising due to statutory demands, and thereafter, to include the same in the Information Memorandum ('IM') for making a provision for the same in the Resolution Plan, failing which, the Resolution Plan cannot be said to be in conformity of Sections 30 and 31 of the Code. It was held that, accordingly, such a Plan cannot be considered as binding on the Government. Earlier, in the judgment of *Ghanshyam Mishra & Sons (P.) Ltd.* (*supra*), a larger bench of the Supreme Court held that when the dues of any creditor, including the Central Government or State Government, do not form part of the approved Resolution Plan, the same shall stand frozen and extinguished, and accordingly, no proceedings in respect of such dues of any creditor can be continued. Accordingly, a conundrum has been created.

Regarding the issue of the State Government being a 'secured creditor', the Court held that by virtue of the definitions of 'secured creditor' and 'security interest' under sections 3(30) and 3(31) of the Code, the State Government will be a secured creditor as security interest can be created by operation of law as well. Accordingly, the dues of the State have been held to be falling under section 53(1)(*b*)(*ii*) of the Code and shall rank equally with the other specified debts including debts of workmen. The Court further held that the dues of other secured creditors cannot be prioritized by CoC at the cost of statutory dues owed to the Government. While making the above observation, the Court also noted that Section 48 of the GVAT Act is not contrary to Section 53 of the Code.

Issues to be considered

Creation of security interest due to a 'transaction'

Section 3(30) of the Code defines a 'secured creditor' as a creditor in favour of whom security interest is created. 'Security interest' is defined in Section 3(31) of the Code which states that security interest means any right, title or interest or a claim to the property, created in favour of or provided for a secured creditor by a *transaction* which secures payment or performance of any obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. Provided that security interest shall not include a performance guarantee.

A careful perusal of the above would demonstrate that the creation of security interest must have been done in favour of the secured creditor by a transaction which secures payment or performance of the obligation. Statutory dues cannot be said to have arisen from any 'transaction', rather, they arise due to the operation of law (in this case, the GVAT Act) which is in force for the time being.

Overriding effect of the Code over GVAT Act

The Court has noted that the NCLAT and NCLT erred in their observation that Section 53 of the Code overrides Section 48 of GVAT Act, as the latter is not inconsistent with the former and Section 53 of the Code starts with a *non obstante* clause, meaning that Section 53 of the Code is applicable notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force.

The Court seems to have disregarded Section 238 of the Code, which states that the Code shall have an overriding effect over laws which are inconsistent with it. Further, the issue of overriding effect of the Code on other laws has also been considered by the Supreme Court on previous occasions.[7]

The authors are of the view that Section 48 of the GVAT Act is in clear contradiction with Section 53 of the Code. Section 48 of GVAT Act,[8] also starting with a *non-obstante* clause states that any amount payable by a dealer under the Act shall be the first charge on the property of such dealer, while Section 53 has determined the priority of claims in cases of liquidation of Corporate Debtor. The two cannot be read together and construed harmoniously.

It is pertinent to note that there are *non obstante* clauses in several other statutes, such as the Central Goods and Services Tax Act, 2017, Customs Act, 1962, Employees Provident Funds and Miscellaneous Provisions Act, 1952 and Employees State Insurance Act, 1948.[9] Thus, if the ratio of the judgment is to be considered, it can lead to a state of confusion as several statutes provide for priority of the dues recoverable under the specific legislation. With such an import, the provisions of the Code will be rendered ineffective, as the objective itself states that the Code aims to provide availability of credit and balance the interests of all the stakeholders including *alteration in the order of priority of payment of Government dues*. Had the legislative intent been to accord the highest rank to the sovereign debt in the form of taxes or other statutory dues, it could have very well been indicated in the Code.

In this pursuance, reference can also be made to doctrine of repugnancy under Article 254 of the Constitution,[10] which covers the inherent contradiction or incompatibility between two different legislations. Further, it is a settled position of law that the Central Act shall prevail over the State Act, by virtue of doctrine of repugnancy. [11]

Dues of 'secured creditors' and creation of 'security interest'

The tax department or the State, merely by resorting to recovery proceedings in the nature of the attachment of property or bank accounts under the relevant legislation, cannot be considered to be a 'secured creditor' as no 'security interest' is created in its favour which is arising due to a 'transaction' for securing payment or performance of an obligation. The observation to the contrary disregards the scheme of the Code which specifically puts the costs towards the resolution process and other debts higher in precedence than government dues.

The Court's ruling appears to be in contradiction to earlier judgments of the Supreme Court

In earlier judgments,[12] the Supreme Court had observed that the Code would prevail over the other legislations such as the Customs Act, 1962 which also creates statutory charge under section 142A of said Act, incidentally to the extent that once the moratorium is imposed in terms of the Code, the departmental authorities have a limited jurisdiction to determine the quantum of customs duty and other levies. The authorities do not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Act. Therefore, the question is unsettled once again.

Pendency of the appeal, finality of the proceedings or challenge to recovery proceedings

Another aspect that has been left open-ended and could have been considered by the Supreme Court in *Rainbow Papers Ltd.* (*supra*) is that the tax dues had not attained finality inasmuch as the appeal filed by the Corporate Debtor was pending before the Gujarat VAT Tribunal. It is a common practice by the state tax authorities to resort to recovery mechanism by attaching the properties/bank accounts while the appeal challenging the orders of the adjudicating/appellate authorities is pending adjudication. This is despite the fact that several High Courts have time and again held that while the appeal is pending or the time limit to file the appeal is remaining, coercive recovery cannot be initiated by the State tax authorities.[13]

Looking ahead

It could be argued that the present judgment appears to disturb the prevailing understanding of the order of priority of debts among different classes of creditors in the event of liquidation and appear to be contrary to the scheme and provisions of the Code and is inconsistent with the clear intention of the legislature and earlier judgments rendered in similar facts and circumstances, particularly the judgment in the case of *Ghanshyam Mishra & Sons (P.) Ltd.* (*supra*).

It is expected that the judgment will be reviewed and clarified by the Supreme Court

in the near future. Until such clarification, a state of confusion for the secured and unsecured creditors may prevail with respect to statutory dues. The exception to the above confusion is the approach of the tax authorities under the Central or State Government, which are likely to adopt a stricter approach in resorting to recovery mechanisms under the relevant statutes. This, in all likelihood, will also lead to a situation where prospective resolution applicants and bidders in the process of liquidation will be dissuaded from expressing their interest due to the uncertainty over the dues of the Central or State Government under any legislation.

●●●

1. Section 53 of the Code-Distribution of assets.
2. *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365/213 Comp. Cas. 198 (SC)/(2019) 4 SCC 17
3. *BK Educational Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293/(2019) 212 Comp. Cas. 1 (SC)
4. *Vishal Saxena* v. *Swami Deen Gupta, Resolution Professional* (2020) SCC Online NCLT 2734; *Assistant Commissioner of Customs* v. *Mathur Sabhapathy Vishwanathan* (IBA/578/2019, dated 10-6-2021)
5. Section 30 of the Code-Submission of resolution plan. Section 31 of the Code-Approval of resolution plan.
6. Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 talks about the duty of Resolution Professional to prepare the Information memorandum based on the documents of the corporate debtor.
7. *Kotak Mahindra Bank Ltd.* v. *Kew Precision Parts (P.) Ltd.* (2022) 141 taxmann.com 147 (SC)/2022 SCC OnLine SC 978; *Indian Overseas Bank* v. *RCM Infrastructure Ltd.* 2022 SCC OnLine SC 634; and *Rajendra K. Bhutta* v. *Maharashtra Housing and Area Development Authority* (2020) 114 taxmann.com 655/160 SCL 95 (SC)/(2020) 13 SCC 208
8. Section 48 of GVAT Act: Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case may be, such person.
9. Section 82 of CGST Act, 2017-Tax to be first charge on property; Section 142A of Customs Act, 1962-Liability under the Act to be first charge; Section 11 of EPF Act, 1952-Priority of payment of contribution over other debts; and Section 94 of ESIC Act, 1948-Contributions, etc., due to Corporation to have priority over other debts
10. Article 254 of Constitution of India - Inconsistency between laws made by Parliament and laws made by the Legislatures of States
11. *ITC Ltd.* v. *Agricultural Produce Market Committee*, AIR 2002 SC 852; *M Karunanidhi* v. *Union of India*, AIR 1978 SC 898, *et al.*
12. *Sundaresh Bhatt, Liquidator of ABG Shipyard* v. *Central Board of Indirect Taxes and Customs* (2022) 141 taxmann.com 471 (SC).
13. *ATC Telecom Infrastructure (P.) Ltd.* v. *State of Gujarat* (R/Special Civil Application No. 17784 of 2018, dated 29-1-2020) Gujarat High Court; *Vitrag Impex* v. *State of Gujarat*, 2017 SCC OnLine Guj 2545.

(2022) 142 taxmann.com 157 (SC)

SUPREME COURT OF INDIA

State Tax Officer *v.* Rainbow Papers Ltd.

INDIRA BANERJEE AND A.S. BOPANNA, JJ.

CIVIL APPEAL NOS. 1661 AND 2568 OF 2020†

SEPTEMBER 6, 2022

Section 238, read with section 53 of the Insolvency and Bankruptcy Code, 2016 and section 48 of the Gujarat Value Added Tax Act, 2003 - Overriding effect of Code - Whether section 48 of GVAT Act is not contrary to or inconsistent with section 53 or any other provisions of IBC - Held, yes - Whether under section 53(1)(b)(ii), debts owed to a secured creditor, which would include State under GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding liquidation commencement date - Held, yes - Whether State is a secured creditor under GVAT Act - Held, yes - Whether section 3(30) defines 'secured creditor' as a creditor in favour of whom security interest is created and such security interest can be created by operation of law - Held, yes - Whether definition of 'secured creditor' in IBC does not exclude any Government or Governmental Authority - Held, yes - Whether thus, if a resolution plan approved by CoC ignores statutory demands payable to a secured creditor, which includes State under GVAT Act or any legal authority, NCLT is bound to reject said resolution plan and corporate debtor would necessarily have to be liquidated and its assets are to be sold and distributed in manner stipulated in section 53 - Held, yes - Whether Committee of Creditors, which includes financial institutions and other financial creditors, cannot secure their own dues at cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues - Held, yes (Paras 56 and 57)

Circulars and Notifications : Notification No. IBBI/2018-19/GN/REG013, dated 3-7-2018

FACTS

- The respondent company was engaged in the business of manufacture and sale of Crafts and Oars within and outside the State of Gujarat.
- Recovery proceedings were initiated by appellant against the respondent in respect of its dues for the year 2011-12, and the appellant attached the property of the respondent.
- Meanwhile, one operational creditor of the respondent filed petition under section 9 before NCLT, for initiation of the Corporate Insolvency Resolution Process (CIRP) against the respondent.
- Said Company Petition was admitted and Resolution Professional (RP) was appointed.
- After appointment of the RP, claims were invited from Creditors by issuance of newspaper publications. The last date for submission of claims was 5-10-2017. After receipt of claims, a Committee of Creditors (CoC) was constituted.
- After admission of CIRP and appointment of RP, one 'R' submitted a resolution plan which was approved by CoC.
- The appellant filed a claim before the RP in the requisite Form B, claiming that Rs. 47.36 crores (approximately), was due and payable by the respondent to the appellant, towards its dues under the GVAT Act. The claim was filed beyond time.
- The Resolution Professional informed the appellant that in said plan the entire claim of the appellant had been waived off. The order of the RP was conveyed to the appellant by an e-mail.
- The appellant challenged the resolution plan contending that Government dues could not be waived off. The appellant prayed for payment of total dues of Rs. 47,35,72,314 towards VAT/CST on the ground that the Sales Tax Officer was a secured creditor.
- On behalf of the appellant, it had been argued that there were proceedings initiated by the State against the respondent-corporate debtor to realise its statutory dues. The books of account of the corporate debtor would have reflected the liability of the corporate debtor to the State in respect of its statutory dues. In abdication of its mandatory duty, the RP failed to examine the books of account of the corporate debtor, verify and include the same in the information memorandum and make provision for the same in the resolution plan. The Resolution Plan did not conform to the statutory requirements of the IBC and was, therefore, not binding on the State.

- NCLT rejected the application made by the appellant as not maintainable.
- The appellant filed an appeal before the NCLAT against the aforesaid order of the NCLT under section 61. The appeal had been dismissed by the NCLAT holding that 'Department' filed its claim at belated stage after plan had been approved by 'CoC', the 'RP' had no jurisdiction to entertain the same and rightly not entertained.

On appeal to Supreme Court :

HELD

- Prior to amendment by Notification No. IBBI/2018-19/GN/REG013 dated 3-7-2018, with effect from 4-7-2018, sub-regulation (1) of regulation 12 read with sub-regulation (2) provided that a creditor shall submit proof of claim on or before the last date mentioned in the public announcement. Sub-regulation (2) was amended with effect from 4-7-2018 and now reads 'a creditor shall submit claim with proof on or before the last date mentioned in the public announcement'. (Para 22)
- The Regulations have to be read as a whole and not in a truncated manner and interpreted in the light of the statutory provisions of the IBC, as interpreted by the Court. Instant Court has time and again held that the time lines stipulated in the IBC even for completion of proceedings are directory and not mandatory. (Para 23)
- In instant case, claims were invited well before the 5-10-2017 which was the last date for submission of claims. Under the unamended provisions of regulation 12(1), the appellant was not required to file any claim. Read with regulation 10, the appellant would only be required to substantiate the claim by production of such materials as might be called for. The time stipulations are not mandatory as is obvious from sub-regulation (2) of regulation 14 which enables the Interim Resolution Professional or the Resolution Professional, as the case may be, to revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1) of the said regulation as soon as might be practicable, when he came across additional information warranting such revision. (Para 24)
- There was no obligation on the part of the State to lodge a claim in respect of dues which are statutory dues for which recovery proceedings have also been initiated. The appellants were never called upon to produce materials in connection with the claim raised by the appellants towards statutory dues. The NCLT as well as the NCLAT misconstrued the Regulations. (Para 25)
- If the established facts and circumstances require discretion to be exercised in a particular way, discretion has to be exercised in that way. If a Resolution Plan is ex

facie not in conformity with law and/or the provisions of IBC and/or the Rules and Regulations framed thereunder, the Resolution would have to be rejected. It is also a well settled principle of interpretation that the expression 'may', if circumstances so demand can be construed as 'Shall'. (Para 51)

- If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan. (Para 52)
- In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in section 53. (Para 53)
- The Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues. (Para 54)
- The NCLAT clearly erred in its observation that section 53 overrides section 48 of the GVAT Act. (Para 55)
- Section 48 of the GVAT Act is not contrary to or inconsistent with section 53 or any other provisions of the IBC. Under section 53(1)(b)(*ii*), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date. (Para 56)
- The State is a secured creditor under the GVAT Act. Section 3(30) defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority. (Para 57)
- The NCLAT and the NCLT erred in law in rejecting the application/appeal of the appellant. As observed above, delay in filing a claim cannot be the sole ground for rejecting the claim. (Para 58)
- The appeals are allowed. The impugned orders are set aside. The resolution plan approved by the CoC is also set aside. The RP may consider a fresh resolution plan in the light of the observations made above. (Para 59)

CASE REVIEW

Tourism Finance Corp. v. *Rainbow Papers* (2020) 120 taxmann.com 265 (NCLAT - New Delhi) (para 59) *reversed*.

