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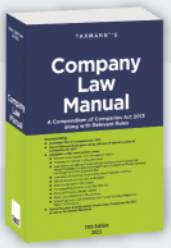

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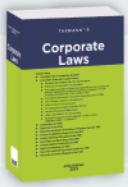

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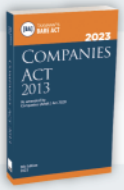

COMMENTARIES

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NEWS FROM THE INSTITUTE

ICSI IIP'S Initiatives during the month of December, 2022

Webinars

S. No	Date of Webinar	Topic
	02.12.2022	Final Word on IBC - Part 9
	16.12.2022	Anatomy of IBC Cases -1
	30.12.2022	Anatomy of IBC Cases - 2

Workshops

S. No	Date of Workshop	Topic
	03.12.2022	Effectiveness of Individual Insolvency & Pre-Packaged Insolvency Resolution
	07.12.2022 to 16.12.2022	Perspective on IBC - An Array (Series I)
	10.12.2022	Pre-Insolvency Workout, Restructuring and Avoidance Transactions under IBC
	17.12.2022	Financial Statement Analysis, PUFE Transactions under IBC
	23.12.2022 to 29.12.2022	Perspectives on IBC - An Array (Series II)

Rountable

S. No	Date of event	Topic
	13.12.2022	Peer Review Policy of ICSI IIP

Pre-Registration Educational Course (Online Course)

S. No	Date of event	Topic
	06.12.2022 to 12.12.2022	Pre-Registration Educational Course

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At a Glance

No. 12 | Pg. 1-92 | December 2022

Section 419, read with section 410 of the Companies Act, 2013 and section 61 of the Insolvency and Bankruptcy Code, 2016 - Tribunal and Appellate Tribunal - Benches of - Against order of NCLT dated 27-9-2022, petitioner had filed an appeal and same was stated to be listed before NCLAT on 9-12-2022 - However, an order bearing F.No.10/37/2018-NCLAT had been issued by NCLAT on 21-10-2022, which required physical filing of documents before NCLAT, for purpose of computation of limitation - Apprehension expressed by petitioner was that maximum limitation period of 45 days for filing an appeal under section 61 of IBC expired on 12-11-2022 which was Saturday - Though, e-filing of appeal was done on 11-11-2022, which was a Friday but physical filing was done on following Monday ***i.e.*** on 14-11-2022 and, thus, appeal might be dismissed - Petitioner filed instant writ seeking quashing of NCLAT's order dated 21-10-2022 - Whether since matter was pending adjudication before NCLAT which was a duly constituted Tribunal under section 410, there was no need to give an opinion on factual issue *i.e.*, whether appeal was within limitation period or not - Held, yes - Whether with these observations, instant petition was disposed of leaving petitioner's remedies open, in accordance with law, upon decision being taken by NCLAT - Held, yes (Paras 11 and 12)

Section 11, read with section 9 of the Arbitration and Conciliation Act, 1996 and section 9 of the Insolvency and Bankruptcy Code, 2016 - Ap-

pointment of arbitrators - Respondent awarded work order for electrical works in its residential project to petitioner - Overtime, dispute arose between parties regarding payment - Petitioner filed application under section 9 of IBC to initiate CIRP against respondent - NCLT opined that claim of petitioner was valid and genuine and respondent was asked to settle matter - However, officials of respondent were not willing to settle matter - Since, in terms of clause 13 of work order, resolution of disputes was through arbitration, petitioner filed instant petition under section 11 for appointment of Arbitrator - Respondent raised a objection that petitioner had been filing petitions before various forums of law submitting claims and, thus, it was a clear indication that petitioner was resorting to forum shopping and its acts were *mala fide* - It was found in instant case, scope of enquiry in proceedings before NCLT and before Arbitrator was absolutely distinct and merely because petitioner approached NCLT before seeking appointment of Arbitrator, it could not be said that he was indulged in forum shopping - Also it was quite evident that there was consistent stand of respondent challenging amounts claimed by petitioner, and, thus, clearly, there were arbitrable disputes in regard to claimed amounts and disputes between parties were referable to Arbitration - Whether thus, instant petition was to be allowed - Held, yes (Paras 29, 34 and 56)

- **Andhra Pradesh State Financial Corporation *v.* Kalptaru Steel Rolling Mills Ltd.**
  (2023) 148 taxmann.com 59 (NCLAT - New Delhi) • P-391

Section 31, read with sections 7 and 30 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Appellant-APSFC sanctioned a term loan to corporate debtor, which was secured by mortgage and hypothecation of land, plant and machinery - Andhra Bank and appellant were two financial creditors having voting share of 66.13 per cent and 33.87 per cent respectively - An application under section 7 filed by Andhra Bank against corporate debtor was admitted by Adjudicating Authority - Resolution plan submitted by resolution applicant 'S' was approved by CoC - Appellant filed objection to resolution plan, which was rejected by Adjudicating Authority and by a subsequent order resolution plan was approved - Appellant challenged order passed by Adjudicating Authority approving resolution plan of corporate debtor and submitted that application, which was filed by Andhra Bank was highly barred by time and very initiation of proceedings was illegal - However, in objections which were filed by appellant to resolution plan only issue raised by appellant was with regard to apportionment of amount to dissenting financial creditor, which was repelled by Adjudicating Authority - At no point of time any issue regrading limitation of section 7 application had been raised - In Special Leave Petition filed by appellant challenging order initiating CIRP, ground regarding section 7 application being barred by time had been raised, however, said Special Leave Petition had been dismissed - Whether therefore, when challenge to section 7 application had been rejected by Supreme Court on all grounds, appellant could not be permitted to challenge initiation of CIRP on ground of limitation in instant Appeal - Held, yes - Whether since Adjudicating Authority had considered that resolution plan contained provision for takeover of corporate debtor as going concern and also contained provision for implementation of plan through a monitoring committee, various parts of plan were compliant to section 30 and, therefore, no grounds were made out to interfere with order approving resolution plan - Held, yes (Paras 8, 9, 12, 14 and 16)

- **Pramod Kumar Pathak *v.* ARFAT Petrochemicals (P.) Ltd.**
  (2023) 148 taxmann.com 61 (NCLAT-New Delhi) • P-395

Section 33, read with sections 5(26) and 34 of the Insolvency and Bankruptcy Code, 2016 - Corporate Liquidation Process - Initiation of - Company JK was declared a sick industrial unit by Board of Industrial and Financial Reconstruction (BIFR) - Company JK (corporate debtor)

entered into Memorandum of Understanding (MoU) with respondent, on basis of which, implementation of rehabilitation scheme was approved by Appellate Authority for Industrial & Financial Reconstruction (AAIFR) - Appellant claiming to be representative of workmen union of sick industry JK filed an application under section 33 before NCLT, alleging that Rehabilitation Scheme had been breached, corporate debtor be liquidated - NCLT came to conclusion that sanctioned scheme of rehabilitation could not be termed as resolution plan within meaning of section 5(26) and, hence, there was no question of respondent committing breach of implementation of plan, and application filed under section 33 be rejected - Appellant challenged rejection of application and in support of his submission had relied on Notification namely Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017, dated 24-5-2017 - However, Supreme Court in Spartek Ceramics India Ltd. v. Union of India (2019) 111 taxmann.com 535 had clearly held that Notification dated 24-5-2017 travelled beyond scope of removal of difficulties provisions - Whether when Notification dated 24-5-2017, was not a valid Notification, there was no occasion to accept submission that approved rehabilitation scheme, which was foundation of application filed by appellant under section 33 could be treated as a resolution plan within meaning of IBC - Held, yes - Whether very foundation of application filed by appellant under section 33 having been knocked out, application was rightly rejected by Adjudicating Authority - Held, yes (Paras 13, 19 and 20)

- **Commissioner of Customs & Excise, Jp *v.* Ashika Commercial (P.) Ltd.**
  (2023) 147 taxmann.com 591 (NCLAT-New Delhi) • P-399

Section 31, read with sections 30 and 60 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - Application in case of corporate debtor under section 7 was admitted by NCLT and RP was appointed - RP made a public announcement inviting claims from creditors of corporate debtor - Appellant-Commissioner of Custom and Excise had to recover an amount of Rs. 2.88 crores from corporate debtor for violation of various provisions of Central Excise Act, 1944 - Appellant had not filed its claim while RP invited claims from creditors of corporate debtor - Even claim had not been filed at belated stage prior to approval of resolution plan by CoC - Claim had been filed after plan had been approved by NCLT - At such belated stage no fund was available out of kitty of resolution plan, which could be earmarked to appellant - Both resolution applicant and RP had confirmed implementation of plan and nothing remained to be adjudicated - Whether therefore, appeal against impugned order passed by NCLT approving resolution plan as also non-provisioning for outstanding dues of corporate debtor in resolution plan could not be accepted - Held, yes (Para 11)

- **Indo World Infrastructure (P.) Ltd. *v.* Mukesh Gupta Resolution Professional of Rohtas Projects Ltd.**
  (2023) 148 taxmann.com 63 (NCLAT- New Delhi) • P-402

Section 18 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Interim resolution professional - Duties of - Corporate debtor was allotted a plot of land in Noida by Noida Authority by lease deed executed in favour of corporate debtor for setting up of a commercial complex - Later, corporate debtor entered into an Agreement to Sell with appellant and appellant got rights for construction and development of project land - However, corporate debtor got admitted to CIRP by Adjudicating Authority - Subsequent to triggering of CIRP, Resolution Professional took over possession of said plot of land of corporate debtor including project land and Adjudicating Authority approved Resolution Plan in respect of corporate debtor- Whether it is incumbent upon Resolution Professional under section 18 to embark upon necessary steps to take control and custody of assets of corporate debtor - Held, yes - Whether Agreement to sell does not convey a property from one person

to another, either in present or even in future and, hence, appellant could not have relied upon Agreement to Sell to claim sub-lease rights and ownership rights of project land - Held, yes - Whether therefore, it could not be said that Resolution Professional had acted in a manner that transgressed statutory framework of IBC or that his conduct did not inspire confidence in credibility of insolvency process undertaken by him - Held, yes - Whether thus, having included project land in pool of assets of corporate debtor, Resolution Professional could not be held to be remiss in performance of his duties- Held, yes (Paras 19, 21 and 26)

Section 31, read with sections 29A and 30 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Corporate debtor was allotted a plot of land in Noida by Noida Authority by lease deed executed in favour of corporate debtor for setting up of a commercial complex - Later, corporate debtor entered into an Agreement to Sell with appellant and appellant got rights for construction and development of project land - Corporate debtor got admitted to CIRP by Adjudicating Authority - Subsequent to triggering of CIRP, Resolution Professional took over possession of said plot of land of corporate debtor including project land and Adjudicating Authority approved resolution plan in respect of corporate debtor - Appellant submitted that it had filed two IAs which remained undisposed, while Adjudicating Authority went ahead and approved resolution plan of corporate debtor, which was not justified - However, on looking at prayers contained in IAs, central issue was exclusion of project land from CIRP and, thus, was akin to prayer in earlier IAs, which were dismissed - Whether since resolution plan approved by CoC did not contravene any of the provisions of law for time being in force, though IAs had not been disposed by Adjudicating Authority before approving Resolution Plan, same did not vitiate CIRP of corporate debtor - Held, yes (Paras 30 and 31)

- **Keshav Kantamneni *v.* Kishan Chand Suresh Kumar**
  (2023) 148 taxmann.com 57 (NCLAT - Chennai) • P-408

Section 5(6), read with sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Dispute - Whether in law, Adjudicating Authority, is only to ascertain, if there is a debt due in fact and in law, payable by opposite party and that a default, is committed - Held, yes - Whether if a debt sum, of more than Rs. 1 lakh (now 1 crore) is admitted, an application under section 9, is to be admitted, by an Adjudicating Authority - Held, yes - Appellant/ex-Managing Director of corporate debtor entered into a business relationship, wherein, petitioner/operational creditor, had supplied ply, plywoods and boards to appellant, under various consignments - Operational creditor, based on purchase orders of corporate debtor, had raised invoices - However, corporate debtor failed to make payments - Operational creditor issued a notice of demand under section 8 to corporate debtor - Application was filed under section 9 by operational creditor for initiation of CIRP against corporate debtor - Corporate debtor sought time on pretext that settlement was about to arrive at between parties, however, thereafter, there was no representation on behalf of corporate debtor - Subsequently, NCLT passed an *ex parte* order against corporate debtor admitting section 9 application - Whether since there was no pre-existing dispute between parties and appellant had not repudiated that sum of Rs. 3.25 crores was due and payable to operational creditor by corporate debtor and that debt of corporate debtor was very clearly established from memorandum of compromise and other materials available on record, admission of section 9 application, by Adjudicating Authority was free from any legal infirmities - Held, yes (Paras 59, 60, 62, 65 and 66)

- **Aswathi Agencies *v.* Bijoy Prabhakaran Pulipra, Resolution Professional PVS Memorial Hospital (P.) Ltd.**
  (2023) 147 taxmann.com 590 (NCLAT - Chennai) • P-415

I. Section 3(23) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Person - Whether word 'person', as defined under section 3(23)(*d*), also includes a trust, and, therefore, there is no fetter/embargo or a legal impediment for a trust to be a resolution applicant in submitting a resolution plan - Held, yes (Para 67)

II. Section 61, read with section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's adjudicating authorities - Appeals and Appellate Authority - Whether commercial wisdom of CoC is not be interfered with, except in limited ambit, as contemplated under section 30(2), in respect of an Adjudicating Authority, and as per section 61(3), in regard to an Appellate Authority - Held, yes - CIRP was initiated against corporate debtor and Resolution Professional (RP) was appointed - RP filed an application before NCLT seeking approval of resolution plan submitted by successful resolution applicant, which was approved by CoC with a majority of 100 per cent voting share - NCLT by impugned approved said resolution plan - Appellant-operational creditor filed instant appeal against approval of resolution plan on ground that said resolution plan was not genuine one and in fact intention of resolution applicant was absolute purchase of corporate debtor for a meagre price and that appellant was not provided with an opportunity to present its views or claims, while determining admitted claim - It was noted that plan submitted by successful resolution applicant had satisfied requirements mentioned under Code and Regulations, thereunder and a compliance certificate was filed by RP in terms of regulation 39 of CIRP Regulations - It was also noted that resolution plan, was fully implemented - Further, appellant had not made out a case in its favour and had not proved any grounds for filing an appeal against impugned order - Whether thus, appeal against impugned order passed by NCLT in approving resolution plan was to be dismissed - Held, yes (Paras 70 and 73)

- **Punjab National Bank *v.* Dinesh Polytubes (P.) Ltd.**
  (2023) 147 taxmann.com 553 (NCLT - Chd.) • P-420

Section 31 of the Insolvency and Bankruptcy Code, 2016, read with regulation 12 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Corporate insolvency resolution process (CIRP) was initiated against corporate debtor and Resolution Professional (RP) was appointed - RP filed an application for approval of resolution plan under section 31, which was approved - Applicant, Excise and Taxation Commissioner filed instant application seeking acceptance of claim/revised claim regarding statutory dues of department by RP and for modifying/setting aside resolution plan as approved by Committee of Creditors - Whether regulation 12 of CIRP Regulations, 2016 provides for an outer limit of 90 days from Insolvency commencement date for submission of claims and, therefore, allowing a claim well after approval of resolution plan would derail entire post-CIRP process and would negate all efforts put at insolvency resolution of corporate debtor and was in teeth of objectives of IBC - Held, yes - Whether since claim in instant case was submitted after a period of more than one year after approval of resolution plan by Adjudicating Authority, same could not have been accepted - Held, yes (Paras 7, 8 and 10)

- **Thomas George *v.* K. Easwara Pillai Resolution Professional Mathstraman Manufacturers and Traders (P.) Ltd.**
  (2023) 147 taxmann.com 552 (NCLAT - Chennai) • P-421

Section 66 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Fraudulent or wrongful trading - Whether look back period under IBC is three

years from date of default - Held, yes - Whether however, section 66 does not provide for any look back period as far as fraudulent transactions are concerned - Held, yes (Para 12)

Section 66 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Fraudulent or wrongful trading - CIRP was commenced against corporate debtor and RP was appointed - While inspecting factory of manufacturing unit of corporate debtor, RP found that erstwhile directors of corporate debtor *i.e.* appellants had transferred ownership of land mortgaged to financial creditor in favour of R3 to settle liabilities of corporate debtor - RP thus, filed an application under section 66 declaring transactions as fraudulent transactions and directing appellants to make good losses caused to creditors of corporate debtor - Though notice was served on appellants, they did not appear before NCLT - Advocate for appellant was very much present before NCLT but did not choose to contest matter and, hence, appellants were set as *ex-parte* - It was a case of appellants that impugned order passed by NCLT was a non-speaking order devoid of any finding to arrive at conclusion that appellant had done any fraudulent act and there was no investigation done nor any report filed to prove that fraud was committed by appellants and, thus, matter be remanded to consider afresh by NCLT - However, absolutely no ground was made out for not having filed reply despite service of notice on appellants - Whether having not contested their case before NCLT despite service of notice, appellants could not now wriggle out of observation made by NCLT - Whether in absence of any reason given by appellants, there was no sufficient cause for setting aside *ex-parte* order or giving any additional opportunity to appellant to present their case as RP had produced sufficient material to evidence that appellants had committed fraudulent act - Held, yes - Whether thus, appeal against order of NCLT was to be dismissed - Held, yes (Paras 10 and 13)

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

From Chairman's Desk

Constant change is the essential nature of any journey

While introduction of IBC in the Indian Statute Book was a major departure from the erstwhile legal regime governing the subject, in the past 6-odd years of its existence (despite all challenges and road-blocks coming in its way) the legislation got strengthened with each passing day, month and year. The strengthening took place not merely in terms of landmark judicial pronouncements as well as establishment of an institutional mechanism, but also due to constant vigil and timely steps/actions taken by the Government as well as the IBBI. In the year 2022, while the Code did not go any amendment, the regulatory amendments by the IBBI made it possible that the regime remains firm and progressive. The common objective underlying these amendments has been to compress the timelines. As we have now reached end of this calendar year 2022, it may be apt to recount some of these developments which concern CIR Process, Liquidation Process, Voluntary Liquidation Process and the IP Regulations.

The amendments *vis-à-vis* CIRP regulations focus on subjects including *inter alia*: (*a*) reduction in timelines; (*b*) enhanced realisation by stakeholders; (*c*) empowerment of RPs to invite EoI to sell-off CD's assets severably (in case of non-receipt of an all-encompassing resolution plan within given timeframe);

(*d*) provision *vis-à-vis* avoidance application and realisations therefrom in the resolution plan; (*e*) payment of regulatory fee @ 0.25% of realisable value under resolution plan (effective 1st Oct 2022) which shall form part of CIRP cost.

The amendments in Liquidation Regulations have been in terms of: (*a*) reconstitution of SCC for inclusion of a wide range of stakeholders; (*b*) expanding the domain of areas which are subject to SCC's advisory like decision on liquidator's fee, decision regarding conduct of valuation, manner of avoidance applications post CD's dissolution (these areas are now subject to SCC's advisory jurisdiction and in case the liquidator decides to act otherwise, he/she is required to record and file his reasons thereof with AA and IBBI; (*c*) the requirement for liquidator to explore other options for sale (included under Reg. 32) as well, if there is a failure in the first attempt to sell the CD as a "going concern"; (*d*) SCC to decide (and liquidator to provide in its final report) the course to be persued *vis-à-vis* avoidance applications post CD's dissolution. This is intended to expedite and facilitate closure of liquidation proceedings.

The amendments *vis-à-vis* Voluntary Liquidation Regulations have been to the effect that: (*a*) in case there are no creditors, the process is to be completed within a limited time window of 90 days; (*b*) requirement for liquidator to file a compliance certificate with the AA *vis-à-vis* different regulatory requirements and in case there is any deviation then the reasons for the same are to be provided; (*c*) requirement for majority of Directors of CD to make arrangements for preservation of CD's records post dissolution. Insofar as IP Regulations are concerned, the amendments are in the form of consolidating IBBI circulars issued in the past.