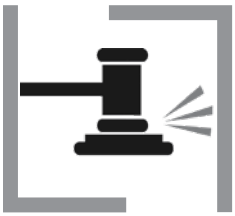
CASES REFERRED TO

Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365/213 Comp Cas 198 (SC)/(2019) 4 SCC 17 (para 35), *Asstt. Commissioner of Customs* v. *Mathur Sabhapathy Vishwanathan* (IBA No. 578 of 2019, dated 10-6-2021) (para 40), *Ghanshyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237/227 Comp Case 251 (SC)/(2021) 9 SCC 657 (para 42) and *Ebix Singapore (P.) Ltd.* v. *Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208/(2022) 231 Comp. Case 110 (SC)/(2022) 2 SCC 401 (para 47).

Ms. Aastha Mehta, Adv. and **Ms. Deepanwita Priyanka**, AOR *for the Appellant*. **Rajesh Srivastava**, AOR, **Gaurav Verma**, **Neeraj Datt Gaur**, **Ankur Kashyap**, **Ayush Agarwala**, **Ms. Aditi Mittal**, **Ms. Arushi Kaularkar**, **Ms. Swati Khanvisara**, **Aman Bajaj**, Advs. and **Arnav Narain**, AOR *for the Respondent*.

† Arising out of order of NCLAT - New Delhi in *Tourism Finance Corpn.* v. *Rainbow Papers* (2020) 120 taxmann.com 265.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 142 taxmann.com 157 (SC)



(2022) 142 taxmann.com 158 (SC)

SUPREME COURT OF INDIA

K. Paramasivam *v.* Karur Vysya Bank Ltd.

INDIRA BANERJEE AND J.K. MAHESHWARI, JJ.

CIVIL APPEAL NO. 9286 OF 2019†

SEPTEMBER 6, 2022

Section 62, read with section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authorities - Supreme Court, appeal to - Whether an action under section 7 can be initiated against a corporate entity who has given a guarantee to secure dues of a non-corporate entity; guarantor is then, corporate debtor - Held, yes - Whether liability of guarantor is co-extensive with that of principal borrower and it is open to financial creditor to proceed against guarantor without first suing principal borrower - Held, yes (Paras 13 and 16)

FACTS

- The appellant was the promoter, shareholder and suspended/ discharged director of company 'MTPR'. The R1-financial creditor had advanced credit facilities to the three entities. Company 'MTPR' stood guarantor for the loans availed by all the three borrowers. The borrowers failed to repay the debts payable by them to the financial creditor.

- The financial creditor filed an application under section 7 for initiation of CIRP against 'MTRP'. In the said application the financial creditor stated that 'MTPR' had extended corporate guarantee(s) for loans availed by each of the borrowers. On failure of the borrowers to repay the loans, MTPR, as guarantor, became liable to repay the loan.

- 'MTPR' filed its counter statement before the NCLT, objecting to the jurisdiction of the NCLT to entertain the petition under section 7, on the contention that, the company, MTPR, was not a corporate debtor, which is defined in section 3(8) to mean, a corporate person who owes a debt to any person. It was contended that MTPR did not owe any financial debt to the financial creditor.

- The appellant contended that, MTPR did not also fall within the definition of 'corporate guarantor' in section 5(5A).

  The NCLT admitted the petition under section 7 and initiated the CIRP against MTPR.

- Being aggrieved by the order of the NCLT admitting the application for CIRP, the appellant filed an appeal. The appeal filed by the appellant, had been dismissed by the NCLAT.

HELD

- Under section 7, CIRP can be initiated against a corporate entity who has given a guarantee to secure the dues of a non-corporate entity as a financial debt accrues to the corporate person, in respect of the guarantee given by it, once the borrower commits default. The guarantor is then, the corporate debtor. (Para 13)
- Further, issues raised in instant appeal are settled in Laxmi Pat Surana v. Union Bank of India (2021) 125 taxmann.com 394/166 SCL 318 (SC). Thus, there is no ground to interfere with the concurrent findings of the NCLT and the NCLAT. (Paras 16 and 17)

CASE REVIEW

Order of NCLAT in Company Appeal (AT) Insolvency No. 538 of 2019, dated 18-11-2019 (para 17) *affirmed.*

Laxmi Pat Surana v. *Union Bank of India* (2021) 125 taxmann.com 394/166 SCL 318 (SC) (para 16) *followed.*

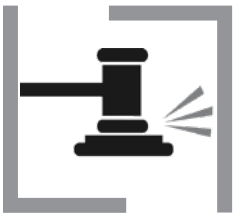
CASES REFERRED TO

Laxmi Pat Surana v. *Union Bank of India* (2021) 125 taxmann.com 394/166 SCL 318 (SC) (para 12).

Amitesh Chandra Mishra, **Ms. Ankit Chaturvedi** and **Ms. Pratibha Yadav**, Advs. *for the Appellant.* **Nikhil Nayyar**, Sr. Adv., **Ms. Sugandha Batra**, Adv., **T.V.S. Raghavendra Sreyas**, AOR, **Mrs. Gayatri Gulati Sreyas**, **Siddharth Vasudev**, Advs. and **Iyengar Shubharanjani Ananth**, AOR *for the Respondent.*

† Arising out of order of NCLAT in Company Appeal (AT) Insolvency No. 538 of 2019, dated 18-11-2019.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 142 taxmann.com 158 (SC)



(2022) 142 taxmann.com 372 (SC)

SUPREME COURT OF INDIA

Tech Sharp Engineers (P.) Ltd. *v.* Sanghvi Movers Ltd.

INDIRA BANERJEE AND J.K. MAHESHWARI, JJ.

CIVIL APPEAL NO. 296 OF 2020†

SEPTEMBER 19, 2022

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 - Pursuant to an agreement executed by and between corporate debtor and operational creditor, operational creditor let out on hire to corporate debtor, 150 MT crane for erection of equipment at site of Indian Oil Corporation Ltd. - Operational creditor raised invoices on corporate debtor - Corporate debtor committed default and, thus, operational creditor filed a petition for winding up of corporate debtor - Meanwhile, IBC came into force - Thereafter operational creditor filed an application to initiate CIRP - NCLT rejected said application on ground that default occurred in year 2013 and, thus, application on 30-3-2018 was barred by limitation - NCLAT by impugned order set aside NCLT's order on ground that right to apply accrued on 1-12-2016, when IBC came into force and, thus, said application was filed well within limitation period - It was noted that right to sue accrues when a default occurs and date of enforcement of IBC is not relevant in computation of limitation - Whether since in instant case default occurred in year June 2013 and there was no acknowledgement of liability after 7-11-2013, NCLAT's impugned order was unsustainable in law and, thus, was to be set aside - Held, yes (Paras 21, 24 and 30)

FACTS

- Pursuant to an agreement executed by and between the appellant and the respondent/operational creditor, the respondent let out on hire to the appellant, 150 MT crane for erection of equipment at the site of Indian Oil Corporation Ltd. (IOCL) at Paradip in Odisha. The respondent raised invoices on the appellant between 3-1-2012 and 4-3-2013.
- On or about 6-5-2013, the respondent issued notice to the appellant for payment of outstanding hire charges. By letter dated 17-5-2013, the appellant replied to the said notice. Further correspondence ensued.
- Ultimately, on 14-10-2013, the respondent issued a statutory notice to the appellant under sections 433(e), 434 and 439 of the Companies Act, 1956 for winding up of the appellant-company. The appellant duly replied to the notice on 7-11-2013, acknowledging its liability to the respondent.

- On 9-11-2013, the respondent called upon the appellant to clear its dues. On 24-5-2014, the respondent issued a statutory notice under sections 433(e), 434 and 439 of the Companies Act, 1956 calling upon the appellant to pay outstanding amount.
- On or about 22-12-2015, the respondent filed a winding up petition.
- The IBC came into force on 1-12-2016. Thereafter the respondent issued a demand notice on 14-11-2017 under section 8(1) calling upon the appellant to repay its dues.
- On 30-3-2018, the respondent filed petition under section 9 for initiation of the Corporate Insolvency Resolution Process (CIRP).
- The NCLT rejected the application as barred by limitation.
- The respondent appealed to the NCLAT under section 61. By the impugned judgment and order, the NCLAT set aside the order dated passed by the NCLT rejecting the application of the respondent under section 9 and remitted the case to the NCLT for admission after notice to the parties. The NCLAT held that right to apply under section 9 accrued to the appellant on 1-12-2016, when 'I&B Code' came into force. Therefore, application under section 9 filed on 30-3-2018 was within the period of three years from the date of Code came into force from the date of right to apply accrued.

HELD

- For the purpose of limitation, the relevant date is the date on which the right to sue accrues which is the date when a default occurs. (Para 11)
- It is well settled by a plethora of judgments of this Court as also different High Courts and that the NCLT/NCLAT has the discretion to entertain an application/appeal after the prescribed period of limitation. The condition precedent for exercise of such discretion is the existence of sufficient cause for not preferring the appeal and/or the application within the period prescribed by limitation. (Para 14)
- The condition precedent for condonation of the delay in filing an application or appeal, is the existence of sufficient cause. Whether the explanation furnished for the delay would constitute "sufficient cause" or not would be dependent upon facts of each case. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished by the appellant/applicant for the delay in taking steps. (Para 16)
- When an appeal is filed against an order rejecting an application on the ground of limitation, the onus is on the appellant to make out sufficient cause for the delay in filing the application. The date of

enforcement of the IBC and/or the date on which an application could have first been filed under the IBC are not relevant in computation of limitation. It would be absurd to hold that the CIRP could be initiated by filing an application under section 7 or section 9, within three years from the date on which an application under those provisions of the IBC could have first been made before the NCLT even though the right to sue may have accrued decades ago. (Para 17)

- The fact that an application for initiation of CIRP, may have been filed within three years from the date of enforcement of the relevant provisions of the IBC is inconsequential. What is material is the date on which the right to sue accrues, and whether the cause of action continuous. (Para 18)

- The pendency of the proceedings in a parallel forum, invoked by the respondent, is not sufficient cause for the delay in filing an application under section 9. By the time the application was filed, the claim had become barred by limitation. (Para 19)

- From the averments in the winding up petition, it is patently clear that there was no acknowledgement of liability after 7-11-2013. The last payment was made in June 2013. (Para 21)

- Under section 18 of the 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 of a fresh period of limitation, from the date on which the acknowledgement is signed. However, the acknowledgement must be made before the period of limitation expires. (Para 24)

- Proceedings in good faith in a forum which lacks jurisdiction or is unable to entertain for like nature may save limitation. Similarly, acknowledgement of liability may have the effect of commencing afresh period of limitation. (Para 25)

- The last acknowledgement was in 2013 and the High Court neither suffered from any defect of jurisdiction to entertain the winding up application nor was unable to entertain the winding up application for any other cause of a like nature. (Para 26)

- The limitation for initiation of winding up proceedings in the High Court stopped running on the date on which the winding up petition was filed. The initiation of proceedings in High Court would not save limitation for initiation of proceedings for initiation of CIRP in the NCLT under section 7. (Para 28)

- A claim may not be barred by limitation. It is the remedy for realisation of the claim, which gets barred by limitation. The impugned order of the NCLAT is unsustainable in law. (Para 29)

- The appeal is allowed. The impugned order of the NCLAT is set aside. (Para 30)
- This judgment, however, will not prevent the respondent from pursuing any other remedy which the respondent may be entitled to avail in accordance with law and/or pursue any pending proceedings in accordance with law. (Para 31)

CASE REVIEW

B.K. Educational Services (P.) Ltd. v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC)/(2019) 11 SCC 633 (para 14) *followed.*

NCLAT's order in Company Appeal (AT) Insolvency No. 118 of 2019, dated 23-7-2019 (para 30) *affirmed.*

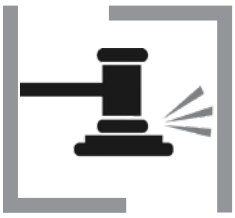
CASES REFERRED TO

B.K. Educational Services (P.) Ltd. v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC)/(2019) 11 SCC 633 (para 9), *Radha Exports (India) (P.) Ltd.* v. *K.P. Jayaram* (2020) 118 taxmann.com 560/(2021) 163 SCL 210 (SC)/(2020) 10 SCC 538 (para 12), *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 118 taxmann.com 323 (SC)/(2020) 15 SCC 1 (para 13), *Ramlal Motilal & Chhotelal* v. *Rewa Coalfields Ltd.* AIR 1962 SC 361 (para 15) and *Krishna* v. *Chathappan* 1889 SCC Online Mad. 1 (para 15).

R. Chandrachud, AOR *for the Appellant.* **Shikhil Shiv Suri**, **Ms. Madhu Suri**, **Ms. Jyoti Suri**, **Ms. Nikita Thapar**, **Ms. Komal Gupta**, **Ms. Mahima Aggarwal**, Advs. and **T.R.B. Sivakumar**, AOR *for the Respondent.*

† NCLAT's order in company appeal (AT) (Insolvency) No. 118 of 2019, dated 23-7-2019.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 142 taxmann.com 372 (SC)



(2022) 142 taxmann.com 465 (SC)

SUPREME COURT OF INDIA

Ashok G. Rajani *v.* Beacon Trusteeship Ltd.

INDIRA BANERJEE AND J.K. MAHESHWARI, JJ.

CIVIL APPEAL NO. 4911 OF 2021†

SEPTEMBER 22, 2022

Section 62, read with section 12A of the Insolvency and Bankruptcy Code, 2016 and rule 11, of the National Company Law Appellate Tribunal Rules, 2016 - Corporate Person's Adjudicating Authorities - Supreme Court, appeal to - Application filed by financial creditor under section 7 had been admitted by NCLT - NCLAT granted opportunity to parties to settle their dispute before NCLT and granted stay on constitution of CoC - Application for settlement under section 12A was pending before NCLT - It was a case of corporate debtor that though NCLAT by impugned order stayed formation of CoC, it however, declined to exercise its power under rule 11 of NCLAT Rules to take on record settlement and dispose matter and further permitted IRP to issue publication and also handover all assets and proceed with CIRP - It was noted that order impugned was only an interim order, which did not call for interference - Further, there was no question of law which required determination by instant Court - Whether thus, appeal against order of NCLAT was to be dismissed - Held, yes - Whether however, considering investments made by corporate debtor and considering number of people dependant on corporate debtor for their survival and livelihood, NCLT was directed to take up settlement application and decide same - Held, yes (Paras 29 and 30)

FACTS

- The corporate debtor, a company incorporated under the Companies Act, 1956 has been carrying on business, *inter alia*, of manufacture of benzene based Speciality Chemicals since 1990.
- The corporate debtor was the source of livelihood for about 150 workmen, 40 unskilled workers and 75 employees on its payroll and is engaged with more than 200 customers/vendors. It was claimed that the corporate debtor had a net worth of Rs. 972 crores and fixed assets worth more than Rs. 1500 crores.
- In order to expand its chemical manufacturing plant at Maharashtra, the corporate debtor raised capital and the R1 committed to invest Rs. 100 crores in the said integrated Project, in the form of Rs. 20 crores, towards Compulsorily Convertible Preference Shares (CCPS) and Rs. 80 crores, by way of Non-Convertible Debentures (NCDs). Thereafter the corporate debtor and R1 executed a Debenture Trust Deed (DTD), inter alia, recording

the terms and conditions of the issue of said NCDs.