Coming to some noticeable judicial decisions witnessed in the year 2022, the year saw a few rulings from Hon'ble SC, which, to put it mildly, ruffled a few feathers . These decisions include the one rendered by Hon'ble SC in the matter of *Vidarbha Industries Power Limited* v. *Axis Bank Limited* (decision dt.12th July 2022) and that rendered in *State Tax Officer* v. *Rainbow Papers Ltd.* (decision dt. 6th Sep. 2022). In the first mentioned decision (*Vidarbha*, *supra*), a distinction was drawn between the respective requirement for AA to admit a CIRP application filed u/s 7, IBC from that u/s 9, IBC. The Court held that while

admission of an application filed u/s 9, IBC is mandatory, the NCLT has the discretion to admit or not to admit an application filed u/s 7(5)(*a*). Thus, insolvency proceedings against a CD cannot be initiated merely on account of temporary inability of CD to pay-off its financial debt. In the second mentioned decision (Rainbow Papers, *supra*), the Apex Court, while relying on the language employed in Gujarat VAT Act, held the State Government to be a secured creditor thereby making dues of State Government to be put on same pedestal as debts owed to workmen (s. 53(1)(*b*)(*ii*) of IBC).

When we embarked on this journey, there was a inherent fear of uncertainty, but it did not deter us from progressing further. We moved together with a sheer sense of determination and commitment to make this legislative reform a success, and our experience so-far amply demonstrates that uncertainty is the best time for those seeking opportunity in life!

Let's remain committed!

COO's Message

DR. PRASANT SARANGI
COO (Designate)

Dear Professional Member(*s*),

The end of an year is an apt moment for us to recount the learnings that the year gone-by has put into our basket. The most remarkable thing about time is that it passes at the same pace for all. Whether we do something or not, it would fly away at the same pace. Therefore, there is a need to keep an account of what we have learnt and what direction we have taken at the end of an year, just the way we keep account of our income at the end of a financial year (for payment of our income tax liability etc). Afterall it is always good to check if we made a profit (or moved forward) or stand in loss (or gone backward).

There are some very important ruling which came from Hon'ble Supreme Court in this year 2022. The common theme amongst them all is that they have all made us think on the way forward. I would like to share a few of the learnings that I had from these landmark judgments. For instance, in one of the matters[1], Hon'ble SC interpreted language of s. 7, IBC as requiring AA to go beyond the *Debt and Default* test in order to satisfy itself on the reason for such default. This amounted to conferment of discretionary power on the

AA for deciding admission or rejection of a CIRP Application (made by an FC). The construction of the provision, though based on literal interpretation rule/principle, has persuaded the law maker to look into the necessary amendment needed in the language. In another matter before Hon'ble SC[2], it was held that if a resolution plan excludes payment of statutory dues, it would be liable to be rejected by the AA. In the facts of the case, reliance was placed on the language of s. 48 of GVAT Act, 2003 to hold that CD's VAT dues towards State Government are to be ranked at par with those of secured creditor. In another important ruling[3] by Hon'ble High Court of Delhi, the question of effect of moratorium order on PMLA proceedings has been settled by holding that the two proceedings operate in their own sphere, and therefore, the moratorium order under IBC would not come in the way of continuation of proceedings under PMLA. In yet another important ruling[4], Hon'ble SC turned down the contention claiming NOIDA to be an FC (CD had taken land from NOIDA on lease for 90 years). Another matter connected with the ambit and interpretation of s. 29A got decided by Hon'ble SC[5]. The facts of the case were that a personal guarantee was issued by a person for the credit facility availed by CD. After initiation of CIRP against such CD, the said guarantor sought to file a resolution plan for CD. Applying the language of s. 29A, Hon'ble SC held such person to be disqualified to be a Resolution Applicant. Further, resolving an apparent conflict in application of Customs Act, 1962 and IBC, 2016, the Apex Court in a matter[6] held that in case of any conflict, IBC would prevail over Customs Act as IBC is a special legislation. Applying the said principle, once a moratorium order is passed in respect of a CD, the Customs Authorities cannot enforce their dues against CD's assets and are required to file their claim with the IRP or RP or Liquidator (as the case may be). Again, while resolving an apparent conflict in the application of IBC and SARFAESI, Hon'ble SC held in a matter[7] that if a moratorium order is already in effect/operation, no order for foreclosure, recovery or enforcement of security interest (including proceeds under SARFAESI Act, 2002) can take effect. The Court went on to hold that even if sale proceedings were initiated prior to commencement of CIRP, but completion of sale u/s 13(4) of SARFAESI fell under moratorium period, such sale proceedings cannot be put to effect.

IBC is intended to maximise the value of CD and for this it envisages boundless possibilities of resolution. The resolution must, however, be sustainable and feasible so that an entity once resolved does takes a leap forward and not get pushed into insolvency again.

1. *Vidarbha Industries Power Ltd.* v. *Axis Bank Ltd. (Civil Appeal No. 4633 of 2021).*
2. *State Tax Officer* v. *Rainbow Papers Limited (Civil Appeal No. 1661 of 2020).*
3. *Rajiv Chakraborty, RP of EEIL* v. *Directorate of Enforcement, W.P.(C) 9531/2020.*
4. *NOIDA* v. *Anand Sonbhadra (Civil Appeal No. 2222 of 2021).*
5. *Bank of Baroda* v. *MBL Infrastructure Limited and Ors. (Civil Appeal No. 8411 OF 2019).*
6. *Sundresh Bhatt, Liquidator of ABG Shipyard* v. *Central Board of Indirect Taxes and Customs (Civil Appeal No. 7667 of 2021).*
7. *Indian Overseas Bank* v. *RCM Infrastructure (Civil Appeal No. 4750 of 2021).*

INTERVIEW

HASTIMAL KACHHARA
IP, FCA & FCS

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

The IBC is one of India's success stories. Since 2016, the IBC has managed to deal with a number of corporate insolvencies either through resolution or liquidation. However, judicial discretion and delays is resulting the IBC to become less effective than what was envisaged. There is shortage of judges in NCLT across India which in-ordinate delays the whole process. The CIRP and liquidation cases/matters are pending before NCLT for more than 3 years even without hearing the case once. The entire process of IBC, 2016 is going for a toss due to judicial discretion and delays.

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

I have a rich experience of over 40 years in various industries managing Textile, Chemicals, Dyes, Metals, Telecom, Power

and Infrastructure Projects/Sectors. With the introduction of IBC, a new avenue opened up to put my earned knowledge to use. The responsibilities of IPs as envisaged in IBC are quite challenging in running a company in troubled times. The Insolvency professional gives their best talents to revise the sick/NPA and closed industrial units. This is the best platform for IP Professional having industrial experience to overcome the challenges during CIRP and Liquidation processes.

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

As an IP, my experience has been mixed, while on one hand there is a sense of achievement in being able to restart production in companies that were shut and on the other hand there is dejection caused by judicial delays. There were lot of hurdles and pressure put up by the erstwhile promoters/directors to derail the entire CIRP/Liquidation process.

4. In reference to the assignments handled by you what practical challenges you faced as an Insolvency Professional so far?

Liasioning with statutory authorities has been a challenge, as not all authorities are aware about the provisions of IBC. More often they completely disregard the moratorium applicable to companies under CIRP and take adverse steps against the Corporate Debtor. Moreover, there were personal attacks on integrity of insolvency professional by levelling corruption or favouring someone by erstwhile promoters/ directors by filing false cases/complaints by way of Miscellaneous Applications (MAs)/Interlocutory Applications (IAs) to NCLT and IBBI against RPs/IPs. This leads to inordinate delays in CIRP cases in various Adjudicating Authorities (AA)

5. Since, you have handled number of assignments, how has your experience been with the Promoters of the Corporate Debtors?

The experience with promoters has been varied, while some of the promoters are quite co-operative, the others are either not traceable or non-co-operative. However, in either case my approach has been to err on the side of caution when dealing with the promoters. Moreover, the personal attack on the integrity of insolvency professionals by filing false, baseless and fabricated complaints against the resolution professional has lead to inordinate delays in CIRP cases in various Adjudicating Authorities (AA). There were more than 25 IAs/MAs filed before NCLT in one of my handled CIRP Cases. The most of the applications were filed by erstwhile promoters/directors to derail the entire process of CIRP.

I have turn-around the closed industrial units into profitable industry/venture in short span of time even in troubled times of Covid-19. I have managed to achieve more than 95% capacity utilization of the Corporate Debtor (CD). I have managed earned profits and having surplus funds at the end to the CIRP assignment inspite Covid pandemic. I have saved lot of expenditures in terms of overheads, raw

material cost and stores & spares cost for the corporate Debtor (CD) by using my vast industrial experience. I have managed to get Power Subsidy for textile industry from the MSEDCL @ ₹ 2 per unit during CIRP period resulted into huge saving of power cost by ₹ 10.80 crores during CIRP till 31st March, 2022. I was able to Generated additional cash flow of more than ₹ 5.00 Crores during the CIRP Period which had kept in FDs with Public Sector banks. The entire CIRP Cost has been met from the funds generated by the operations of CD and no contribution has been made by any of the CoC members.

6. How significantly do you think the regulators *i.e.*, IBBI and IPAs serve the profession of Insolvency Professionals?

Both IBBI and the IPAs have been proactive to the needs of IPs bringing about swift amendments in the Code and Regulations. It has been my experience that the IBBI and IPA are not supportive professionally to Insolvency Professional. There are number of procedural requirements by IBBI and IPA which delays the routine work of IRP/RP during the course of CIRP/Liquidation and there are web-portal issues sometimes as well as time limits set by IBBI and IPA are so tight that the IPs are unable to comply the requirements of IBBI/IPA timely due to their business in CIRP/Liquidation processes of Corporate Debtor (CD).

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

It's a very good platform to learn and update yourself about knowledge of all commercial laws including IBC, Company Law etc. I enjoyed the working during my CIRP assignments being qualified FCA, FCS and IP Professionals apart from having more than 40 years of industrial experience. I could utilize my industrial experience of 40 years in various Industries in CIRP cases.

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

Anyone aspiring to make a career as an IP shall enter/approach to this profession with an insurmountable level of patience and cool-mindedness. I advise all youngsters professionals to join this profession and make very good career in the field of IBC, 2016.

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

Apart from the challenges with the judiciary, supremacy of IBC over all existing laws needs to be established. Otherwise, IBC will follow the fate of its predecessor laws. Further, a Code of Conduct for Committee of Creditors should be introduced without further delay. The recent case laws of Supreme Court as well as NCLAT may lead further derail the entire purpose/process of IBC, 2016. Its need to be looked into it.

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

IBC when implemented in its true sense and spirit will help strengthening the economy of the country as it will provide a swift exit option for unsuccessful or failing businesses. It will bring India at par with the international community with the introduction of cross-border insolvency regime.

** (***Disclaimer: The views and opinion expressed in the publication are that of author. Any statement made shall not be considered as a professional advice.***)*********

Insight!

Payment to Dissenting Financial Creditor (DFC) under IBC By CA Vikram Kumar, Insolvency professional

CA VIKRAM KUMAR
IP

Payment to dissenting financial creditor (DFC) under the Insolvency & Bankruptcy Code (IBC/Code) remains a contentious issue with contradictory judgments on this vital subject by the adjudicating authorities.

Payment to assenting financial creditor (AFC) is explicitly stated in a resolution plan presented before the committee of creditors (CoC) and hence is known by the AFCs while approving a resolution plan placed for voting before the CoC. However, the payment to DFCs in a resolution plan may be ambiguous and the resolution plan placed before the COC may only state that the payment to DFCs shall be in compliance with the provisions of Section 30(2)(*b*)(*ii*) of the Code *i.e.,* payment shall not be less than the amount to be paid to creditors who do not vote in favour of the resolution plan in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor. Hence under

such circumstances, the payment to DFCs remains vague and subject to litigation and judicial interpretations.

Who is a Dissenting Financial Creditor?

A financial creditor (FC) who does not vote in favour of the resolution plan or abstains from voting on a resolution plan is considered as a DFC. However, the definition of the term DFC as stated in the CIRP Regulations has been deleted w.e.f. 5-10-2018 which further compounds the problem as the term DFC is now not defined under the Code or the CIRP Regulations.

The Code or the CIRP Regulations as they stand today do not use the term dissenting financial creditor, they only use the term "**financial creditors, who do not vote in favour of the resolution plan**"

Both Code or the CIRP Regulation is silent on the treatment to be given to a creditor "**who abstains from voting on the resolution plan**".

It is a grey area as to whether the treatment to be given to financial creditors, who do not vote in favour of the resolution plan is same as the treatment to financial creditors who abstains from voting on the resolution plan (emphasis added). Under the present IBC framework, the provisions as laid down in Section 30(2)(*b*)(*ii*) and Regulation 38(1)(*b*) are applicable only for a financial creditor who do not vote in favour of the resolution plan, however the Code and CIRP Regulations are silent on payment to a financial creditor who abstains from voting on the resolution plan.

Background note on definition of DFC

Definition of DFC as on 1-12-2016

When CIRP Regulations (Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016) were introduced w.e.f. 1-12-2016, Regulation 2(1)(*f*) defined DFC as:

> *"Dissenting financial creditors" means the financial creditors who voted against the resolution plan approved by the committee.*

Amended Definition as on 31-12-2017

The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2017, w.e.f. 31-12-2017 modified the definition of the DFC under Regulation 2(1)(*f*) as"

> *"Dissenting financial creditor" means a financial creditor who voted against the resolution plan or abstained from voting for the resolution plan, approved by the committee;"*

The above definition of DFC was deleted by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2018, w.e.f. 5-10-2018.

With no other amendments on the subject since then, the term DFC is not defined under the Code or the CIRP Regulations as on date.

In this article, the term DFC has been used to mean a financial creditor who does

not vote in favour of the resolution plan or abstains from voting on a resolution plan. (Emphasis added)

Provisions for protection of the interests of DFC under the Code

The provisions for protection of the interests of DFC under the Code and CIRP Regulations have gone through several amendments and modifications as explained below:

A. Provisions under CIRP Regulations

(*i*) w.e.f. 1-12-2016

Regulation 38(1)(c)- A resolution plan shall identify specific sources of funds that will be used to pay the liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

The above provision mandated that the resolution plan can only pay liquidation value to the DFCs, *i.e.*, the AFCs and DFCs are to be treated separately even though they may be similarly situated creditors/ or belong to the same class.

The provisions of Regulation 38(1)(*c*) were rightly held to be invalid and contrary to the provisions laid down in the Code by the Hon'ble NCLAT in matter of ***Central Bank of India vs. Resolution Professional of the Sirpur Paper Mills Ltd (Company Appeal (AT) (Insolvency) No. 526 of 2018 dated 12-9-2018).***

The Hon'ble NCLAT held that no discrimination can be made between the 'Financial Creditors' in the Resolution Plan on the ground that one has dissented and voted against the Resolution Plan or the other has supported and voted in favour of the Resolution Plan.

The provisions pertaining to Regulation 38(1)(*c*) was therefore deleted w.e.f. 5-10-2018 and Regulation 38(1)(*a*),(*b*) and (*c*) were substituted by Regulation 38(1) as stated below:

Regulation 38(1)- The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(*iii*) w.e.f. 27-11-2019 - following provisions were introduced to further protect the interest of DFC:

Regulation 38(1)(b) - The amount payable under a resolution plan to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.

B. Provisions under the Code

w.e.f. 16-8-2019- Provisions for Payment to DFC

Section 30(2)(b) *- "The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -*

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(*b*) *provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-*

(*i*) *the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or*

(*ii*) *the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.*

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors."

As per the above provisions of the Code and the CIRP Regulations, the DFCs are to be paid at least the liquidation value payable to the financial creditors and in priority to the assenting financial creditors and the payment to DFC shall be fair and equitable. What is fair and equitable has been adjudicated by the Hon'ble Supreme Court of India in the judgment of Essar Steel which is covered in the section "Judicial pronouncements" in this article.

w.e.f. 16-8-2019- Provisions for distribution of amount under the resolution plan by the CoC to DFC

The manner in which the amount under a resolution plan is to be distributed has been prescribed under section 30(4) of the Code, as stated below:

(***ii***) **Section 30(4)** - *The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability,* ***the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board.***

(emphasis added)

Several litigations arose post amendment to Section 30(4) - as the language of the section can be interpreted to mean that it is requisite for the CoC to consider the value of the security interest in determining the distribution of the amount to be paid to a secured creditor. The moot question is whether it is mandatory or it is directory/ discretionary for the CoC to consider the value of security interest in deciding the distribution for each creditor?

The intent behind legislating section 30(4) of the Code as amended w.e.f. 16-8-2019

is articulated in the judgment of *India Resurgence ARC Private Limited Vs. Amit Metaliks Limited (Company Appeal (AT) (Insolvency) No. 1061 of 2020 dated 2-3-2021)* wherein the Hon'ble NCLAT has pronounced that

(i) *"Section 30(4) vests discretion in the Committee of Creditors to take into account the value of security interest of a Secured Creditor in approving of a Resolution Plan. It's a guideline and not imperative in terms, which may be taken into account by the Committee of Creditors in arriving at a decision as regards approval or rejection of a Resolution Plan, such decision being essentially a business decision based on commercial wisdom of the Committee of Creditors".*

(ii) *"While it is true that prior to amendment of Section 30(4) the Committee of Creditors was not required to consider the value of security interest obtaining in favour of a Secured Creditor while arriving at a decision in regard to feasibility and viability of a Resolution Plan,* ***legislature brought in the amendment to amplify the scope of considerations which may be taken into consideration by the Committee of Creditors while exercising their commercial wisdom*** *in taking the business decision to approve or reject the Resolution Plan.* ***Such consideration is only aimed at arming the Committee of Creditors with more teeth so as to take an informed decision in regard to viability and feasibility of a Resolution Plan, fairness of distribution amongst similarly situated creditors being the bottom line****." (emphasis added) However, such business decision taken in exercise of commercial wisdom of Committee of creditors would not warrant judicial intervention unless creditors belonging to a class being similarly situated are not given a fair and equitable treatment."*

Issues around payment to DFC under a resolution plan

There are several litigations/issues around payment to DFCs and sum and substance of the various issues involved in these litigations are summarized below:

i. Quantification of the amount to be paid to DFCs as per Section 53(1)

ii. Is the liquidation value to a financial creditor under section 53 in CIRP different from the liquidation value payable under liquidation?

iii. Is it mandatory for the CoC to consider the value of security held by a dissenting secured financial creditor for determining the liquidation value payable to such dissenting financial creditor under CIRP?

iv. Can a secured FC be paid less than the value of security held by the said FC under a resolution plan in CIRP?

v. Whether treatment given to the financial creditors, who do not vote in favour of the resolution plan be also given to a financial creditor who abstains from voting on the resolution plan?

To answer the above issues pertaining to DFCs, I have referred to a few important judicial pronouncements wherein the Hon'ble NCLAT/Hon'ble Supreme Court have delved into the said issues and have clarified the treatment to be given to DFCs.

Judicial pronouncements regarding payment to DFC

i. ***DBS Bank Ltd.*** v. ***Ruchi Soya Industries Limited*** (Company Appeal (AT) (Insolvency) No. 788 of 2019 dated 18-11-2019)

Facts of the Case: The appellant (DBS Bank) had high value security interest which covered around 90% of its admitted claim. However, the CoC approved the plan which did not consider the value of security interest available with the appellant. As per the appellant, the amount payable in the event of liquidation would be around 90% of its admitted claim, *i.e.,* value of security interest available with the appellant.