- R1 released a sum of Rs. 72,00,00,000/- toward subscriptions of 360 Series A debentures and 360 Series B Debentures ('First tranche Debentures'). The aforesaid amount was to be invested in capacity expansion of the company and hence not available as cash flow. The service of interest for the first tranche had to be met out of the second tranche of Rs. 8 Crores to be invested by the R1 which would have created the cash flow for the same and the remaining amount was to be invested for Capex investment. R1 however, defaulted in making payment of the second tranche of Rs. 8 Crores.
- In addition to the DTD dated 8-3-2019, the parties entered into a Supplemental Deed dated 14-3-2019 revising certain terms set out in DTD including the timelines and schedule for the Interest Payment Dates.
- The corporate debtor sent an e-mail to the R1, requesting payment of the second tranche of Rs. 8 crores in terms of the DTD. The corporate debtor also issued notice to the R1 to make payment of second tranche of Rs. 8 crores.
- The corporate debtor took recourse to Arbitration Proceedings against the other Respondents R1 issued a notice to the corporate debtor regarding non-payment of interest amount of Rs. 2,18,95,890.41/-. R1 also issued an Enforcement Notice accelerating payment of the full investment amount *i.e.* Rs. 77,94,92,513/- as due on 17-10-2019 on account of non-payment of Rs. 2,18,95,890.41/- being interest coupon amount.
- R1 invoked clause 6.1 of the share pledge agreement and transferred 26.60 lakh shares worth Rs. 91.78 crores into the DEMAT Account(s) of the respondents.
- The corporate debtor initiated Arbitration Proceedings before the High Court. While the Arbitral Proceedings, to which the R1 had themselves agreed and consented to, were pending, they filed an application under section 7 before NCLT.
- The corporate debtor filed its statement of claim seeking an award aggregating to Rs. 848,75,30,000/- for losses and damages suffered by it.
- The R1 filed statement of defence and counter claim seeking an award for payment of its claim amounting to Rs. 73,56,59,238/-.
- The arbitrator passed an interim award in favour of R1 and directed the corporate debtor to make payment of Rs. 72,06,99,244/- along with interest.
- Being aggrieved by the order of the arbitrator, the corporate debtor preferred an arbitration petition under section 34 of the Arbitration and Conciliation Act, 1996 before

the High Court of Bombay which was still pending.

- The NCLT, heard the matter and reserved its order on 13-5-2021. On 1-7-2021, the corporate debtor and the R1 filed a joint application before the NCLT requesting to defer the order as the parties were in the process of arriving at a settlement and sought time.
- The NCLT, rejected the request of the parties for further deferment of orders for arriving at a settlement and admitted and allowed the application under section 7 preferred by R1 against corporate debtor.
- Being aggrieved by the order passed by the NCLT, admitting and allowing application for initiating CIRP against the corporate debtor, the appellant who was Director of the corporate debtor filed an appeal in the NCLAT.
- The parties had amicably settled their disputes and entered into a formal settlement.
- NCLAT considering the settlement arrived at between the parties, granted interim stay of publication under section 13 and further gave liberty to the parties to adopt procedure under section 12A of IBC.
- The parties with the consent of the IRP filed an application under section 12A before the NCLT. However, the same had not been listed till date.
- NCLAT stayed the formation of CoC, but declined to exercise its power under rule 11 of the NCLAT Rules to take on record the settlement and dispose of the matter. Further, the NCLAT permitted the IRP to issue publication and also handover all assets and proceed with the CIRP even though the matter had been settled between the parties. Being dissatisfied by the said order of the NCLAT, the corporate debtor had preferred the instant Civil Appeal.

HELD

- Section 12A enables the NCLT to allow the withdrawal of an application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of 90 per cent voting shares of the Committee of Creditors in such a manner as may be specified. (Para 23)
- Section 12A clearly permits withdrawal of an application under section 7 that has been admitted on an application made by the applicant. The question of approval of the Committee of Creditors by the requisite percentage of votes, can only arise after the Committee of Creditors is constituted. Before the Committee of Creditors is constituted, there is, no bar to withdrawal by the applicant of an application admitted under section 7. (Para 24)
- The object of the IBC is to consolidate and amend the laws

relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance of interests of all stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India and matters connected therewith or thereto. (Para 26)

- The statement says that an effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets, encourage entrepreneurship, improve business and facilitate more investments leading to higher economic growth and development. (Para 27)
- A reading of the statement of objects and reasons with the statutory rule 11 of the NCLT Rules enables the NCLT to pass orders for the ends of justice including order permitting an applicant for CIRP to withdraw its application and to enable a corporate body to carry on business with ease, free of any impediment. (Para 28)
- Considering the investments made by the corporate debtor and considering the number of people dependant on the corporate debtor for their survival and livelihood, there is no reason why the applicant for the CIRP, should not be allowed to withdraw its application once its disputes have been settled. (Para 29)
- The settlement cannot be stifled before the constitution of the Committee of Creditors in anticipation of claims against the corporate debtor from third persons. The withdrawal of an application for CIRP by the applicant would not prevent any other financial creditor from taking recourse to a proceeding under IBC. The urgency to abide by the timelines for completion of the resolution process is not a reason to stifle the settlement. (Para 30)
- Application for settlement under section 12A is pending before the NCLT. The NCLAT has stayed the constitution of the Committee of Creditors. The order impugned is only an interim order which does not call for interference. In an appeal under section 62, there is no question of law which requires determination by instant Court. The appeal is, accordingly, dismissed. The NCLT is directed to take up the settlement application and decide the same in the light of the observations made above. (Para 32)

CASE REVIEW

Ashok G. Rajani v. *Beacon Trusteeship Ltd.* (Company Appeal (AT) (Insolvency) No. 598 of 2021, dated 18-8-2021) (para 32) *affirmed*.

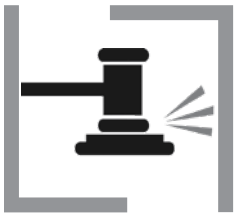
CASES REFERRED TO

Ashok G. Rajani v. *Beacon Trusteeship Ltd.* (Company Appeal (AT) (Insolvency) No. 598 of 2021, dated 18-8-2021) (para 1) and *Kamal K. Singh* v. *Dinesh Gupta* (Civil Appeal No. 4993 of 2021, dated 25-8-2021) (para 31).

Puneet Jain, **Ms. Christi Jain**, **Harsh Jain**, **Umang Mehta**, **Shruti Singh**, **Mann Arora**, **Abhinav Deshwal**, **Ms. Akriti Sharma**, **Yogit Kamat** and **Ms. Shira Singh**, Advs. *for the Appellant.* **Ravi Raghunath**, **Ms. Rathina Maravakman**, **Ms. Aakashi Lodha**, Advs., **Sanyat Lodha**, AOR, **Mahesh Agarwal**, **Rishi Agrawala**, **Himanshu Satija**, Advs. and **E.C. Agrawala**, AOR *for the Respondent.*

† Arising out of order, passed by the (NCLAT-New Delhi) in 'Ashok G. Rajani' Beacon Trusteeship Ltd. Company Appeal (AT) (Insolvency) No. 598 of 2021, dated 18-8-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 142 taxmann.com 465 (SC)



(2022) 142 taxmann.com 484 (SC)

SUPREME COURT OF INDIA

Maitreya Doshi *v.* Anand Rathi Global Finance Ltd.

INDIRA BANERJEE AND J.K. MAHESHWARI, JJ.

CIVIL APPEAL NO. 6613 OF 2021†

SEPTEMBER 22, 2022

Section 62 of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authorities - Supreme Court, appeal to - Whether if there are two borrowers or if two corporate bodies fall within ambit of corporate debtors, there is no reason why proceedings under section 7 cannot be initiated against both corporate debtors - Held, yes - Whether however, same amount cannot be realised from both corporate debtors - Held, yes - Whether if dues are realised in part from one corporate debtor, balance may be realised from other corporate debtor being co-borrower - Held, yes - Whether however, once claim of financial creditor is discharged, there can be no question of recovery of claim twice over - Held, yes (Para 37)

Section 62 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Supreme Court, appeal to - Loan borrowed by corporate debtor from financial creditor was secured under 'Pledge Deed' of shares owned by company 'D' in borrower company - Corporate debtor committed default in repayment - Financial creditor, thus, filed a petition under section 7 against borrower company as well as company 'D' - NCLT admitted said petition - Appellant, being suspended director of company 'D', challenged NCLTs order on ground that 'D' was merely a pledger of shares and, thus, said petition was not maintainable against it - NCLAT upheld NCLTs order on ground that company 'D' had been referred as borrower and pledger in loan-cum-pledge agreement and, thus, it was a party to agreement in dual capacity and petition was maintainable - Whether factual finding of NCLAT, which was final fact finding authority, was based on its interpretation of loan-cum pledge agreements and supporting agreements and interpretation given by NCLAT was definitely a possible interpretation and could not be interfered with in an appeal under section 62 - Held, yes - Whether thus, appeal against order passed by NCLAT was to be dismissed - Held, yes (Paras 34 and 38)

FACTS

- Respondent No. 1 a Non-banking Financial Company (financial creditor) disbursed loan to the tune of Rs. 6 Crores to company 'P' (Corporate debtor) under three separate Loan-cum-Pledge Agreements 'D' company pledged shares held by it in 'P' in favour of the financial creditor, by way of security for the loan.

- 'P' failed to make repayments in terms of the Loan-cum-Pledge Agreements.
- The financial creditor called upon 'P' and 'D' to pay the entire outstanding loan amount.
- 'P' admitted and acknowledged its liability to pay its outstanding dues to the financial creditor under the Loan-cum-Pledge Agreements, but stated that it could not pay the same on account of genuine difficulty.
- The financial creditor filed a petition under section 7 for initiation of CIRP against 'P'.
- On the same day, the financial creditor also filed a petition against 'D' under section 7 based on the same loan documents.
- Both the petitions filed by the financial creditor were heard together and admitted by the NCLT.
- By an order dated 29-1-2021, the Adjudicating Authority (NCLT) admitted the petition for initiation of CIRP against 'P'. By another Order passed on 19-2-2021, the Adjudicating Authority (NCLT) admitted the petition for initiation of CIRP against 'D' for the same set of loans arising out of the same loan documents, in respect of which the Financial Creditor had initiated CIRP against 'P'.
- The Appellant filed an appeal in the National Company Law Appellate Authority (NCLAT) under section 61 of the IBC. By the impugned judgment and order dated 25-8-2021, the Appellate Authority (NCLAT) dismissed the appeal and upheld the order of admission of the petition under section 7 of the IBC.
- Appellants suspended directors of 'D' challenged said order before Supreme Court on ground that since no disbursement had been made to 'D' against consideration for the time value of money, there was no obligation on the part of 'D' to make any repayment to the financial creditor. There was, therefore, no financial debt owed by 'D' to the financial creditor under section 5(8). Insofar as 'D' was concerned, the Loan-cum-Pledge Agreements only created a pledge of the shares of 'D' in 'P' in favour of the financial creditor. The petition under section 7 against the 'D' was clearly not maintainable.

HELD

- The mere fact of 'D' also being a *pledger* is wholly irrelevant and does not in any manner disentitle the R1 to initiate proceedings under section 7 against such a co-borrower. (Para 32)
- It is not in dispute that the financial creditor disbursed loan to 'P' pursuant to the Loan-cum-Pledge Agreements executed both by 'P' and 'D'. 'D' has been referred to in the agreement as borrower and

pledgor. *Prima facie*, it appears that 'D' was a party to the Loan-cum-Pledge Agreement in its dual capacity of borrower and *pledgor* of shares. The NCLAT has arrived at the factual finding that 'D' is also a borrower under the Loan-cum-Pledge Agreement. The factual finding of the NCLAT which was the final fact finding authority ought not to be interfered in this appeal. (Para 33)

- The finding of the NCLAT that 'D' is a borrower, is based on its interpretation of the Loan-cum-Pledge Agreements and supporting documents. The interpretation given by the NCLAT is definitely a possible interpretation. The interpretation is a plausible interpretation which cannot be interfered with in an appeal under section 62. (Para 34)

- The contract of indemnity is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person. In a contract of indemnity, a promisee acting within the scope of his authority is entitled to recover from the promisor all damages and all costs which he may incur. A contract of guarantee, on the other hand, is a promise whereby the promisor promises to discharge the liability of a third person in case of his default. The person who gives the guarantee is called the surety. The person in respect of whose default, the guarantee is given is the principal debtor and the person to whom the guarantee is given is the creditor. Anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. On the other hand, the bailment of goods as security for payment of a debt or performance of a promise is a pledge. (Para 35)

- If there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under section 7 cannot be initiated against both the corporate debtors. Needless to mention, the same amount cannot be realised from both the corporate debtors. If the dues are realised in part from one corporate debtor, the balance may be realised from the other corporate debtor being the co-borrower. However, once the claim of the financial creditor is discharged, there can be no question of recovery of the claim twice over. (Para 37)

- There is no grounds to interfere with the impugned judgment and order of the NCLAT. The appeal is, accordingly, dismissed. (Para 38)

CASE REVIEW

Maitreya Doshi v. *Anand Rathi Global Finance Ltd.* (2021) 133 taxmann.com 421 (NCLAT - New Delhi) (para 38) *affirmed*.

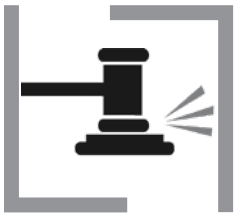
CASES REFERRED TO

Maitreya Doshi v. *Anand Rathi Global Finance Ltd.* (2021) 133 taxmann.com 421 (NCLAT - New Delhi) (para 1), *Anand Rathi Global Finance Ltd.* v. *Doshi Holdings (P.) Ltd.* (C.P. (IB) No. 1220 (MB) of 2020, dated 19-2-2021) (para 1), *Anand Rathi Global Finance Ltd.* v. *Premier Ltd.* (C.P. (IB) No. 1224 (MB) of 2020, dated 29-1-2021) (para 7), *Anuj Jain* v. *Axis Bank Ltd.* (2020) 114 taxmann.com 656 (SC)/(2020) 8 SCC 401 (para 14), *Phoenix ARC (P.) Ltd.* v. *Ketulbhai Ramubhai Patel* (2021) 124 taxmann.com 90/164 SCL 468 (SC)/(2021) 2 SCC 799 (para 19), *Bharat Barrel & Drum Manufacturing Company* v. *Amin Chand Payrelal* (1999) 3 SCC 35 (para 22), *Sub Inspector Rooplal* v. *LT. Governor Thru Secy* (2000) 1 SCC 644 (para 25) and *Lalit Kumar Jain* v. *Union of India* (2021) 127 taxmann.com 368 (SC)/(2021) 9 SCC 321 (para 36).