Decision of the Hon'ble NCLAT: Section 30(2)(*b*)(*ii*) cannot be interpreted in a manner to give advantage to a 'dissenting secured financial creditor'. In fact, Section 30(2)(*b*)(*ii*) **has been amended only to ensure that 'dissenting financial creditor' should not get anything 'less than liquidation value' but not for 'getting maximum of the secured assets** (emphasis added)

Conclusion: It is only mandatory to pay the liquidation value to a DFC, the value of security interest held by the said DFC shall be of no relevance. However, the method of calculating the liquidation value for a secured financial creditor under CIRP has not be explained by the Hon'ble NCLAT in the said judgment.

***ii. Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta & Ors.* (Civil Appeal No. 8766-67/2019 and other petitions dated 15-11-2019)**

Some very important observations were made by the Hon'ble Supreme court of India with respect to

payment to DFCs in this landmark judgment, which is enumerated below:

(a) Para 80, page 133- "*When it comes to the validity of the substitution of Section 30(2) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b)* ***that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors.*** *(emphasis added)*

Mrs. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a ***certain minimum amount****, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b),* ***and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable****. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2).* ***Mrs. Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at*** *(emphasis added) as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder."*

(b) Para 49- "*Protecting creditors in general is, no doubt, an important objective. Protecting creditors from each other is also important."*

(*c*) Para- 54- "*If an "equality for all" approach recognizing the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured FCs will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the CD is liquidated. This would defeat the objective of the Code.*"

(*d*) Para 56, Page 95- "*UNCITRAL Legislative Guide which makes it clear beyond any doubt that* ***equitable treatment is only of similarly situated creditors****. Fair and equitable dealing of operational creditors' rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve* differences in *distribution of amounts between different classes of creditors*".

(*b*) **Conclusion:** The Hon'ble Supreme Court has categorically laid down that the Provisions of Section 30(2)(*b*)(*ii*) is only for certain minimum payment to the DFCs and the mention of Section 53 in the said section is to be looked into only from that perspective *i.e.*, a detailed calculation of the liquidation value payable to a secured FC after considering the value of his security interest is not envisaged for the purposes of Section 30(2)(*b*)(*ii*).

iii. India Resurgence ARC Private Limited v. ***Amit Metaliks Limited*** (Civil Appeal No. 1700 Of 2021 dated 13-5-2021)

Facts of the Case: The appellant (India Resurgence ARC) dissented to the approval of the resolution plan as the amount proposed for distribution to the appellant was only Rs. 2.02 Crs as compared to the value of security interest amounting to Rs. 12.00 Crs. As per the appellant, the CoC should have considered the value of the

security in deciding the distribution of the proceeds as per Section 30(4) of the Code as amended on 16-8-2019. The resolution plan was approved by the CoC with 95.35% vote.

Decision of the Hon'ble Supreme Court of India:

(a) *The process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority.*

(b) *The limitations on the scope of judicial review are reinforced by the limited ground provided for an appeal under section 61 of the Code.*

(c) *In the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal.*

(d) *The NCLAT was, therefore, right in observing that such amendment to sub-section (4) of Section 30 only amplified the considerations for the Committee of Creditors while exercising its commercial wisdom so as to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.*

(e) ***we find that the proposal for payment to all the secured financial creditors (all of them ought to be carrying security interest with them) is equitable and the proposal for payment to the appellant is at par with the percentage of payment proposed for other secured financial. No case of denial of fair and equitable treatment or disregard of priority is made out.*** *(Emphasis added)*

(f) ***The repeated submissions on behalf of the appellant with reference to the value of its security interest neither carry any meaning nor any substance.*** *(Emphasis added)*

(*g*) *A dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.*

(*h*) ***It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.*** (*Emphasis added*)

(*i*) *What amount is to be paid to different classes or sub-classes of creditors is essentially the commercial wisdom of the CoC; and a dissenting secured creditor cannot suggest a higher amount to be paid to it with reference to the value of the security interest.*

(*j*) *The principles laid down by the Supreme Court in the judgment of Essar Steel has been reiterated in this judgment also.*

Conclusion: The Hon'ble Supreme court of India has amply clarified that the payment to a dissenting secured financial creditor shall be as per the commercial wisdom of the CoC and the wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.

The Hon'ble Supreme court has made it abundantly clear that a dissenting secured financial creditor cannot seek payment in excess of the amount proposed for payment to other secured financial creditors just because the amount being paid to such dissenting secured financial creditor under a resolution plan is less than the value of the security interest held by the said dissenting secured financial creditor.

With regard to the calculation of the liquidation value as per Section 53 as referred to in Section 30(2)(*b*)(*ii*) under CIRP is concerned, all the secured financial creditors shall be treated as one class irrespective of the value of security interest held by each of the secured financial creditors and the liquidation value shall be calculated for the entire class of secured financial creditors in a summary manner as per priority given under section 53. Thereafter based on the voting share of the respective financial creditor, the liquidation value payable to a financial creditor whether dissenting or assenting shall be determined.

This judgment therefore brings to an end, all the confusions around the payment to be made to the DFCs.

***iv. Jaypee Kensington Boulevard Apartments Welfare Association & Ors.* v. *NBCC (India) Ltd. & Ors.* (Civil Appeal no. 3395/2020, Hon'ble Supreme Court of India Dated 24-3-2021**

In the above judgment, the Hon'ble Supreme Court has made some very important observations with respect to the mode of payment to DFCs as stated below:

a. The dissenting financial creditor are entitled to receive the amount payable in monetary terms alone and not in any other term. DFCs cannot be forced to remain attached to the CD by way of equity or securities. **Hence the DFCs are to be paid in cash and not in kind.** (**Emphasis added**)

*"**Para 124:** To sum up, in our view, for a proper and meaningful implementation of the approved resolution plan, the payment as envisaged by the second part of clause (b) of sub-section (2) of Section 30 could only be payment in terms of money and the financial creditor who chooses to quit the corporate debtor by not putting his voting share in favour of the approval of the proposed plan of resolution (i.e., by dissenting), cannot be forced to yet remain attached to the corporate debtor by way of provisions in the nature of equities or securities"*

b. The homebuyers as a class can either assent or dissent to a resolution plan, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting FC or an aggrieved person. The entire class of home buyers shall either be assenting or dissenting financial creditor.

*"**Para 175:** For what has been discussed above, we hold that the homebuyers as a class having assented to the resolution plan of NBCC, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person"*

Concluding Remark

The lending by Indian banks is primarily secured based hence the value of primary and collateral securities mortgaged/ hypothecated by the borrower plays a significant role in securing lending from Indian banks. However, under CIRP all unrelated financial creditors whether secured or unsecured constitute the CoC. The voting share is determined based on the proportion of the financial debt owed

to such financial creditor in relation to the financial debt owed by the corporate debtor. The value of security held by a financial creditor is irrelevant in determining the voting share. The liquidation value as per Section 53 under CIRP payable to a DFC is calculated based on the voting share of a financial creditor irrespective of the value of security interest held by the said financial creditor.

This can be explained with the help of an *e.g.*, say a CD under CIRP has a liquidation value of Rs. 300.00 Crs against a total claim of Rs. 1150.00 Crs as demonstrated in the table below:

	Claim arranged as per Section 53			
Sl No.	Claim	Sec 53	Total (Rs)	Share of Liquidation Value
1	CIRP Cost	53(1)(*a*)	**30.00**	**30.00**
2	Workmen dues	53(1)(*b*)	**100.00**	**71.00**
	Secured financial creditors (**Sharing Ratio 5:14**)	53(1)(*b*)	**280.00**	**199.00**
3	Employees	53(1)(*c*)	**300.00**	
4	Unsecured creditors in respect of financial debts	53(1)(*d*)	**20.00**	
5	Govt. dues	53(1)(*e*)	150.00	**NIL**
6	Operational debts	53(1)(*f*)	**10.00**	
7	Preference shareholders	53(1)(*g*)	**90.00**	
8	Equity Shareholder	53(1)(*h*)	**170.00**	
	Total		1,150.00	300.00

The Details of CoC constitution is stated in the table below:

	Voting %				
Sl No.	COC members	Claim admitted(Rs)	Vote % in CoC	Vote % amongst Secured FC	Share of liquidation value
1	Secured FC-A	**3 0.00**	**10.00**	**1 0.71**	**21.32**
2	Secured FC-B	**100.00**	**33.33**	**3 5.71**	**71.07**
3	Secured FC-C	**150.00**	**50.00**	**5 3.57**	**106.61**
4	Unsecured FC-D	**2 0.00**	**6.67**	**-**	**-**
	Total	3 00.00	100.00	100.00	199.00

If the liquidation value of Rs. 300.00 Crs is to be distributed under section 53, the liquidation value to secured FC shall be Rs. 199.00 Crs and the liquidation value to unsecured FC shall be Nil as detailed in the table above. For the calculation of the liquidation value, all the secured FCs shall be under one bucket, irrespective of the value of security held by the respective financial creditors. If the secured FC-(A) dissents to the approval of the resolution plan, the liquidation value payable to

secured FC-(A) shall be Rs. 21.32 Crs only as demonstrated in the table above, irrespective of the value of security interest held by FC-(A). If Unsecured FC-(D) dissents to the approval of the resolution plan, the said unsecured FC-(D) shall get Nil as the liquidation value.

The initiation of CIRP under IBC is intended for resolution of insolvency and not for the purposes of recovery. There are penalties under section 65 of the Code for initiation of CIRP for purposes other than resolution of insolvency, however the mindset of the financial creditors is primarily recovery and it is a long journey before a change in the said mindset can happen. Hence wherever a FC is likely to recover an amount under a resolution plan which is less than the value of security interest held by the said FC, the said FC is likely to dissent. The problem is further compounded where unsecured FCs constitute more than 66% vote share of the CoC, the secured FCs are Likely to dissent under said circumstances as the secured FCs may not recover the value of security held by them.

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HIGH COURT OF DELHI

Power Infrastructure India *v.* Union of India

PRATHIBA M. SINGH, J.

W.P.(C) NO. 16676 OF 2022 CM APPLS. NOS. 52547 AND 52548 OF 2022†

DECEMBER 5, 2022

Section 419, read with section 410 of the Companies Act, 2013 and section 61 of the Insolvency and Bankruptcy Code, 2016 - Tribunal and Appellate Tribunal - Benches of - Against order of NCLT dated 27-9-2022, petitioner had filed an appeal and same was stated to be listed before NCLAT on 9-12-2022 - However, an order bearing F.No.10/37/2018-NCLAT had been issued by NCLAT on 21-10-2022, which required physical filing of documents before NCLAT, for purpose of computation of limitation - Apprehension expressed by petitioner was that maximum limitation period of 45 days for filing an appeal under section 61 of IBC expired on 12-11-2022 which was Saturday - Though, e-filing of appeal was done on 11-11-2022, which was a Friday but physical filing was done on following Monday *i.e.* on 14-11-2022 and, thus, appeal might be dismissed - Petitioner filed instant writ seeking quashing of NCLAT's order dated 21-10-2022 - Whether since matter was pending adjudication before NCLAT which was a duly constituted Tribunal under section 410, there was no need to give an opinion on factual issue *i.e.,* whether appeal was within limitation period or not - Held, yes - Whether with these observations, instant petition was disposed of leaving petitioner's remedies open, in accordance with law, upon decision being taken by NCLAT - Held, yes (Paras 11 and 12)

Ms. Fereshte D. Sethna, **Ms. Shivangi Sanghvi**, **Mohit Tiwari** and **Ashish Mishra** , Advs. *for the Petitioner*. **Shiva Lakshmi**, CGSC, **Ms. Srishti Rawat**, **Deepak Khurana**, **Ms. Nishtha Wadhwa**, **Ashish Verma**, Advs. and **M. Theepa** GP *for the Respondent*.

† Arising of order NCLAT in order No. F. No. 10/37/2018, dated 21-10-2022.

For Full Text of the Judgment see
(2023) 147 taxmann.com 554 (Delhi)

(2023) 148 taxmann.com 58 (Delhi)

HIGH COURT OF DELHI

Brilltech Engineers (P.) Ltd. *v.* Shapoorji Pallonji and Company (P.) Ltd.

MS. NEENA BANSAL KRISHNA, J.

ARB.P. 790 OF 2020 IA 12493 OF 2020 AND 3888 OF 2021 O.M.P. (1) (COMM) NO. 324 OF 2020

DECEMBER 15, 2022

Section 11, read with section 9 of the Arbitration and Conciliation Act, 1996 and section 9 of the Insolvency and Bankruptcy Code, 2016 - Appointment of arbitrators - Respondent awarded work order for electrical works in its residential project to petitioner - Overtime, dispute arose between parties regarding payment - Petitioner filed application under section 9 of IBC to initiate CIRP against respondent - NCLT opined that claim of petitioner was valid and genuine and respondent was asked to settle matter - However, officials of respondent were not willing to settle matter - Since, in terms of clause 13 of work order, resolution of disputes was through arbitration, petitioner filed instant petition under section 11 for appointment of Arbitrator - Respondent raised a objection that petitioner had been filing petitions before various forums of law submitting claims and, thus, it was a clear indication that petitioner was resorting to forum shopping and its acts were *mala fide* - It was found in instant case, scope of enquiry in proceedings before NCLT and before Arbitrator was absolutely distinct and merely because petitioner approached NCLT before seeking appointment of Arbitrator, it could not be said that he was indulged in forum shopping - Also it was quite evident that there was consistent stand of respondent challenging amounts claimed by petitioner, and, thus, clearly, there were arbitrable disputes in regard to claimed amounts and disputes between parties were referable to Arbitration - Whether thus, instant petition was to be allowed - Held, yes (Paras 29, 34 and 56)

FACTS

- Army welfare housing organization (AWHO) had awarded the work of construction of twin tower residential accommodation at Greater Noida, to the respondent approved the petitioner as 'specialist firm' for carrying out electrification works in the said Project.
- The respondent had awarded the work order for electrical works in the said project exclusively to the petitioner. The mechanism for executing the work order agreed between the parties was that the petitioner would issue the Running Account Bills (RA Bills) in respect of the work done which would be approved and confirmed by the respondent on the basis of joint inspection conducted by the

AWHO and the architect. Thereafter, the petitioner would generate the tax invoices after accepting the verification and certification, which the respondent would receive and accept by making an endorsement and would make the payment on back-to-back basis.

- Petitioner claimed that the respondent was obligated to pay to the petitioner for the work done only upon the receipt of corresponding amount from AWHO. It was claimed that the respondent had been receiving the corresponding payment from the AWHO but it failed to make payments on back-to-back basis to the petitioner; rather the payments were made after the period of 6-8months. The disputes have thus, arisen between the parties.

- The petitioner also submitted an application with MSME SAMADHAAN but no steps were initiated by the latter and the proceedings became *void ab initio* because of the statutory limit prescribed thereunder.

- Consequently, Petition under section 9 of the Insolvency and Bankruptcy Code was filed by the petitioner against the respondent in NCLT, for initiating corporate insolvency resolution process. The NCLT, opined that the claim of the petitioner is valid and genuine and the respondent was asked to settle the matter. However, officials of the respondent were not willing to settle the matter and have been making fictitious and self-contradictory statements.

- The petitioner filed the petition under section 11 of the Arbitration and Conciliation Act, 1996 wherein again the respondent had asserted that they were desirous of amicable resolution of disputes but again adopted an adamant and illogical approach and all the efforts to amicable settlement failed.

- The petitioner had asserted that a sum of Rs. 2,58,03,143 was to be recovered from the respondent. In terms of clause 13 of the work order, the resolution of disputes was through arbitration. Hence, the present petition had been filed under section 11 for appointment of the Arbitrator.

- The respondent in its reply had taken preliminary objection that the matter had already been submitted before the NCLT, under section 9 of the Insolvency and Bankruptcy Code, 2016 as an operational creditor. It was a trite law that proceedings under section 9 of IBC could be initiated only when the disputes between the parties were non-arbitrable. Hence, the petitioner had expressly rejected any remedy available under the Arbitration Agreement.

- Further, the petitioner in its rejoinder had specifically stated that there were absolutely no disputes between the parties but the respondent (corporate debtor) had

delayed the release of payments to the petitioner. There was a clear admission on behalf of the petitioner that that there were no disputes between the parties for arbitration and therefore, the instant petition was not maintainable.

- It was further asserted that according to clause 13 of the work order which contains the mechanism for dispute resolution, the first step was mutual discussion and thereafter the matter was to be referred to the Regional Head and in case the disputes were still not resolved, the matter could be referred to the arbitration. The petitioner had failed to follow the pre-conditions for referral of disputes to the arbitration and therefore, the petition was not maintainable.

- The respondent had further asserted that the mandatory notice under section 21 of the Arbitration and Conciliation Act invoking the arbitration has not been served upon the respondent till date. The petitioner had not specified the date on which arbitration was invoked as per the provisions of the 1996 Act which was in contravention of the law as laid down by the Courts. In the absence of the notice of invocation of arbitration, the instant petition was liable to be dismissed. It was further asserted that the petitioner had been continuously resorting to various Demand Notices to respondent and Letters to AWHO before various Courts and had been filing petitions before various forums of law submitting the claims indifferent amount. It was a clear indication that the petitioner was resorting to forum shopping and his acts were *mala fide*. It was re-asserted that there was no arbitrable dispute and the present petition was liable to be dismissed.

HELD

A. Existence of Arbitrable Disputes:

- The first objection taken on behalf of the respondent is that there are no arbitrable disputes between the parties. A reference has been made to the rejoinder filed by the petitioner in its petition before the NCLT wherein it was asserted that there are no arbitrable disputes and had claimed that the debt amount was liable to be paid by the respondent. (Para 24)

- It is a settled proposition of law that jurisdiction of NCLT can be invoked only in respect of determined debts. However, merely because a petition has been filed by the petitioner asserting that a definite amount is payable by the respondent, would not imply that the claimed amount has been admitted by the respondent but is only expressing its inability to be able to pay the claimed amount. The Respondent has consistently taken a stand in its Reply to the Demand Notice and in the other proceedings including section 9 petition as well as in the reply to the present petition that

the amounts have been claimed by the petitioner wrongly and the same are not due and payable by the respondent. (Para 26)

- In the present case, though a proceeding may have been initiated by the petitioner before the NCLT asserting that there is an admitted debt as has been pointed out by the respondent, but a mere assertion would not make it into an admitted liability especially when the respondent has been refuting it at every forum and in every proceeding. (Para 28)

- It is quite evident that there is consistent stand of the respondent challenging the amounts claimed by the petitioner. Clearly, there are arbitrable disputes in regard to the claimed amounts and the objection taken by the respondent in regard to non-existence of arbitrable disputes, is not tenable. (Para 29)

B. Forum Shopping:

- The respondent has further claimed that different amounts have been claimed by the petitioner in different proceedings. The claim before the MSME forum was of Rs. 20.87 lakhs while under section 8 of IBC it was Rs. 99 lakhs. In the present case, the claim has been made for Rs. 2.50 crores. It is quite evident from the fluctuating amounts that nothing is due and it is only forum shopping which is being indulged into by the petitioner. (Para 30)

- It can be seen from the various proceedings which have been initiated by the petitioner that different amounts had become due and payable at different times and also interest component which was being claimed, was a variable. The petitioner has given explanation for claiming the amounts before various forums depending upon when it had approached that particular forum. Merely because the petitioner has approached different forums for redressal of its claims, cannot be said to be a ground to hold that this is a case of forum shopping. Each of the provision invoked by the petitioner has its own individual scope and it cannot be said that resort to one has the effect of ousting the other forums or that it is a case of forum shopping. (Para 31)

- In the present case, the scope of enquiry in the proceedings before the NCLT and before the Arbitrator is absolutely distinct. Merely because the petitioner approached NCLT before seeking appointment of arbitration, it cannot be said that he was indulging in forum shopping. (Para 34)

C. Notice of Invocation under section 21 of the Act:

- The next objection taken on behalf of the respondent is that there is no valid notice of invocation under section 21 of the 1996 Act. (Para 35)