K.V. Vishwanathan, Sr. Adv., **Ms. Dhanyashree Jadeja**, **Ankit Lohia**, Advs., **Samiron Borkataky**, AOR and **Manas Kotak**, Adv. *for the Appellant.* **Prateek Sakseria**, **Saket Mone**, **Nishant Chottani**, **Vishesh Kalra**, **Ms. Smriti Churiwal**, **Ms. Priyashree Sharma PH**, **Jaiveer Kant**, **Syed Faraz**, Advs. and **Kush Chaturvedi**, AOR *for the Respondent.*

† Arising out from *Maitreya Doshi* v. *Anand Rathi Global Finance Ltd.* (2021) 133 taxmann.com 421 (NCLAT - New Delhi)

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 142 taxmann.com 484 (SC)



(2022) 144 taxmann.com 15 (SC)

SUPREME COURT OF INDIA

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

INDIRA BANERJEE AND J.K. MAHESHWARI, JJ.

REVIEW PETITION (CIVIL) NO. 1043 OF 2022†
CIVIL APPEAL NO. 4633 OF 2021

SEPTEMBER 22, 2022

Section 60, read with section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Petitioner filed instant petition for review of order passed by instant Court in Vidarbha Industries Power Ltd. v. Axis Bank Ltd. (2022) 140 taxmann.com 252/173 SCL 355 wherein it was held that 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 - It was submitted that instant Court had overlooked judgment of Supreme Court in E.S. Krishnamurthy v. Bharath Hi-Tech Builders (P.) Ltd. (2021) 133 taxmann.com 159/(2022) 169 SCL 644/(2022) 3 SCC 161 wherein it was observed that only two courses of action are available to Adjudicating Authority in a petition under section 7 i.e., Adjudicating Authority must either admit application under clause (a) sub-section (5) or it must reject application under clause (b) of sub-section (5) - However, question as to whether section 7 sub-section (5) is mandatory or discretionary was not in issue in any of judgments cited on behalf of review applicant - Whether therefore, there being no grounds for review of judgment and order, review petition was to be disposed of - Held, yes (Paras 4, 6 and 8)

FACTS

- The petitioner filed instant petition for review of order passed by Supreme Court in *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.* (2022) 140 taxmann.com 252/173 SCL 355.
- It was mentioned and submitted that instant Court while passing order had overlooked judgment of this Court in *E.S. Krishnamurthy* v. *Bharath Hi-Tech Builders (P.) Ltd.* (2021) 133 taxmann.com 159/(2022) 169 SCL 644/(2022) 3 SCC 161 wherein it was observed that only two courses of action were available to adjudicating authority in a petition under section 7 i.e., Adjudicating Authority must either admit application under clause (a) sub-section (5) or it must reject application under clause (b) of sub-section (5), statute does not provide for Adjudicating Authority to undertake any other action, but for two choices available.

HELD

- The question of whether section 7 sub-section (5) was mandatory or discretionary was not in

issue in any of the judgments cited on behalf of the Review applicant. What was in issue in E.S. Krishnamurthy's case (supra) was whether the adjudicating authority could foist a settlement on unwilling parties. That issue was answered in the negative. (Para 4)

- It is well settled that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case. (Para 6)
- To interpret words and provisions of a statute, it may become necessary for the Judges to embark upon lengthy discussions. The words of Judges interpreting statutes are not to be interpreted as statutes. (Para 7)
- There are no grounds for review of the judgment and order. The Review Petition is, accordingly, disposed of. (Para 8)

CASE REVIEW

Review Petition disposed of against *Vidarbha Industries Power Ltd.* v. *Axis Bank Ltd.* (2022) 140 taxmann.com 252/173 SCL 355/233 Comp Case 544 (SC) (para 8).

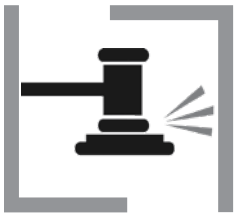
CASES REFERRED TO

E.S. Krishnamurthy v. *Bharath Hi-Tech Builders (P.) Ltd.* (2021) 133 taxmann.com 159/(2022) 169 SCL 644 (SC)/(2022) 3 SCC 161 (para 1).

K.V. Vishwanathan, Sr. Adv., **Sanjay Kapur**, AOR, **Ms. Megha Karnwal**, **Arjun Bhatia**, **Rahul Sangwan**, **Ms. Akhila Nambiar**, **Ms. Akshata Joshi**, **Ms. Shubhra Kapur**, Advs., **Tushar Mehta**, SG, **Ms. Madhavi Divan**, ASG, **Vikas Mehta**, **Ms. Apoorv Khator**, Advs., **Jaideep Gupta**, Sr. Adv., **Venkatesh**, **Ms. Kanika Chugh**, Advs., **Nitin Saluja**, AOR, **Suhael Buttan**, **Vikas Maini**, **Abhishek Nangia**, **Kartikaj Trivedi**, **Prateek Sakseria** and **Ms. Simran Saluja**, Advs. *for the Appearing Parties.*

† Arising out of order passed by Supreme Court in *Vidarbha Industries Power Ltd.* v. *Axis Bank Ltd.* (2022) 140 taxmann.com 252/173 SCL 355/233 Comp. Case 544 (SC).

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 144 taxmann.com 15 (SC)



(2022) 144 taxmann.com 18 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Arun Mittal *v.* Sun Control Systems

JUSTICE ASHOK BHUSHAN, CHAIRPERSON

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 298 OF 2022†

SEPTEMBER 20, 2022

Section 5(6) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Dispute - Corporate debtor issued a work order to operational creditor to supply and install UPVC Profile of doors and windows - Operational creditor raised invoices - Corporate debtor defaulted in making payment of debt due - Operational creditor issued demand notice claiming operational debt and filed an application under section 9 to initiate CIRP in respect of corporate debtor - Said application was admitted by NCLT - Aggrieved by order of NCLT, corporate debtor had preferred instant appeal praying for termination of CIRP process initiated against corporate debtor on ground that there were defects in work executed and that 50 per cent work was not completed - It was noted that there was no exchange of correspondence raising any dispute prior to issue of demand notice - Whether, there was nothing credible to substantiate pre-existence of dispute - Held, yes - Whether corporate debtor had defaulted in payment of operational debt of an amount exceeding Rs. 1 lakh, i.e., Rs. 2,26,258, which amount had clearly become due and payable - Held, yes - Whether in absence of any pre-existing dispute, no error had been committed by NCLT in admitting application under section 9 and initiating CIRP and, therefore, impugned order passed by NCLT admitting application under section 9 did not require any interference - Held, yes (Paras 14, 15 and 17)

FACTS

- The corporate debtor/appellant issued a work order to operational creditor to supply and install UPVC Profile of doors and windows including toughened glasses in the Regency Park Project of the corporate debtor. The operational creditor raised invoices.
- Corporate debtor defaulted in making payment of the debt due. The operational creditor issued statutory demand notice under section 8 claiming operational debt. The corporate debtor replied to the Demand Notice mentioning that more than 50 per cent of work not having been completed and there being defects in the execution of work, payment for entire work could not be demanded. The operational creditor filed an application under

section 9 to initiate CIRP against corporate debtor.

- The NCLT came to the conclusion that there being clear indication of an operational debt due from the Corporate Debtor and the Corporate Debtor having defaulted in making payment of the debt due and further in the absence of any pre-existing dispute relating to the said debt, admitted the section 9 application filed by operational creditor and ordered initiation of CIRP.
- Aggrieved by the order of the NCLT, the corporate debtor had preferred instant appeal praying for termination of CIRP process initiated against the corporate debtor. Corporate debtor had alleged that there were defects in the work executed and that exorbitant rates were charged by the operational creditor.

HELD

- The short point for consideration is whether payment to the Operational Creditor/Respondent No. 1 as per work order is triggered in the instant case giving rise to an operational debt, and if so, whether a default has been committed by the corporate Debtor/Appellant in respect of payment of such operational debt having already become due and payable and whether the said operational debt exceeds an amount of Rs. 1 lakh and is an undisputed debt. (Para 12)
- It is an admitted fact that three separate work orders were issued on 10-6-2016, 5-5-2017 and 16-8-2017 for supply and installation of UPVC profile of doors and windows including toughened glasses on payment terms as at para 2(d) above. Based on the said purchase orders, the Respondent No. 1 raised invoices from 22-9-2015 till 28-12-2018 which have been duly recorded by Adjudicating Authority at para 1(iii) of the impugned order. Without going into the intricacies of minutely examining the account statements, the ledger accounts relied upon by the appellant and also by the Respondent No. 1 in his written submissions before the NCLT has also been considered along with other material records. It is further noted that while the Corporate Debtor/Appellant has claimed that bills raised against these invoices amounts to Rs. 1,18,61,393. The respondent No. 1 has claimed an amount of Rs. 1,18,61,078. The variance between the two figures being nominal, the difference is ignored. However, it is found that while Corporate Debtor/ Appellant has claimed to have paid Rs. 92,62,856, the Respondent No. 1 has claimed to have received only Rs. 83,93,717. It is pertinent to note that the Corporate Debtor/ Appellant has admittedly held back an amount of Rs. 23,72,215 on the ground that 15% payment was to be released after installation and 5 per cent amount as defect liability to be released after 6 months. Again, by their own admission, it is noted that the Corporate Debtor/

Appellant has submitted that the Respondent No. 1 completed installation in 92 out of 149 flats which accounts for 62 per cent completion of installation work. It logically follows that Respondent No. 1 was entitled to receive 62 per cent payment from out of the retained amount, on *pro rata* basis for the completed installations. If that be the case, then payment to the tune of Rs. 14.70 lakhs had become due and payable as per payment terms and for which invoices had also been raised. The contention of the Appellant that payment was to be made only after full installation was completed in the respective towers and not on flat-wise completion cannot be acceded to for the following reasons. Firstly, it fails to explain why composite payment was not insisted upon tower-wise for the 80 per cent amount for material delivery and RA bills were accepted. Secondly, from a plain reading of the payment terms, we do not find any embargo having been placed on the Operational creditor from claiming flat-wise payments as long as the installation was complete. (Para 13)

- Furthermore, the assertion made by Respondent No. 1 that Corporate Debtor/Appellant has in any case admitted that it owes an operational debt amounting Rs. 2,26,258 to respondent No. 1 which is yet to be paid is agreed with. The explanation given by Corporate Debtor/Appellant for not releasing this payment to Respondent No. 1 is that this amount has not been demanded by them and that they have not agreed to accept this amount as a final payment. This is a lame excuse to posit a justification to cover grounds for not having paid an admitted debt that had become due and payable. Moreover, when the operational debt had already arisen and become due, and invoice was also raised, in such circumstances, merely placing of conditions prior to release of payment, does not alter the colour and character of the operational debt and does not detract from its having become due and payable. The above findings clearly establish that the first two conditions laid down in the Mobilox Innovations (P.) Ltd. v. Kirusa Software (P.) Ltd. (2017) 85 taxmann.com 292/140 CLA 123/144 SCL 37/4 Com. LJ 255/205 Comp. Case 324 (SC)/ (2018) 1 SCC 353 of operational debt exceeding Rs. 1 lakh and having become due and payable but not yet paid is squarely met. (Para 14)

- Records reveal that no disputes were raised prior to the issuance of statutory demand notice on 3-6-2019 under section 8. There is no exchange of correspondence raising any dispute prior to issue of demand notice. It is noted that three grounds have been raised but all post issue of demand notice. One ground is that there are defects in the work executed which was contained in the reply to the demand notice sent on 10-6-2019. However, it is a cryptic

letter and does not flesh out any details and therefore lacks sufficient gravitas. The second ground as cited in the same reply dated 10-6-2019 is that 50 per cent work is not completed but again no supporting documents are available on record to show exchange of any sustained correspondence with the Operational creditor having taken place in this regard prior to issue of demand notice. The other ground raised is that of exorbitant rates being charged by the Operational creditor but that too has also been raised post issue of demand notice. There is nothing on record to suggest that the Corporate Debtor/Appellant raised any such dispute before receipt of invoices or at any period prior to the issue of demand notice. Thus, even on the third test laid down by Mobilox Innovations (P.) Ltd. (supra), it is found that there is nothing credible to substantiate the pre-existence of dispute. (Para 15)

- The corporate debtor has defaulted in the payment of operational debt, of an amount exceeding Rs. 1 lakh (i.e. Rs. 2,26,258), which amount had clearly become due and payable, and further in the absence of any pre-existing dispute, no error has been committed by the NCLT in admitting the application under section 9 and initiating CIRP and, hence, instant appeal is dismissed. (Para 17)

CASE REVIEW

Sun Control Systems v. *Aarcity Infrastructure (P.) Ltd.* (2022) 144 taxmann.com 17 (NCLT - New Delhi) (para 17) *affirmed.* (***See Annex***)

Mobilox Innovations (P.) Ltd. v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/140 CLA 123/144 SCL 37/4 Comp. LJ 255/205 Comp. Case 324 (SC)/(2018) 1 SCC 353 (para 12) *followed.*

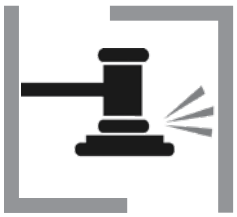
CASES REFERRED TO

Mobilox Innovations (P.) Ltd. v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/140 CLA 123/144 SCL 37/4 Comp. LJ 255/205 Comp. Case 324 (SC)/(2018) 1 SCC 353 (para 3), *Amitabh Ray* v. *Master Development Management (India) (P.) Ltd.* (Co. Appeal No. (AT) (Ins.) No. 274 of 2022) (para 6), *Innovative Industries Ltd.* v. *ICICI Bank* (2017) 84 taxmann.com 320/140 CLA 39/143 SCL 625/4 Comp LJ 193/205 Comp. Case 57 (SC)/(2018) 1 SCC 407 (para 10) and *Vidarbha Industries Power Ltd.* v. *Axis Bank Ltd.* (2022) 140 taxmann.com 252/173 SCL 355/233 Comp Case 544 (SC) (para 16).