- According to clause 11 of arbitration agreement all disputes or difference of opinion on account of interpretation of clauses, technical specifications, etc. were to be first resolved through direct and mutual discussions at site level. In case difference of opinion still persisted, the matter was to be referred to Regional Head and even if thereafter the parties failed to reach the amicable settlement, the matter was to be referred to Arbitration. It may be observed that the mutual discussions and referral to Regional Head essentially pertained to difference/dispute in regard to interpretation of clauses, technical specifications, etc. The dispute between the parties arose in regard to the payments and not in respect of any technical specifications. Moreover, petitioner had also approached MSME Samadhan for resolution of disputes. Therefore, it cannot be said that the procedure as prescribed under clause 13 of terms of Contract was not followed by the petitioner. (Para 38)

- It needs to be considered if the petitioner has met the pre-requisite requirement of service of notice under section 21 of the 1996 Act. First and foremost, the intention of approaching the appropriate forum for recovery of its claims had been indicated in the demand notice itself. It was also stated that in case the claims of the petitioner are not satisfied, it would be compelled to approach the NCLT. In response thereto, the respondent had clearly indicated that there was no ground to approach the arbitration or NCLT. It is quite evident that from the notice and the reply thereto, the intention of invoking the legal proceedings which included arbitration, was expressly conveyed. The sole purpose of section 21 is to put a party to notice about the intention of approaching the arbitration which was sufficiently conveyed through demand notice and the reply of the respondent. (Para 45)

- It is significant to refer to the Order under section 9 of the 1996 Act wherein it was submitted on behalf of the respondent that though the parties were unable to arrive at any settlement, it would be appropriate if the pending disputes are referred to arbitration subject to the petitioner withdrawing proceedings from other forums. Respondent further agreed to maintain a balance of Rs. 99,87,763 towards the amount claimed by the petitioner in its demand notice. (Para 46)

- Even if for the sake of arguments, it is accepted that the demand notice failed to meet the requisite requirements of section 21 of the 1996 Act, it cannot be overlooked that in the proceedings under section 9, the respondent had agreed to referral of the disputes between the parties to arbitration. The petition under section 9 of the 1996 Act and the willingness of the

respondent to resort to arbitration for resolution of disputes is sufficient compliance of section 21 of the 1996 Act. (Para 47)

- The objection now being taken on behalf of the respondent of there being no proper notice under section 21 of the Act, loses its significance in view of the proceedings that have transpired between the parties. (Para 48)
- Prima facie, it has been shown that there are arbitral disputes between the parties and in terms of the clause 13 of the work order, the disputes between the parties are referable to arbitration. (Para 51)
- In light of the facts and submissions made, Arbitrator is here by appointed as the independent Arbitrator to adjudicate the disputes between the parties. (Para 52)
- The parties are at liberty to raise their respective objections before the Arbitrator. (Para 53)
- Accordingly, petition under section 11 is allowed. (Para 56)

CASE REVIEW

Nirman Sindia v. *Indal Electromelts Ltd.* AIR 1999 Ker 440 (para 39) *distinguished*.

CASES REFERRED TO

Mobilox Innovations (P.) Ltd. v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/144 SCL 37 (SC) (para 27), *A. P. State Financial Corpn.* v. *Gar Re-Rolling Mills* (1994) 2 SCC 647 (para 32), *National Insurance Co. Ltd.* v. *Mastan* (2006) 2 SCC 641 (para 32), *Ireo Grace Realtech (P.) Ltd.* v. *Abhishek Khanna* (2021) 3 SCC 241 (para 32), *Union of India* v. *Cipla Ltd.* (2017) 5 SCC 262 (para 33), *Bharat Sanchar Nigam Ltd.* v. *Nortel Networks India (P.) Ltd.* (2021) 5 SCC 738 (para 35), *Concept Infracon (P.) Ltd.* v. *Himalaya Press Power Ltd.* 2016 SCC OnLine Delhi 518 (para 36), *Municipal Corpn, Jabalpur* v. *Rajesh Construction* 2007 (2) ARB. LR 65 (SC) (para 36), *Nirman Sindia* v. *Indal Electromelts Ltd.* AIR 1999 Ker 440 (para 39), *Alupro Building Systems (P.) Ltd.* v. *Ozone Overseas (P.) Ltd.* 2017 SCC Online Delhi 7228 (para 42), *Badri Singh Vinimay (P.) Ltd.* v. *MMTC Ltd.* 2020 SCC OnLine Delhi 106 (Para 43), *Anacon Process Control (P.) Ltd.* v. *Gammon India Ltd.* 2016 SCC OnLine Bom 10076 (para 44), *State of Goa* v. *Praveen Enterprises* 2011 SCC OnLine SC 860 (para 44), *Universal Consortium of Engineers (P.) Ltd.* v. *Kanak Mitra* AIR 2021 Cal. 127 (para 49), *Bhupender Lal Ghai* v. *Crown Buildtech (P.) Ltd.* (ARB. P. Nos. 470 and 471 of 2009, dated 14-7-2011) (para 50), *Haldiram Manufacturing Co. Ltd.* v. *SRF International* (2007) 139 DLT 142 (para 50) and *Civtech Engineers (P.) Ltd.* v. *M.N. Securities (P.) Ltd.* (ARB. P. No. 93 of 2010, dated 1-9-2010) (para 50).

Ankur Singhal, Adv. *for the Petitioner.* **Manik Dogra**, **Haiyesh Bakshshi**, **Ravi Tyagi**, **Gaurav Mishra**, **Ms. Mayuri Shukla**, **Daman Popli** and **Neetu Devrani**, Advs. *for the Respondent.*

For Full Text of the Judgment see
(2023) 148 taxmann.com 58 (Delhi)

(2023) 148 taxmann.com 59 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Andhra Pradesh State Financial Corporation *v.* Kalptaru Steel Rolling Mills Ltd.

JUSTICE ASHOK BHUSHAN, CHAIRPERSON AND
BARUN MITRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 584 OF 2020†

DECEMBER 13, 2022

Section 31, read with sections 7 and 30 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Appellant-APSFC sanctioned a term loan to corporate debtor, which was secured by mortgage and hypothecation of land, plant and machinery - Andhra Bank and appellant were two financial creditors having voting share of 66.13 per cent and 33.87 per cent respectively - An application under section 7 filed by Andhra Bank against corporate debtor was admitted by Adjudicating Authority - Resolution plan submitted by resolution applicant 'S' was approved by CoC - Appellant filed objection to resolution plan, which was rejected by Adjudicating Authority and by a subsequent order resolution plan was approved - Appellant challenged order passed by Adjudicating Authority approving resolution plan of corporate debtor and submitted that application, which was filed by Andhra Bank was highly barred by time and very initiation of proceedings was illegal - However, in objections which were filed by appellant to resolution plan only issue raised by appellant was with regard to apportionment of amount to dissenting financial creditor, which was repelled by Adjudicating Authority - At no point of time any issue regrading limitation of section 7 application had been raised - In Special Leave Petition filed by appellant challenging order initiating CIRP, ground regarding section 7 application being barred by time had been raised, however, said Special Leave Petition had been dismissed - Whether therefore, when challenge to section 7 application had been rejected by Supreme Court on all grounds, appellant could not be permitted to challenge initiation of CIRP on ground of limitation in instant Appeal - Held, yes - Whether since Adjudicating Authority had considered that resolution plan contained provision for takeover of corporate debtor as going concern and also contained provision for implementation of plan through a monitoring committee, various parts of plan were compliant to section 30 and, therefore, no grounds were made out to interfere with order approving resolution plan - Held, yes (Paras 8, 9, 12, 14 and 16)

FACTS

- The appellant - APSFC sanctioned a Term Loan of Rs. 7.70 crores on 11-1-2008 and Additional Term Loan

of Rs. 12.30 crore on 27-1-2009 to the corporate debtor. The loan was secured by the mortgage and hypothecation of the land, plant and machinery.

- On 17-6-2013, the appellant took over the possession of the mortgaged property as there was default on behalf of the corporate debtor to pay Term Loan. Possession was taken by the appellant under section 29 of the State Financial Corporation Act, 1951. Appellant gave advertisements for sale of the mortgaged assets of the corporate debtor but sale could not be completed. An application under section 7 was filed by Andhra Bank against the corporate debtor in which an order was passed on 14-8-2018 by the Adjudicating Authority admitting section 7 application.

- The Andhra Bank and the appellant were two financial creditors claiming Rs. 90.33 crores and Rs. 46.27 crores respectively. Publication was made calling for Expression of Interest on 16-10-2018 in pursuance of which resolution applicant 'S' submitted Resolution Plan. Andhra Bank had voting share of 66.13 per cent whereas the appellant had voting share of 33.87 per cent. The resolution plan was approved by CoC on 7-5-2019.

- The appellant filed objection to the Resolution Plan. By order dated 31-1-2020, the objections of the appellant were rejected by the Adjudicating Authority and by a subsequent order dated 14-2-2020, the resolution plan was approved.

- On appeal the appellant challenged order dated 14-2-2020 passed by Adjudicating Authority approving resolution plan of corporate debtor and order allowing application filed by resolution professional seeking direction to appellant for releasing original title deeds of property mortgaged with appellant by corporate debtor. The appellant submitted that the application which was filed by the Andhra Bank was highly barred by time and very initiation of the proceedings was illegal.