Abhijeet Sinha and **Kunal Godhwani**, Advs. *for the Appellant*. **Bhuvan Arora**, **Ramesh Gupta**, **Aakash Bhardwaj**, **Sanjay Pal**, **Rishi Sood**, **Parv Garg**, **Pawas Kulshreshtha**, **Piyush Hans**, Advs. and **Harsh Pratap Shahi** *for the Respondent.*

† Arising out of order of NCLT - New Delhi in *Sun Control Systems* v. *Aarcity Infrastructure (P.) Ltd.* (2022) 144 taxmann.com 17.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 144 taxmann.com 18 (NCLAT - New Delhi)



(2022) 144 taxmann.com 71 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Alok Kaushik Erstwhile Resolution Professional of Cheema Spintex Ltd. *v.* Cheema Spintex

JUSTICE ASHOK BHUSHAN, CHAIRPERSON
AND BARUN MITRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 896 OF 2022†

SEPTEMBER 5, 2022

Section 18, read with sections 12A and 208, of the Insolvency and Bankruptcy Code, 2016 and rule 11 of the National Company Law Tribunal Rules, 2016 and regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Interim Resolution Professional - Duties of - R2-operational creditor filed an application against corporate debtor to initiate CIRP, and same was admitted by NCLT - Appellant was appointed as IRP of corporate debtor - Thereafter, corporate debtor entered into a settlement with operational creditor - Further, IRP was requested to proceed to file withdrawal application - IRP filed an application for withdrawal of CIRP application including discharge from duties as IRP and also filed expenses incurred on CIRP - NCLT vide impugned order held that IRP misconducted in not pursuing withdrawal application and unnecessarily adding to costs by carrying out non-essential activities - IRP submitted that mere filing of withdrawal application did not lead to automatic stay of CIRP proceedings and, therefore, as IRP he was duty bound under CIRP regulations to complete CIRP proceedings and for this purpose he had to engage other professionals and deploy resources thereby incurring expenses and, therefore, NCLT wrongly disallowed fees and expenses payable to IRP for conduct of CIRP and for making erroneous remarks about conduct of IRP - Whether since application under section 12A had already been filed by IRP before NCLT well before constitution of CoC, continuance of IRP with CIRP process without making adequate effort to seek point clarification from NCLT on whether to proceed with CIRP or not, did not reflect well on its conduct - Held, yes - Whether since IRP took advantage of fluid situation and unnecessarily added to costs by carrying out activities, which could have otherwise been put to hold, conduct of IRP was deprecatory and, therefore, impugned order passed by NCLT did not suffer from infirmities and same was to be affirmed (Paras 12 and 16)

FACTS

- An operational creditor filed a petition under section 9 to initiate CIRP against R1-corporate debtor.
- The NCLT audited said application, and commenced CIRP proceedings, the appellant-IRP was appointed, and in pursuance of duties and responsibilities, a public announcement was made.

- However, before the expiry of last date for submission of claims, a settlement was arrived between R1 and the operational creditor, and latter submitted forms FA to the IRP seeking withdrawal from the CIRP.
- The IRP moved an application before NCLT for withdrawal of CIRP application under section 12A including discharge from duties as IRP and restoration of suspended board of directors of the corporate debtor.
- The ex-management of the corporate debtor had also filed application on 22-10-2021 seeking withdrawal of CIRP and stay on CIRP of the corporate debtor.
- The NCLT while considering the stay application of the corporate debtor had directed the IRP to file the details of its fee charged for conducting the business of the corporate debtor.
- The expenses incurred on CIRP was filed by the IRP in pursuance to the order passed by NCLT.
- The NCLT vide impugned order, held that CIRP process be closed and that the withdrawal application having been filed prior to constitution of the CoC, there was no requirement to obtain the consent of the members of the CoC in this regard.
- The NCLT further held that the IRP committed misconduct in not pursuing the withdrawal application filed by himself only and unnecessarily adding to the costs by carrying out non-essential activities, therefore CIRP costs were allowed to the extent of Rs. 8.36 thousand and the same was to be reimbursed by the corporate debtor.
- On appeal, the appellant submitted that mere filing of the withdrawal application did not lead to automatic stay of the CIRP proceedings, therefore, as IRP he was duty bound under the CIRP regulation to complete the CIRP proceedings, and for this purpose he had to engage other professionals and deploy resources, thereby incurring expenses.
- The appellant further submitted that the CIRP costs and IRP's fee was placed before CoC and duly ratified by CoC, and despite its best possible efforts, the NCLT had been wrong in not appreciating the conduct of the IRP and made adverse remarks without cogent reason which should therefore be expunged.

HELD

- It is an undisputed fact that the operational creditor having entered into a settlement with the corporate debtor, he had informed the IRP in the prescribed format, seeking withdrawal of CIRP. Within six days, the IRP had also filed the CIRP withdrawal application before the Adjudicating Authority. The corporate debtor also had taken steps on his part before the Adjudicating Authority for stay on the CIRP and also filed an

application for withdrawal of the CIRP. It is therefore amply clear that all the important stakeholders in the process were in unison in seeking closure of CIRP and awaiting final directions of the Adjudicating Authority. It is also pertinent to note that the withdrawal applications were filed by the stakeholders before the constitution of CoC which had its first meeting. It is also observed that the IRP had been present before the Adjudicating Authority as and when the matter came up for hearing on the related application and that details of the expenses incurred on CIRP was filed by the IRP in pursuance to the orders passed by the Adjudicating Authority. Yet another crucial point to be borne in mind is that while examining the expense-details filed by the IRP, the Adjudicating Authority took cognizance of the fact that records and assets were not handed over to the IRP by the ex-management of the corporate debtor consequent upon their settlement with the operational creditor and therefore only the expenses found essential have been allowed while the remaining disallowed and treated as non-essential. The Adjudicating Authority after categorizing the costs as essential and non-essential have allowed the CIRP costs to the extent of Rs. 8.36 thousand to be reimbursed by the corporate debtor. The Adjudicating Authority has also allowed certain amount as the expenses of the IRP and for payment towards his fees. (Para 11)

- Given the material on record and the facts and circumstances in the instant matter, inclined to agree with the finding of the Adjudicating Authority that since the section 12A application was filed by the IRP before the Adjudicating Authority well before the constitution of CoC, the IRP's continuance with the CIRP process without making adequate efforts to seek pointed clarification from the Adjudicating Authority on whether to proceed with the CIRP or not, does not reflect well on his conduct. IRP cannot afford to be unmindful of the fact that he is the driving force and the nerve-center in the resolution process and is expected to assist in the CIRP process in a fair and objective manner in the best interest of all stakeholders. Simply by registering presence on each date of hearing before the Adjudicating Authority without seeking clear guidance on CIRP modalities cannot in itself become a sufficient ground for the IRP to proceed with the CIRP full throttle. As an officer of the Court, it was incumbent upon the IRP to highlight before the Adjudicating Authority the special and peculiar circumstances that he was confronted with in the matter. Instead of pursuing the withdrawal application with greater vigour, he has rather chosen to mechanically proceed with CIRP by taking the plea of adherence to CIRP Regulations, therefore agree with the Adjudicating Authority that the conduct of the IRP though may be technically correct, the

same cannot be countenanced given the attendant circumstances. (Para 12)

- As regards the CIRP expenses claimed by the appellant/IRP, it is observed that the Adjudicating Authority had directed the IRP to file the details of expenses and IRP had accordingly submitted the expense details. The Adjudicating Authority in the impugned order has carefully examined in details the expenses and given cogent reasons for disallowing several items of expenditure by treating them as "non-essential". The grounds cited in the impugned order for disallowing expenses incurred on valuation exercise and payment to advocate is justified particularly because these tasks were contingent upon the records and assets being handed over to the IRP by the ex-management of the corporate debtor which in fact had not happened. That these records and assets were not available with the IRP is substantiated by the fact that the appellant/IRP on his own had filed an application before the Adjudicating Authority for non-co-operation on the part of the former management of the corporate debtor. The contention of the appellant that creation of an artificial classification by the Adjudicating Authority of essential and non-essential activities during CIRP is ultra vires the provisions of the IBC is not a tenable argument since the Adjudicating Authority has used these terms more as an easy reckoner to decide on whether to allow or disallow the item of expenditure and not acted in any manner contrary to the form and spirit of IBC. In sum, no reason was found to differ with the evaluation exercise of CIRP expenses filed by the IRP as carried out by the Adjudicating Authority in allowing some expenses and disallowing some. (Para 13)

- Now dwell on the remarks made by the Adjudicating Authority, strongly disapproving the conduct of the IRP in unnecessarily adding to the CIRP costs by carrying out non-essential activities. In the IBC framework, the IRP is the *fulcrum* of the CIRP process and is obligated to act as the bridge between the Adjudicating Authority, the CoC and other stakeholders including the corporate debtor. As an officer of the court vested with administrative powers, the IRP as the facilitator of the resolution process needs to conduct the process with fairness, diligence, forthrightness and highest sense of responsibility. This aspect squarely finds place in section 208(2)(*a*) which subjects the insolvency professionals to abide by a code of conduct which, *inter alia*, obligates the IRP to take reasonable care and diligence while performing his duties. Further, Regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 clearly stipulates that the registration of an insolvency professional is subject to various conditions, one of them being to

abide by the Code of Conduct specified in the first schedule to these Regulations. (Para 14)

- From a reading of the above article in the Code of Conduct, it is clear that what is reasonable, is not amenable to precise definition and therefore is context specific. Given that CIRP withdrawal application before the Adjudicating Authority was a known factor, it would only have been fair on the part of the IRP, if instead of pressing the accelerator on the CIRP process, he had pursued in serious earnest with the Adjudicating Authority for its clear directions and guidance on proceeding with the CIRP. On the contrary, the IRP acted in great hurry to push forward the CIRP exercise on the specious plea that he was acting as per the mandate given by the IBC and CIRP Regulations, and, in the process carried out certain activities which have added to the CIRP costs. The Adjudicating Authority has therefore based on cogent grounds expressed disapproval of the unseemly conduct of the IRP in strong terms. The impugned order considered it is opined that the IRP seems to have taken advantage of the fluid situation and unnecessarily added to the costs by carrying out activities which could have otherwise been put on hold and find the conduct of the IRP deprecatory. (Para 15)

- In the light of the above discussions, no substance was found in the submission raised by the appellant to warrant any interference in the impugned order. The impugned order passed by the Adjudicating Authority, not suffering from any infirmities, is hereby affirmed. The appeal being devoid of merit was to be dismissed. (Para 16)

CASE REVIEW

Kotak Commodity Services (P.) Ltd. v. *Cheema Spintex Ltd.* (I.A No. 510/2021 in CP (IB) No. 352 (Chd.) of 2018, dated 30-5-2022 (para 16) *affirmed.*

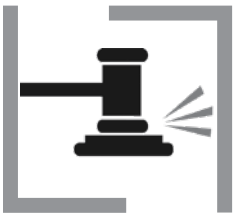
CASES REFERRED TO

Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365/213 Comp. Case 198 (SC) (para 10).

Rajendra Beniwal and **Aman Singhania**, Advs. *for the Appellant.* **Kshitij Kumar**, Adv. *for the Respondent.*

† Arising out from order of NCLT in *Kotak Commodity Services (P.) Ltd.* v. *Cheema Spintex Ltd.* (I.A. No. 510/2021 in CP(IB) No. 352 (Chd.) of 2018, dated 30-5-2022).

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 144 taxmann.com 71 (NCLAT- New Delhi)



(2022) 144 taxmann.com 72 (Bombay)

HIGH COURT OF BOMBAY

NRC Ltd. *v.* State of Maharashtra

G.S. PATEL AND GAURI GODSE, JJ.

WRIT PETITION NO. 8449 OF 2022

SEPTEMBER 30, 2022

Section 31, read with section 3(6), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Petitioner-corporate debtor had gone into CIRP and IRP was appointed - There were outstanding dues to Electricity Distribution Company(EDC), which had every opportunity to present its claims before IRP within time/extended time - However, EDC did not present its claim before approval of resolution plan and appointment of successful resolution applicant - Thereafter, successful resolution applicant made an application for new electricity connection at its four premises, which was refused by EDC on ground that past dues had not been paid - Whether since claim for past dues of EDC stood extinguished as it had not presented its claims before IRP within time/extended time, it could not have refused new connection/restoration only on basis that its past dues had not been paid - Held, yes - Whether therefore, EDC was to be directed to process successful resolution applicant's application for new electricity connection at its four premises without insisting on payment of its demand for past arrears - Held, yes (Paras 31, 32 and 44)

FACTS

- The petitioner NRC Ltd. used to manufacture many different products, including yarn and basic chemicals. In July 2009 NRC was declared sick under the provisions of the erstwhile Sick Industrial Companies (Special Provision) Act 1985. Following this, NRC previous management declared a lockout. This resulted in a complete and immediate cessation of NRC's operations and consequently of its earnings. NRC could not clear many debts, including those it owed to MSEDCL.

- On 3-11-2015, MSEDCL issued an electricity disconnection notice and on 18-4-2016, MSEDCL disconnected power entirely. The NRC Mazdoor Sangh filed Writ Petition seeking a restoration of electricity supply. On 4-5-2016, by an interim order, the Court directed the restoration of electricity supply to NRC but only for its water treatment plant so that water could be supplied to the workmen living in the NRC colony. NRC Ltd. had thus used electricity supply by MSEDCL for this limited purpose. The rest of the NRC Ltd. premises were without power.

- On 28-6-2018, Punjab National Bank (PNB) filed an application under section 7 of the IBC before the NCLT against NRC Ltd. initiating the Corporate Insolvency Resolution Process (CIRP). NCLT admitted the Petition on 27-11-2018, triggering a moratorium under section 14 of the IBC. The NCLT appointed an Interim Resolution Professional or IRP.

- On 7-12-2018, the IRP issued a public notice or advertisement inviting claims from NRC Ltd's creditors. On that very day, MSEDCL issued a notice to NRC under section 56(1) of the Electricity Act demanding payment of Rs. 13.39 crores towards uncleared and pending electricity dues as set out in its bill of 1-12-2018. MSEDCL agrees that it learnt of the initiation of the CIRP against NRC Ltd. in some legal proceedings in the High Court from submissions made in that regard by NRC Ltd. itself.

- Under the IRP's notice the last date for filing proof of claims by creditors was 17-12-2018. However, MSEDCL did not submit its claim by 17-12-2018 or even after the 90 day period, *i.e.*, by 5-3-2019.

- The usual steps in the CIRP followed. There was a Committee of Creditors (CoC). AP came forward as a Resolution Applicant. It propounded a Resolution Plan. The CoC examined the feasibility and viability. There were many creditors: statutory, secured and otherwise. The Resolution Plan was put to vote and finally approved as required by law.

- MSEDCL filed a Miscellaneous Application before the NCLT and sought modification of the NCLT's order of admission passed on PNB's application under section 7 of the IBC. MSEDCL sought that the NCLT should clarify that the uninterrupted supply of goods and services, i.e., electricity by MSEDCL would be subject to payment of charges consumed during the entire moratorium period. The second relief sought was that if the corporate debtor — in this case NRC Ltd. — or the Petitioning Creditor, *i.e.*, PNB, failed to pay the 'regular current electricity bills' then MSEDCL be set at liberty to disconnect electricity supply as per the provisions of the Electricity Act, 2003.

- The NCLT disposed of MSEDCL's Miscellaneous Application saying that since it had already considered and approved the Resolution Plan, there was no occasion or reason to consider any modification of the order admitting the initial application filed by PNB.

- Thereafter, MSEDCL served a notice under section 56(1) of the Electricity Act 2003 on AP. It said that on approval of the Resolution Plan, AP, the successful Resolution Applicant now had to make payment for past unpaid towards electricity arrears.

- NRC, now under new management, denied liability on the simple ground that MSEDCL's claims did not form part of the approved and sanctioned Resolution Plan. Past liability stood extinguished, NRC maintained, and therefore MSEDCL had to issue fresh bills from the period commencing from the date of commencement of CIRP.

- Very shortly after this, the MERC (Electricity Supply Board and Standard of Performance of Distribution Licenses including Power Quality) Regulations 2021 came into force. It is there that Regulation 12.5 substitutes for Regulation 10.5 of the previous Regulations of 2005 and provides that any charge for electricity or any sum shall be a charge on the premises transmitted to the legal representatives/successors-in-law or transferred to the new owner/ occupier of the premises, as the case may be and the same shall be recoverable by the distribution Licensee as due from such legal representatives or successors-in-law or new owner/occupier of the premises, as the case may be.

- MSEDCL demanded past arrears, however, NRC contended that these past liabilities stood extinguished upon the approval of the sanctioned resolution plan. NRC Ltd. asked MSEDCL to restore electricity supply.

- After this, NRC filed an application with MSEDCL for a new electricity connection at its properties at four villages. MSEDCL rejected the applications by impugned petition on the ground of non-payment of electricity arrears.

- On Writ Petition:

HELD

- The respondent correctly and fairly points out, what the Court is asked to do is to balance the competing interests going forward. This is not an order on final disposal of the Petition. MSEDCL's claims and contentions will be assessed at some later date. In the meantime, the interests of MSEDCL, not merely because it is a State-run authority but even otherwise, should be sufficiently safeguarded by an appropriate order of this Court. Whether this should take the form of a deposit in Court or by some other means is a matter best left to the discretion of the Court. (Para 27)

- The petitioner agrees that an interim order will need to be fashioned. However, he submits that the viability of the Resolution Plan is indeed a very delicate thing. That plan is taken to fruition not by some off-the-cuff proposal. It goes to an extremely arduous and exacting process. The statute itself and its companion regulations provide for this. Claims are invited and these are not invited by an applicant or a private party or a stakeholder but by somebody authorised by the statute to carry the process

forward. These claims, once they are received, are not all accepted or rejected as a whole. The Resolution Applicant makes its case regarding viability of its proposal. Individual claims are discussed. There are secured creditors, unsecured creditors, statutory creditors and all these claims are considered. The Resolution Plan may in fact undergo modifications and changes through this process. The Committee of Creditors, as the very name suggests, is one filter. The Resolution Professional is the next, for under section 30, he must be satisfied as to the workability of the proposed plan. The next level filter is the approval of the NCLT which is mandated by law under section 31. This considers the views of the CoC and the RP, but the law does not suggest, the petitioner submits, and correctly so that the NCLT has simply to rubber stamp the views of the CoC or the RP.(Para 28)

- No final pronouncement is required to be made on this aspect of the matter at all at this stage. The point is different. If, despite being given notice, a particular creditor, whether it is supplying essential services or otherwise, does not respond within the time or within the extended time, then the statute itself provides for an extinguishment of that claim. Again, the petitioner is careful to submit, that a final determination of this is not necessary at this stage. His submission is only directed to two purposes or ends; first, that it is in these circumstances that there cannot be an order requiring NRC Ltd. to make a deposit to cover MSEDCL's claim for past arrears. Second, if every creditor then chooses to stay outside the CIRP and later raise a demand, and if Court after Court is then going to compel the Resolution Applicant to deposit vast amounts in Court, the entire approved Resolution Plan is as good as shattered. The Resolution Plan is, the petitioner submits, not some omnibus random figure that is presented on a take-it-or-leave-it basis. It is a negotiated amount that takes into account existing claims and considers how much of each claim is to be paid across all classes of creditors. From the perspective of the Resolution Applicant, in this case AP, it is necessary that the Resolution Applicant knows exactly what it is committing itself to in terms of financial obligations, monetary obligations and even fiscal obligations, *i.e.*, claims from tax authorities. He puts like this: if on the approval on the Resolution Plan even a claim by a tax authority is held by the Supreme Court's decision to stand extinguished, then this much surely apply down the line to all other classes of creditors irrespective of the nature of the goods or services supplied. (Para 29)

- The other aspect of the matter, to which the petitioner points, is to take a step back and look at the

initiation of the CIRP process under section 7. A Petitioning Creditor comes to the NCLT and says its debts have not been paid and that the mandated CIRP process may begin. At this stage, nobody knows the final outcome. There is no assurance that the CIRP process will ultimately succeed or that a Resolution Plan will in fact be approved. Two routes or eventualities are clearly possible. The end results are entirely different and have different implications and connotations. One possibility is that Resolution Applicant comes forward, propounds a Resolution Plan, this is taken up by the CoC, considered, debated, and goes through the tests of sections 30 and 31, to final approval. As he earlier pointed out, the one thing this requires above all is certainty as to obligations that the Resolution Applicant has taken on or agreed to take on. The other possibility at the stage of initiation of a CIRP process is that there is no Resolution Plan, or the proposed Resolution Plan fails to pass muster. In that eventuality, the company moves into liquidation and a completely different and distinct structure arises. This involves the husbanding of the assets of the company from different areas and sources by the liquidator and of then realising them, assessing the claims that are received by creditors, setting these in the priorities required by law and then making payment or pro-rated payment to creditors in that established order. The one thing that neither eventuality contemplates is what the Supreme Court described as 'Hydra popping', a reference to the serpentine water monster from Greek and Roman mythology, a creature with many heads and a regeneration feature: for every head chopped off, Hydra would grow two more. (Para 30)

- The petitioner says MSEDCL had every opportunity to present its claims before the IRP within the time or the extended time. It did not do so. In law, its claim for past dues is extinguished. (Para 31)

- The petitioner is right in this formulation. What the respondent tells is not that MSEDCL did not know or can be held to not have known of the IRP-set date by which claims were to be received or the extended date mandated by law. Instead, she canvasses the reverse, which is to say that IRP or RP 'ought to have known from litigation papers' that MSEDCL had a claim and ought to have included that claim in the Resolution Plan. Her submission is that since this was disclosed in a litigation the Resolution Applicant ought to have disclosed this. It cannot be seen how this helps the respondent very much because the mere disclosure by Resolution Applicant is not equivalent to a lodging of proof of claims by the creditor. The submission seems to imply that if a Resolution Applicant can be shown to have been aware of a claim by creditor, then the

creditor has no obligation to file its proof of claims with the IRP or RP. Such a submission has only to be stated to be rejected precisely for the reasons that the petitioner outlines. It would play havoc with the entire structure of the CIRP process. Nobody would know with any certainty which claim existed in what form and to what extent. Nobody would know whether that claim had to be paid in full. This is because the next necessary implication of the submission on behalf of the MSEDCL is that once AP as the Resolution Applicant or the Resolution Professional disclosed what they must be deemed to have known, then the Resolution Plan should have provided for a full payment of that claim without any reduction. That is not the framework of the CIRP process at all. The process of inviting claims by the IRP or RP is not very different from the process that the Liquidator has traditionally taken in any corporate winding up or liquidation process. Claims are invited in both situations. The difference is that in the case of a resolution process the claims are invited at an earlier point in time *i.e.*, not during liquidation. Those claims are invited precisely to avoid liquidation, this being the legislative mandate of the IBC itself. But the mere filing of a proof of the claim does not mean that the claims stand verified and proved on their own by the mere filing. The IRP/ RP is no mere post-office to merely take a claim and send it forward. The IRP is required to verify the claim. There may be questions of limitation. Some claims may require adjudication. There may be several other reasons why such claims may not be accepted at all or in the full form in which they are submitted to the IRP.(Para 32)

- If MSEDCL did not submit its claims entirely or within the extended time, can its claim for past dues of Rs. 28.54 crores be said to have been 'extinguished'? For this, first the decision of a three Judge Bench of the Supreme Court in *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Assets Reconstruction Co.* (2021) 126 taxmann.com 132/166 SCL 237/227 Comp. Case 251 (SC)/(2021) 9 SCC 657 needs to be referred to. This has an elaborate analysis of the IBC. Among other things, it also considers a previous three-Judge decision of the Supreme Court itself in *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234/(2020) 8 SCC 531 (SC). Among the findings by the Supreme Court in the Ghanashyam Mishra (supra) was that after the CoC approves the plan, the adjudicating authority, that is to say the NCLT, must arrive at a subjective satisfaction that the plan conforms to the requirements of the statute. Once this is done, the Supreme Court tells us, the plan 'becomes binding on the corporate debtor, its employees, members, creditors, guarantors and

other stakeholders'(the words of the statute). The legislative intent is to freeze all claims 'so that the Resolution Applicants starts on the clean slate and is not flung with any surprise claims'. If that is permitted, the Supreme Court says, the very calculations on the basis of which the Resolution Applicant submits its plans, would go haywire and the plan would become unworkable. (Para 33)

- Who are the 'other stakeholders'? The Supreme Court in Ghanashyam Mishra & Sons (P.) Ltd. (supra) said that would squarely cover the Central Government, any State Government, and any local authorities. Indeed, it was found that because there was an obvious lacuna, several State Tax Authorities did not abide by the mandate of the IBC but continued with the proceedings. This resulted in a legislative intervention in the form of a 2019 amendment to cure precisely this mischief. The Supreme Court in Ghanashyam Mishra & Sons (P.) Ltd. (supra) held that amendment to be declaratory, clarificatory and therefore retrospective in operation. This aspect of the law on retrospectivity was considered in depth. In addition, the Supreme Court in Ghanashyam Mishra & Sons (P.) Ltd. (supra) took into account the definition of 'creditor', which means any person to whom a debt is owned. The definition is inclusive. It includes a financial creditor, operational creditor, secured creditor an unsecured creditor and a decree holder. This is important because in the facts of instant case MSEDCL says that it is an operational creditor. In Ghanashyam Mishra & Sons (P.) Ltd. (supra), the Supreme Court also looked at the definition of 'operational creditor'. This means a person to whom an operational debt is owned and includes a transferee or assignee. An operational debt is a claim in respect of the provision of goods or services including employment or a debt in respect of payment of dues arising under any law for the time being in force and payable to the Central Government any State Government or local authority.(Para 34)

- The Supreme Court now interpreted the retrospectively operational 2019 amendment to mean that on the Resolution Plan being approved under section 31 by the NCLT, all claims and dues owed to any State Government, Central Government or any local authorities — including tax authorities — and which were not part of the resolution shall stand extinguished. There is no ambiguity whatsoever in the ratio of the decision of the Supreme Court in *Ghanashyam Mishra & Sons (P.) Ltd.* (*supra*) (Para 35)

- But the respondent draws attention to a later decision of the Supreme Court itself in *State Tax Officer* v. *Rainbow Papers Ltd.* (2022) 142 taxmann.com 157/(2022) SCC

OnLine SC 1162. This is a decision by a two Judge Bench of the Supreme Court. Clearly it could not take a view different from that taken by the Supreme Court in Ghanashyam Mishra & Sons (P.) Ltd. (supra), a decision that was binding on it. It is for this reason that the respondent is at some pains to point out that Rainbow Papers in fact cites and follows Ghanashyam Mishra & Sons (P.) Ltd. (supra) but does not deviate from it. Her emphasis however is somewhat different. Rainbow Papers re-emphasises the very finding in the Ghanashyam Mishra & Sons (P.) Ltd. (supra) decision that Resolution Plan must conform to the provisions of the statute. The Resolution Professional and the adjudicating authority must ensure this. The adjudicating authority must record its subjective satisfaction of such conformity. In Rainbow Papers it is said that if the Resolution Plan ignores statutory demands payable to a State Government or a legal authority, the adjudicating authority is bound to reject the Resolution Plan. The Court went on to say that there must be a plan which contemplates a distribution of assets in a phased manner with uniform proportional reduction. Otherwise, the company would have to be liquidated and its assets sold and distributed. It went on to say that the CoC, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to a Government or Government authorities or for that a matter any other dues.(Para 36)

- Rainbow Papers must be read, as the Petitioner says, in context. What was before the Court was section 48 although of the Gujarat Value Added Tax Act, 2003 or the GVAT Act. That section said that any amount due on account of tax interest or penalty would be a 'first charge' on the property of the dealer, etc. The company in question, Rainbow Papers, was drawn into the CIRP process by a petition filed by an operational creditor. An IRP was appointed. Claims were invited by newspaper advertisements. A CoC was constituted. Then a RP was appointed. The STO filed a claim before the RP claiming an amount of Rs. 46.37 crores that was due. That claim was filed beyond time. The Resolution Applicant submitted a Resolution Plan. Many creditors objected to it. There were further proceedings. The RP informed the STO that its entire claim was waived or extinguished. The STO challenged the Resolution Plan and made an application in the form of an IA contending that its dues could not be waived or extinguished. It sought payment of the entire amount. The NCLT rejected this application as not maintainable. The STO filed an appeal before the NCLAT. The NCLAT dismissed that appeal *inter alia* on the ground that the STO had not filed its claim

within time. It was delayed not only before the Resolution Professional but also before the adjudicating authority. This was the factual matrix before the Court in Rainbow Papers. What is important, however, is the submission that there was statutory charge created by section 48 of the GVAT Act and it was pointed out that the STO had made its claim to the RP well before the Resolution Plan was approved even by the CoC under section 30(4) of the IBC.(Para 37)

- This puts MSEDCL's case in a class apart. The last date for filing proof of claims was 17-12-2018. The extended date was 5-3-2019. The CoC approved the Resolution Plan on 3-7-2019. MSEDCL's application for payment of dues post the moratorium was filed only in August 2019. It was not until 14-10-2019 that MSEDCL first forwarded a claim to the RP, that is to say, about three months after the CoC had approved the Resolution Plan was on 3-7-2019. Its demand under section 56(1) did not come until 21-1-2021. (Para 38)

- This takes one to a consideration of the submission that under the amended MERC Regulations of 2021 and Regulation 12.5, MSEDCL has a 'charge' on the premises. (Para 39)

- Prima facie, the submission is well founded. The word 'charge' is used in Regulation 12.5 as being the amount claimed or billed for electricity use. What Regulation 12.5 prima facie seems to say is that where there is a demand for electricity dues or any some other than such a demand due to distribution licensee was remained unpaid, then the amount is due in respect of those premises irrespective of the premises themselves changing hands. All that Regulation 12.5 says is that MSEDCL's claim is one that must be paid by whoever is occupying or using those premises. This is clear from the latter portion of Regulation 12.5: '... and the same shall be recoverable by the distribution Licensee as due from such legal representatives or successors-in-law or new owner/occupier of the premises ...' The recovery is not against the premises. It is against the person/entity. Therefore, this is not a 'charge' in the nature of a security.(Para 40)

- Two things are apparent. MSEDCL's demands are not person- or entity-specific. If one entity applies for a connection and then leaves the premises to which the connection provided, MSEDCL is not required to follow that entity to whatever location it chooses to migrate. It can recover from the successor. But it is equally clear, at least at this stage, that MSEDCL has no enforceable charge in specie over the premises themselves, and to which the connection is given. What the Regulation says is that whoever succeeds to the use of

an enjoyment of the premises, to get the benefit of the electricity connection, is liable to pay MSEDCL dues. That is all that Regulation 12.5 says. It does not create a statutory charge and MSEDCL cannot under that Regulation, for example, recover dues by purporting to attach or sell the premises to which the connection is given. But this Regulation does not permit MSEDCL to stand outside an approved Resolution Plan for the simple reason that its claim is for past dues, and these have been dealt with by the Resolution Plan. It was for MSEDCL to put in its claim, and to do so within time. It cannot, prima facie, by this circuitous route of 'deemed knowledge' position itself outside, or distance itself from, the approved Resolution Plan. If tax authorities are within the net of the IBC and the CIRP process, so is MSEDCL. (Para 41)

- The respondent's submission is finally that if AP leaves, where is MSEDCL supposed to recover its current dues from. But this surely negates the submission in regard to Regulation 12.5. The answer is that the person who then follows and uses the premises will be liable. As to its past dues, prima facie, the Resolution Plan will prevail and govern. (Para 42)

- It cannot be said that prima facie the MSEDCL's case here stands on same footing as Rainbow Papers. There is a completely unexplained failure on MSEDCL's part to lodge its claim within the RP in time. It really had to do very little except lodge its claim. There is the Supreme Court finding in Ghanashyam Mishra & Sons (P.) Ltd. (supra) regarding other claims including from tax authorities standing extinguished after the 2019 amendment. That simply cannot be ignored.(Para 43)

- The only course that is available in these circumstances, is to direct MSEDCL to process the NRC Ltd's application for the connection at the four villages without insisting on payment of the previous demand for past arrears, but on the clear understanding that this creates no equities in favour of NRC Ltd. in regard to MSEDCL demand. Second, that if NRC Ltd. pursues its application for a connection at the four villages, it does so on the footing that application will be processed, and the connection provided by MSEDCL subject to the outcome of this Petition. This must necessarily be so. The applications by NRC Ltd. for the reconnection and the new connection will be processed by MSEDCL on this basis. (Para 44)

CASE REVIEW

Ghanashyam Mishra & Sons (P.) Ltd. v. *Edelweiss Assets Reconstruction Company* (2021) 126 taxmann.com 132 (SC)/(2020) 8 SCC 531 (para 43) *followed.*

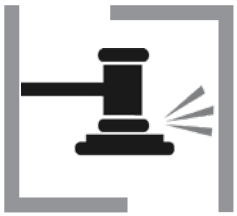
State Tax Officer v. *Rainbow Papers Ltd.* (2022) 142 taxmann.com 157/(2022) SCC OnLine SC 1162 (para 43) *distinguished.*

CASES REFERRED TO

Ghanashyam Mishra & Sons (P.) Ltd. v. *Edelweiss Assets Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237/227 Camp. Case 251 (SC)/(2021) 9 SCC 657 (para 33), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234/(2020) 8 SCC 531 (SC) (para 33) and *State Tax officer* v. *Rainbow Papers Ltd.* (2022) 142 taxmann.com 157/2022 SCC Online SC 1162 (para 36).

C. Keswani, **Akash Manwanai** and **Tanvi Rana** *for the Petitioner.* **Al Patel**, Addl. Govt. Pleader, **K.S. Thorat**, AGP, **Ms. Deepa Chavan**, **Kiran Gandhi**, **Nirav Shah** and **Ravindra Chile** *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 144 taxmann.com 72 (Bombay)



(2022) 144 taxmann.com 75 (NCLAT-New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Doha Bank Q.P.S.C *v.* Anish Nanavaty, Resolution Professional of Corporate Debtor Deloitte Touche Tohmatsu India LLP

RAKESH KUMAR, JUDICIAL MEMBER
AND DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS) NO. 414 OF 2021†

SEPTEMBER 9, 2022

Section 5(8) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Corporate debtor (RTL) had gone under CIRP based on company petition filed under section 9 and Resolution Professional (RP) was appointed - RP made a public announcement inviting claims from creditors of corporate debtor - Appellant-secured financial creditor of corporate debtor stated that R2 to R5 were not lenders of corporate debtor nor had corporate debtor extended any corporate guarantee in favour of R2 to R5 and only 'Deed of Hypothecation' was there as per which corporate debtor hypothecated its asset in favour of R-2 to R5 to secure loans disbursed by them to its group company RCE - Based on 'Deed of Hypothecation' RP considered R2 to R5 - indirect lenders as financial creditor - NCLT by impugned order had held decision of RP as correct - It was noted that 'Deed of Hypothecation' is merely creation of security interest and a mere security of interest created by hypothecation or mortgage does not constitute a financial debt - Whether 'Deed of Hypothecation' discharges liabilities of other borrowers upon their default and is limited to realization value of those hypothecated assets and, hence, it cannot be construed as a contract of guarantee - Held, yes - Whether 'Deed of Hypothecation' cannot be a basis to declare parties as financial creditors - Held, yes - Whether thus, impugned order of NCLT was to be set aside and R2 to R5 were derecognized as 'financial creditors' - Held, yes (Paras 11 and 12)

CASE REVIEW

Doha Bank Q.P.S.C. v. *Anish Nonavaty (RP of Reliance Infratel Ltd.)* (2022) 144 taxmann.com 74 (NCLT - Mum.) (para 12) *reversed.* (***See Annex***)

CASES REFERRED TO

Intesa Sanpaolo S.P.A. v. *Videocon Industries Ltd.* 2013 SCC Online Bom 1910 (para 5), *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 5), Innoventive Industries Ltd. v. *ICICI Bank Ltd.* (2017) 84 taxmann.com 320/143 SCL 625 (SC)/ (2018) 1 SCC 407 (para 5), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC)/2019 SCC Online SC 1478 (para

5), Assam Small Scale Ind. Dev. Corp. v. *J.D. Pharmaceuticals* (2005) 13 SCC 19 (para 8), *Housing Development Finance Corpn. Ltd.* v. *Ariisto Developers (P.) Ltd.* (MA Nos. 999 and 1124 of 2019, dated 13-11-2019) (para 8), Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/157 SCL 365/(2019) 4 SCC 17 (para 10), *Export Import Bank of India* v. *Resolution Professional JEKPL (P.) Ltd.* (2018) 97 taxmann.com 194 (NCLAT - New Delhi)/2018 SCC Online NCLAT 465 (para 10), Essar Steel Ltd. v. *Gramercy Emerging Market Fund* (2002) 40 SCL 848 (Guj.)/2002 SCC Online Guj. 319 (para 10) and *Anuj Jain* v. *Axis Bank Ltd.* (2020) 114 taxmann.com 656 (SC)/2020 SCC Online SC 237 (para 10).

Arun Kathpalia, Sr. Adv., **Shubhabrata Chakraborti**, **Ms. Sharmistha Ghosh** and **Jinal Shah**, Advs. *for the Appellant.* **Gaurav Joshi**, Sr. Adv. **Rishabh Jaisani**, **Ms. Mohana Nijhawan**, **Ms. Sumidha Mathur**, **Mohana Nijhawah**, **Kriti Kalyani**, Advs., **Amit Sibal**, Sr. Adv., **Saksham Dhingra**, **Kaustabh Prakash**, **Ms. Saloni Thakkar** , **Nilang Desai**, **Ms. Nafisa Kandeparket**, **Ayush Chadda**, Advs., **Pradeep Sancheti**, Sr. Adv., **Siddharth Ranade**, **Ms. Nishi Bhankharia**, **Kaazvin Kapadia**, **Ms. Saloni Gupta**, Advs., **Ramji Srinivasan**, Sr. Adv., **Ms. Rajshree Chaudhary** and **Jash Shah**, Advs. *for the Respondent.*

† Arising out of order of NCLT-Mum in *Doha Bank Q.P.S.C.* v. *Anish Nanavaty (RP of Reliance infratel Ltd.)* (2022) 144 taxmann.com 74

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 144 taxmann.com 75 (NCLAT-New Delhi)

Fixing of fees of IPE having wide variation without fixing any criterion or basis for calculating fees is not in conformity with the provisions of Regulation 7(1) of Liquidation Regulation as per which the remuneration to professionals appointed in the process of liquidation should be a reasonable

CASE NO.	IBBI/DC/131/2022
DATE OF ORDER	28th September, 2022

Contravention-1

Influencing Registered Valuer to change valuation of assets

The Insolvency Professional tried to dictate the methodologies for valuation and also to influence the valuation. The IP even intimidated the valuer of not paying them

of their fees in case valuation report is not prepared as per his views/directions.

Observations of the Disciplinary Committee of IBBI

- The email correspondences between the valuer and IP showed that IP was influencing the work of the registered valuer. In dealing with other professionals, especially valuers, abundant caution is required so as to avoid the situation of influencing the end results; which otherwise required to be carried out independently. It is not the question whether valuer was entrusted with the work of valuation or to examine specific query related to price discovery, in both the situation, threat to withhold the fee is devoid of any justification and is akin to influencing the price discovery mechanism.
- Considering the fact that valuers had been engaged not for doing the valuation of the assets of CD but for doing market assessment of the assets of the CD on the advice of SCC, DC of IBBI took lenient view and closed this particular contravention with a word of caution to the IP.

Provisions Referred

Clause 9 of the Code of Conduct as specified in the First Schedule of IBBI (IP) Regulations mandates that an IP shall not influence the decision or the work of the CoC or debtor, or other stakeholders under the Code, so as to make any undue or unlawful gains for himself or his related parties or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means to achieve any *mala fide* objectives.

Contravention-2

Prescribing Non-refundable participation fees

In the public announcements made on 17.09.2019, 27.09.2019, 21.10.2019, and 11.11.2019, IP prescribed non-refundable participation fee of Rs. 5,00,000/-, Rs. 10,00,000/-, Rs. 10,00,000/- and Rs.50,000/- respectively at the time of submission of Expression of Interests (EOI).

Observations of the Disciplinary Committee of IBBI

- Prescription of non-refundable participation fee by IP in successive auctions, despite the failure of previous auctions, would have acted as a deterrent for prospective bidders and would have led to limited participation and resultant failure of the auctions.
- The Disciplinary Committee accepted the submission of IP to the extent of non-application of regulation 36A(4)(d) and regulation 36B (4) of CIRP Regulations. (the auction happened before amendment notification). However, the submission of IP that the prescription of non-refundable participation fee would ensure the participation of legitimate bidders who possess the wherewithal and financial capability to execute such a sale, does not bode well as

evident from the circumstances of the instant case. On the contrary, the prospective participants were unaware that the condition of non-refund ability of participation fee shall be diluted in such scenarios where the auction fails, as such, some prospective bidders may not have even participated in the auction.

- Such misuse of authority on part of the liquidator defeated the very objectives of the Code to maximize value of assets of the CD and complete the process in a time-bound manner.
- IP contravened clauses 13 and 14 of the Code of Conduct under IP Regulations.

Provisions Referred

Clause (*d*) of sub-regulation (4) of amended regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) states:

> *"(d) not require payment of any fee or any non-refundable deposit for submission of expression of interest."*

Further, sub-regulation (4) of amended regulation 36B of CIRP Regulations states:

> *"(4) The request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan."*

The above provisions mandates the RP not to prescribe payment of any fee or any non-refundable deposit for submission of EOI and resolution plan for CDs during CIRP.

Clauses 13 and 14 of the Code of Conduct for Insolvency Professionals provided under IP Regulations states as follows:

> "13. An insolvency professional must adhere to the time limits prescribed in the Code and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties.
>
> 14. An insolvency professional must not act with *mala fide* or be negligent while performing his functions and duties under the Code."

Contravention-3

Appointment of unregistered valuers

- The IP appointed two registered valuers say "Mr. X" and "Mr. Y" vide respective engagement letters dated 30.04.2019. However, IP informed to SCC in its meeting held on 19.06.2019, that he appointed an LLP and a firm to conduct the valuation of the assets of CD instead of Mr. X & Mr. Y. The LLP and Firm as stated above were not IPE at that time. Further, the payments were also credited to the respective entities instead to the account of the registered valuers.
- Mr. X and Mr. Y as stated above further outsourced and appointed other valuers.

Observations of the Disciplinary Committee of IBBI

- The IP has not acted as per IBBI Circular No. IBBI/RV/019/2018 dated 17.10.2018 which mandates the liquidator to appoint only registered valuers with effect from 01.02.2019 to conduct valuation under the Code and Regulations made thereunder. Hence, IP is in contravention of IBBI Circular No. IBBI/RV/019/2018 dated 17.10.2018.
- Rule 8(2) of Valuation Rules provides for obtaining inputs for his valuation report or get a separate valuation for an asset class conducted from another registered valuer whereas Regulation 35(2) of Liquidation Regulation provides for appointment of two registered valuers for each class of asset by the liquidator. The DC noted that Rule 8(2) cannot be interpreted to hold outsourcing (of responsibility) *pari passu* with obtaining inputs. In view of the same, the conduct of outsourcing the appointment of valuers to third person, IP has acted in contravention of Regulation 7(1) read with Regulation 35(2) of Liquidation Regulations and Clause 14 of the Code of Conduct under IP Regulations.

Provisions Referred

Regulation 2(1)(*m*) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that:

> *"2(1)(m): "registered valuer" means a person registered as such in accordance with the Companies Act, 2013 (18 of 2013) and rules made thereunder."*

Regulation 27 of the said regulations provides that:

> "27. The resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35:
>
> Provided...".

Clause 14 of the Code of Conduct states:

> "14. An insolvency professional must not act with *mala fide* or be negligent while performing his functions and duties under the Code."

Contravention-4

Fees of IPE

- IP appointed an IPE, where he is a partner, for providing support services in the liquidation process of the CD. Fee/remuneration charged by IPE varied in every quarter. Further in addition to fees, out of pocket expenses (OPE) to IPE was also charged in every quarter. In certain quarters, no fees was charged by IPE but OPE was still charged. Fixing of fees having such wide variation without fixing any criterion or basis for calculating fees of IPE is not in conformity with the provisions of Regulation

7(1) of Liquidation Regulation as per which the remuneration to professionals appointed in the process of liquidation should be a reasonable one.

- Since the inception of the liquidation process, the fees payable to IPE was Rs. 2,83,28,750/- whereas fees payable to IP as per Regulation 4 of Liquidation Regulations was Rs. 2,21,00,000/-. IPE was additionally paid out of pocket expenses also. As brought out above, IPE engaged for support services was paid more than the fees of the liquidator.

Observations of the Disciplinary Committee of IBBI

- IP is one of the partners of the IPE. The charging of OPE incurred by him and IPE together is against the intend of Board Circular No. 1P/004/2018 dated 16th January 2018 which provides that professionals appointed by an IP shall raise bills/invoices in his /its name towards such fees, and such fees shall be paid to his /its bank account. Clubbing of these two expenditures also suggests that IP has not acted independently while conducting the process of liquidation of the CD and the IPE engaged by him was not merely for support services.
- Any entity engaged to help a liquidator cannot be expected to be entrusted with responsibilities more than that of liquidator so as to justify higher fees to such entity in comparison to that of liquidator. Hence, engaging a related entity on vague terms and conditions and paying them fee more than his own fee as liquidator is not only unjustified but also *mala fide*. Thus, in view of the above facts, the DC was of the view that by vaguely fixing fee of IPE and obscurely presenting OPE, IP had contravened Clause 25A of the Code of Conduct under IP regulations.

Provisions Referred

Clause 25A of the Code of Conduct states that:

25A. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

DECISION

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

KEY TAKEAWAYS

- The IP must ensure to not influence the work of professionals engaged by him. Caution is required to avoid the situation of influencing the end results.
- Public announcement must not require payment of any fee or any non-refundable deposit for

submission of expression of interest.

- Only registered valuers must be appointed to conduct valuation of the assets of the Corporate Debtor.
- The registered valuers cannot further outsource and appoint other registered valuers.
- The terms and conditions of engagement of IPE, criteria and basis for calculating fees of IPE should be specified.
- Any entity engaged to help a IP cannot be expected to be entrusted with responsibilities more than that of IP so as to justify higher fees to such entity in comparison to that of IP.

FAQs on FEES

1. How much annual membership fees is required to be paid by Insolvency professionals to IPAs?

As per Clause 11 of Model Bye-Laws of An Insolvency Professional Agency as per Regulation 3 read with Regulation 2(1)(c) of IBBI (Model Bye- Laws And Governing Board of Insolvency Professional Agencies) Regulations, 2016, the Agency may require the professional members to pay a fixed sum of money as its annual membership fee.

Accordingly, every IPA has fixed its own annual membership fees for its professional members.

W.r.t ICSI IIP, the professional members are required to pay 10,000 + GST every year before 30th June, 2022.

2. What type of fees is required to be paid by Insolvency professionals to IBBI?

Membership fees:

As per Regulation 7(2)(c) of IP Regulations, 2016, an insolvency professional shall pay to the Board,

- a fee of twenty thousand rupees, in case the insolvency professional is an individual or
- a fee of two lakh rupees, in case the insolvency professional is an insolvency professional entity,

every five years after the year in which the certificate is granted and such fee shall be paid on or before the 30th April of the year it falls due.

Professional fees:

As per Regulation 7(2)(*ca*) of IP Regulations, 2016, an insolvency professional shall pay to the Board,

- a fee calculated at the rate of 1% of the professional fee earned for the services rendered by him as an insolvency professional in the preceding Financial Year on or before the 30th of April of every year, along with a statement in Form E.

- where the insolvency professional is an insolvency professional entity, it shall pay to the Board, a fee calculated at the rate of one per cent. of professional fee earned for the services rendered as an insolvency professional in the preceding financial year on or before the 30th day of April every year, along with a statement in Form G.

Regulatory fees

(1) As per Regulation 31A(2) of CIRP Regulations read with Reg 7(2)(*cb*) of IP Regulations, 2016, a regulatory fee calculated at the rate of **1% of the cost being booked in insolvency resolution process costs in respect of hiring any professional or other services** by the interim resolution professional or resolution professional, as the case may be, for assistance in a corporate insolvency resolution process, shall be payable to the Board, within a period of thirty days, after end of each quarter or upon closure of the processes whichever is earlier, along with a statement in Form EA.

(2) A regulatory fee calculated at the rate of 0.25 per cent of the realisable value to creditors under the resolution plan approved under section 31, shall be payable to the Board, where such realisable value is more than the liquidation value. Such fees will form part of Insolvency Resolution process cost.

3. What is the minimum fixed fees an IP is entitled in a CIRP assignment?

As per Reg 34B(1),(2) & (3) of CIRP Regulations, 2016,

the Fees of IRP/RP shall be decided by the applicant or committee in accordance with this regulation which shall not be less than the fee specified in clause 1* for the period specified in clause 2** of Schedule-II.

Provided that higher fees may be decided keeping into consideration the market factors.

After expiry of period, the fees shall be decided by applicant/CoC, as the case may be.

*Minimum fees

Quantum of claims	Minimum fees per month (lakh)
<=50 Cr	1.00
50 Cr>=500 Cr	2.00
500 Cr>=2.500 Cr	3.00
2.500 Cr>=10,000 Cr	4.00
<=10,000 Cr	5.00

The fee may be paid from the funds, available with the corporate debtor, contributed by the applicant or members of the committee and/or raised by way of interim finance and shall be included in the insolvency resolution process cost.

****Period for minimum fixed fee**

From appointment as interim resolution professional or resolution professional, till the time of –

(*a*) submission of application for approval of resolution plan under section 30;

(*b*) submission of application to liquidate the corporate debtor under section 33;

(*c*) submission of application for withdrawal under section 12A; or

(*d*) order for closure of corporate insolvency resolution process; whichever is earlier.

4. What are the variable fees an IP is entitled in an assignment?

As per Reg 34B(4) of CIRP Regulations, 2016, For the resolution plan approved by the committee on or after 1st October 2022, the committee may decide, in its discretion, to pay performance-linked incentive fee, not exceeding five crore rupees, in accordance with **clause 3*** and **clause 4**** of Schedule-II or may extend any other performance-linked incentive structure as it deems necessary.

*Clause 3: Performance-linked incentive fee for timely resolution

Time period from insolvency commencement date	Fee as % of realizable Value
<=165 days	1.00
165 days>=270 days	0.75
270 days>=330days	0.50
>330 days	0.00

**Clause 4: Performance-linked incentive fee for value maximization

It may be paid to the resolution professional at the rate of 1% of the amount by which the realizable value is higher than the liquidation value, after approval of the resolution plan by Adjudicating Authority on commencement of payment to creditors by the resolution applicant.

"Realizable value" means the amount payable to creditors in the resolution plan approved under section 31

Regulatory updates

- IBBI amended its CIRP Regulations vide the **IBBI** (**CIRP**) (**Third Amendment**) **Regulations, 2022** which got notified on 13th September 2022. The amendment regulations can be accessed @ https://ibbi.gov.in/uploads/legalframwork/7c96f51884d5ad840f4a7af0d6bba604.pdf

- IBBI amended its Insolvency Professionals Regulations, 2016 vide the **IBBI** (**Insolvency Professionals**) (**Second Amendment**) **Regulations, 2022** which got notified on 13th September 2022. The amendment regulations can be accessed @ https://ibbi.gov.in/uploads/legalframwork/8a614479d5c2b8eacb205e226f5e841a.pdf.

- IBBI amended its Voluntary Liquidation Process Regulations and notified the **IBBI** (**Voluntary Liquidation Process**) (**Second Amendment**) **Regulations, 2022** on 16th September 2022. The amendment regulations can be accessed @ https://ibbi.gov.in/uploads/legalframwork/812b4ba287f5ee0bc9d43bbf5bbe87fb.pdf

- IBBI amended its Liquidation Process Regulations and notified the **IBBI** (**Liquidation Process**) (**Second Amendment**) **Regulations, 2022 on 16th September 2022**. The amendment regulations can be accessed @ https://ibbi.gov.in/uploads/legalframwork/f4b9ec30ad9f68f89b29639786cb62ef.pdf

- IBBI amended its CIRP Regulations vide the **IBBI** (**CIRP**) (**Fourth Amendment**) **Regulations, 2022** which got notified on 16th September 2022. The amendment regulations can be accessed @ https://ibbi.gov.in/uploads/legalframwork/98dce83da57b0395e163467c9dae521b.pdf.

- IBBI amended its Insolvency Professionals Regulations, 2016 vide the **IBBI** (**Insolvency Professionals**) (**Third Amendment**) **Regulations, 2022** which got notified on 20th September 2022. The amendment regulations can be accessed @ https://ibbi.gov.in/uploads/legalframwork/da9495e9d4766c4da095a622a6c3b8ec.pdf.

- IBBI amended its Information Utility Regulations and notified the **IBBI** (**Information Utilities**) (**Second Amendment**) **Regulations, 2022** on 20th September 2022. The amendment regulations can be accessed @ https://ibbi.gov.in/uploads/legalframwork/1e85e624a787504c5fdb5b16a353a634.pdf

- IBBI amended its Insolvency Professionals Regulations, 2016 vide the **IBBI** (**Insolvency Professionals**) (**Third Amendment**) **Regulations, 2022** which got notified on 20th September 2022. The amendment regulations can be accessed @ https://ibbi.gov.in/uploads/legalframwork/da9495e9d4766c4da095a622a6c3b8ec.pdf.

- IBBI amended its CIRP Regulations vide the **IBBI** (**CIRP**) (**Fifth Amendment**) **Regulations, 2022** which got notified on 20th September 2022. The amendment regulations can be accessed @ https://ibbi.gov.in/uploads/legalframwork/b32bad90cea91eca5304a685e45d5eb2.pdf.

- IBBI amended its Insolvency Professionals Regulations, 2016 vide the **IBBI**(**Insolvency Professionals**) (**Fourth Amendment**) **Regulations, 2022** which got notified on 28th September 2022. The amendment regulations can be accessed @ https://ibbi.gov.in/uploads/legalframwork/0aade43c842d51184839bd7cbca06f35.pdf.

- IBBI amended the **IBBI** (**online delivery of educational course and continuing professional education by IPAs an RVOs**) **Guidelines** on 30th September 2022. The notification in this regard can be accessed @ https://ibbi.gov.in/uploads/legalframwork/171423e671b649f715ea7e6d01f921ce.pdf.

Insolvency Law Framework in Sweden

In Sweden, there are mainly two formal proceedings prescribed under the law which are available to companies which face financial difficulties: Company Restructuring and Bankruptcy. A company may also be mandatorily liquidated. Mandatory liquidation is usually initiated when the equity of the company is less than half of its registered share capital and is often the result of over indebtedness.

APPLICABLE LEGISLATION:

The Swedish insolvency system mainly consists of two separate regimes: *the Bankruptcy Act, 1987*(*Sw: Konkurslagen*) and the *Company Reorganization Act, 1996* (*Sw: Lag om företagsrekonstruktion*). The former legislation is applicable to both private individuals, *i.e.*, natural persons as well as legal persons, *i.e.*, those who, though not a natural person, but possess personality in the eyes of law; while the latter, as indicated in the name of the Act itself, is merely applicable to the Corporate undertakings, *i.e.*, Businesses.

In Sweden, the businesses facing financial difficulties can be reorganized in a number of ways. The main alternatives are:

1. A composition by Voluntary Arrangement with the Creditors;

2. A Company Reorganization, with or without a Compulsory Composition;
3. Bankruptcy;
4. Liquidation.

The process of reorganisation through *"Voluntary Arrangement"* is not governed by any specific legislation, and therefore, there are no specific pre requisite conditions laid down for the creditors to satisfy in order to apply for it. *"Bankruptcy",* on the other hand, is the most common tool that is employed by Swedish individuals and other legal persons. It is followed by the process of liquidation (in case of Corporates) which results in payment of all known creditors of the company. For Corporates, the proceedings are carried out under Company Reorganization Act.

As per the Bankruptcy Act (*supra*), the Creditors can collectively and compulsorily take the total assets of a debtor for satisfaction of their claims. During Bankruptcy proceedings, the assets of the bankruptcy estate are put into the possession of an Administrator who acts on behalf of the Creditors.

According to the Bankruptcy Act (*supra*), Insolvency is a permanent situation of the Debtor wherein it is unable to pay off any of its debts. Both natural and legal persons are covered by this legislation.

Before the individuals or companies go for insolvency, they can enter into voluntary arrangements with Creditors to reduce their debt and avoid Bankruptcy. Other than Voluntary Arrangements, companies can also apply for reorganization under the Companies Reorganization Act (*supra*). The remedy for reorganization is used if companies are unable to pay their debts in the present, and there is also no possibility of them repaying their debts in the near future.

Bankruptcy

The Creditors' right of priority in the event of Bankruptcy is determined by another legislation called the *Swedish Priority Rights Act* (1970:979). The Act classifies all claims into four categories with priority in the following order:

- Claims with special priority (for example, claims secured by possessory pledges or retention of title claims to specific assets) to the extent the value of the collateral covers the claims. Any shortfall will be treated as claims without priority. This is equivalent to secured financial creditors as under Indian Insolvency law (Insolvency and Bankruptcy Code, 2016).
- Claims with general priority (for example, creditors' costs incurred in placing the company into bankruptcy).
- Claims without priority. This is the equivalent of unsecured creditors in the Indian scenario.
- Subordinated claims.

Same category claims that have rights against the same assets will be treated as *pari passu* and will be discharged out of available proceeds *pro rata* in relation to the size of the claims. Surplus amount, if any, after discharging all the outstanding debts will be returned to the shareholders.

Note: Bankruptcy Costs and expenses, including compensation to the administrator and costs accrued by the bankruptcy estate during ongoing bankruptcy proceedings, have priority ranking before any of the above groups.

PROCESS: The Bankruptcy Petition is lodged with the Court within whose local jurisdiction the debtor resides, or in the case of a company, where the Debtor is established. The Petition can be lodged either by the Debtor itself or by any of the Creditors. The Court rules on the Bankruptcy and appoints an Official Receiver. There is a statutory duty on the Bankrupt (on the Directors in the case of a company) to cooperate with the Receiver, the Courts and the Supervisory Officer and provide them with information. There is an Official Receiver who is appointed to take care of the common rights of the Creditors as well as to wind up the estate of the Debtor.

The Bankruptcy decision must be published in the Official Gazette and in one or more newspapers circulating in the region. The Bankrupt is bound to swear under oath before the Court that his Statement of Affairs is correct. Once a bankruptcy decision has been made, the Bankrupt cannot leave the country without the Court's permission.

Reorganization and restructuring

The purpose of restructuring is to help the companies in financial difficulties recover and not resorting to the Bankruptcy process. All companies domiciled in Sweden (other than banking and public businesses) can be subject to the process of Restructuring. An application for Restructuring can be filed either by the Debtor himself or by any of the Creditors (whether secured or unsecured). This application is to be filed in the District Court of Sweden. If an application is filed by any of the Creditors then the consent of the Debtor is sought for admitting such an application, before reorganization is ordered by the Court.

Through various orders of the Sweden District Court, two substantive tests have been laid down that need to be fulfilled before the Court can issue such an order.

The two basic substantive tests/requirements that need to be satisfied before the District Court can make such order are as follows:

(*a*) Can it can be assumed that the debtor is unable to pay its debts as they fall due or that such inability will arise shortly; and

(*b*) Is it reasonable to assume that the purpose(s) of the corporate reorganization can be achieved?

The Swedish legislation on the subject of "Insolvency" has also undergone a change, through the *Business Reorganization Act*. The law on Corporate Restructuring is aimed at restoring the viability of the fundamentally viable businesses that have fallen into economic crisis. In Sweden, there were relatively large number of bankruptcies compared to the number of citizens and businesses. The procedure of Reorganization was introduced because the number of bankruptcies in Sweden had increased. Sweden has prevented a lot of financial scams by amending its criminal law to make certain acts amount to "offences" which are punishable. Such steps of making economic offences

punishable is necessary for deterrence of such offences. Bankruptcy-related Offences include, for example, the debtor in various ways withholding the estate's assets or concealing assets so that they will not form part of the bankruptcy estate. These Offences come under Chapter 11 of the Swedish Penal Code, and have a strong deterrent effect which has also prevented a large number of financial scams from taking place.

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