HELD

- It is to be noted that in the objections which was filed by the appellant to the Resolution Plan only issue raised by the appellant was with regard to apportionment of amount to the dissenting Financial Creditor which was repelled by the Adjudicating Authority on 31-1-2020. At no point of time any issue regrading limitation of section 7 application has been raised. The order passed by the Adjudicating Authority dated 14-8-2018 admitting section 7 application filed by Andhra Bank was challenged by the appellant by filing a Special Leave Petition which petition was dismissed on 4-1-2021 by order passed by the Supreme Court. (Para 8)

- When the challenge to the section 7 application filed by the appellant

on all grounds has been rejected by the Supreme Court, the appellant cannot be permitted to challenge initiation of CIRP on the ground of limitation in this Appeal. (Para 9)

- The respondent No. 1 has brought on record the copy of the Special Leave Petition filed by the appellant challenging the order initiating the CIRP. The respondent No. 1 has pointed out that in the Special Leave Petition the ground regarding section 7 application being barred by time has also been raised, which Special Leave Petition having been dismissed the appellant cannot be permitted to raise the issue of limitation. (Para 10)

- Thus, it is viewed that the appellant cannot be heard to say that initiation of CIRP itself was bad. What is challenged in this appeal is approval of Resolution Plan by order dated 14-2-2020 and subsequent order passed on the I.A. of the Resolution Professional. (Para 11)

- Now coming to the submission of the appellant that objections raised by the appellant have not been adequately considered by the Adjudicating Authority, suffice it to say that the objection was filed by the appellant raising ground that Resolution Plan is not in accordance with the Code which objection has been rejected on 31-1-2020 by the Adjudicating Authority, which order has never been challenged. The Adjudicating Authority in the impugned order has also noticed certain objection raised by the appellant financial creditor and the Adjudicating Authority has returned a finding that there has been equitable treatment between both the similarly situated secured creditors, CoC had approved the Resolution Plan by the requisite majority. The submission of the appellant that corporate debtor was not a going concern, hence, there was no question of approving the Resolution Plan, also need to be rejected. In the impugned order the Adjudicating Authority has referred to the reply submitted by the Resolution Professional where it was mentioned that the Resolution Plan contains the provision for takeover of the corporate debtor as going concern and amalgamation of the corporate debtor with the Resolution Applicant. The Resolution Plan also contains provision for implementation of the plan through a monitoring committee. The Adjudicating Authority rightly observed that resolution is the rule and the object of the Code is to promote resolution. The Adjudicating Authority in detail considered the various parts of the plan which has been held to be compliant to section 30 of the Code. (Para 12)

- The submission of the appellant that the order passed by the Adjudicating Authority is nullity since it is passed on an application which is barred by time, need no acceptance for the reasons as indicated above. The challenge

to the order initiating CIRP on section 7 application has been rejected by the Supreme Court in the Special Leave Petition filed by the appellant, hence, it is no more open for the appellant to contend that the order passed by the Adjudicating Authority was without jurisdiction. (Para 14)

- Thus, there are no grounds made out to interfere with the order approving the Resolution Plan. (Para 16)
- In result, both the Appeals are dismissed. (Para 18)

CASE REVIEW

Prabhakar Nandiraju v. *Kalptaru Steel Rolling Mills Ltd.* (2020) 121 taxmann.com 108 (NCLT - New Delhi) (para 18) and Order passed by NCLT, New Delhi (I.A. No. 2123 (PB)/2019 in (IB)-563(PB)/2018) dated 19-11-2020) (para 18) *affirmed.*

India Resurgence ARC (P.) Ltd. v. *Amit Metaliks Ltd.* (2021) 127 taxmann.com 610/167 SCL 223 (SC) (para 15) *followed*

CASES REFERRED TO

B.K. Educational Services (P.) Ltd. v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 4), *Andhra Pradesh Financial Corpn.* v. *Kalptaru Steel Rolling Mills Ltd. (SLP (Civil) Dairy No(s). 22842 of 2022, dated 4-1-2021)* (para 5), *Ram Chandra Singh* v. *Savitri Devi* (Civil Appeal No. 8216 of 2003, dated 9-10-2003) (para 13) and *India Resurgence ARC (P.) Ltd.* v. *Amit Metaliks Ltd.* (2021) 127 taxmann.com 610/167 SCL 223 (SC) (para 15).

Gautam Singh, Adv. *for the Appellant.* **Anoop Prakash Awasthi**, **Ms. Prapti Singh**, **Parthivi Ahuja**, **P.B.A. Srinivasan**, **Parth Tandon** and **V. Aravind**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT, New Delhi in *Prabhakar Nandiraju* v. *Kalpataru Steel Rolling Mills Ltd.* (2020) 121 taxmann.com 108 (NCLT - New Delhi) and order passed by NCLT, New Delhi in I.A. No. 2123 (PB)/2019 in (IB)-563(PB)/2018) dated 19-11-2020

(2023) 148 taxmann.com 61 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Pramod Kumar Pathak *v.* ARFAT Petrochemicals (P.) Ltd.

JUSTICE ASHOK BHUSHAN, CHAIRPERSON DR. ALOK SRIVASTAVA AND BARUN MITRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 312 OF 2022†

DECEMBER 12, 2022

Section 33, read with sections 5(26) and 34 of the Insolvency and Bankruptcy Code, 2016 - Corporate Liquidation Process - Initiation of - Company JK was declared a sick industrial unit by Board of Industrial and Financial Reconstruction (BIFR) - Company JK (corporate debtor) entered into Memorandum of Understanding (MoU) with respondent, on basis of which, implementation of rehabilitation scheme was approved by Appellate Authority for Industrial & Financial Reconstruction (AAIFR) - Appellant claiming to be representative of workmen union of sick industry JK filed an application under section 33 before NCLT, alleging that Rehabilitation Scheme had been breached, corporate debtor be liquidated - NCLT came to conclusion that sanctioned scheme of rehabilitation could not be termed as resolution plan within meaning of section 5(26) and, hence, there was no question of respondent committing breach of implementation of plan, and application filed under section 33 be rejected - Appellant challenged rejection of application and in support of his submission had relied on Notification namely Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017, dated 24-5-2017 - However, Supreme Court in Spartek Ceramics India Ltd. v. Union of India (2019) 111 taxmann.com 535 had clearly held that Notification dated 24-5-2017 travelled beyond scope of removal of difficulties provisions - Whether when Notification dated 24-5-2017, was not a valid Notification, there was no occasion to accept submission that approved rehabilitation scheme, which was foundation of application filed by appellant under section 33 could be treated as a resolution plan within meaning of IBC - Held, yes - Whether very foundation of application filed by appellant under section 33 having been knocked out, application was rightly rejected by Adjudicating Authority - Held, yes (Paras 13, 19 and 20)

FACTS

- Company JK was declared a sick industrial unit by the Board of Industrial and Financial Reconstruction (BIFR) *vide* order dated 2-4-1998. Company JK entered into Memorandum of Understanding (MoU) with respondent ARFAT, on basis of which MoU, Appellate Authority for Industrial & Financial Reconstruction (AAIFR) *vide* order dated 7-1-2005, approved and sanctioned the implementation of rehabilitation scheme.

- The appellant claiming to be representative of the workmen union of Sick Industry JK filed an application under section 33, read with section 34 of the IBC before the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad alleging that Rehabilitation Scheme had been breached, the corporate debtor, be liquidated. The appellant in the application relying on Notification of the Central Government dated 24-5-2017 contended that Rehabilitation Scheme sanctioned and under implementation was a Resolution Plan within the meaning of IBC and claimed that an order of liquidation be passed in terms of section 33.

- The Adjudicating Authority came to the conclusion that Sanctioned Scheme of Rehabilitation could not be termed as Resolution Plan within the meaning of section 5(26). It was further held that Rehabilitation Scheme not being Resolution Plan, there was no question of respondent committing breach of implementation of the Plan, hence, application under section 33 was to be rejected.

- On appeal:

HELD

- The main question to be answered in this appeal is as to whether Application filed by the appellant under section 33 read with section 34 was maintainable. The basis of application was approved Rehabilitation Scheme dated 7-1-2005, alleging contravention of which the application was filed. The primary question is as to whether the approved Rehabilitation Scheme is a Resolution Plan within the meaning of IBC. The appellant in support of his submission relied on order dated 24-5-2017 namely - The Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017. The order dated 24-5-2017 was issued in exercise of powers conferred by sub-section (1) of the section 242 of IBC. (Para 6)

- Section 242 of IBC empowers the Central Government to remove any difficulty arising in giving effect to the provisions of the Code. (Para 7)

- The Notification dated 24-5-2017 came for consideration before NCLAT in Pr. Director General of Income-tax v. Spartek Ceramics India Ltd. (2018) 94 taxmann.com 1/148 SCL 450 (NCL-AT). (Para 8)

- It was held that order dated 24-5-2017 does not relate to removal of any difficulties arising in giving effect to the provisions of the IBC. (Para 9)

- The order passed by the Appellate Tribunal was challenged before the Supreme Court in Spartek Ceramics India Ltd. v. Union of India (2019) 111 taxmann.com 535 which appeals were disposed of by order dated 25-10-2018. (Para 10)

- The submission of the appellant in respect of the above judgment of the Supreme Court dated 25-10-2018 is that the judgment is only an obitor and judgment of the Appellate Tribunal dated 28-5-2018 cannot

be read to mean that Notification dated 24-5-2017 is set aside. It is submitted that the Supreme Court has also incorrectly noticed that judgment dated 28-5-2018 has set aside the Notification, whereas the NCLAT has not set aside the Notification, but only made an observation that Notification was in excess of power vested in the Central Government. (Para 11)

- The Supreme Court clearly noticed the view of the Appellate Tribunal that Notification dated 24-5-2017 travels beyond the scope of removal of difficulties provisions, which observation was approved. The judgment of the Appellate Tribunal has been upheld. Thus, the judgment of the Supreme Court clearly lays down that Notification dated 24-5-2017 travels beyond the scope of removal of difficulties order. The Supreme Court has also noticed the orders of the Delhi High Court, where High Court has ordered the parties to avail of the alternative remedy of filing an appeal before the NCLAT in view of the Notification dated 24-5-2017. After upholding the judgment of the Appellate Tribunal dated 28-5-2018, the Supreme Court has revived the two Writ Petitions filed before the Delhi High Court, which makes it clear that Notification dated 24-5-2017 was treated as Notification not to be given effect to. (Para 12)

- The submission of the appellant with regard to Notification dated 24-5-2017 that the judgment of the Supreme Court can be treated as only an obitor is not agreeable. The Supreme Court has clearly approved the view of the Appellate Tribunal that Notification dated 24-5-2017 travels beyond the scope of removal of difficulties provisions, which is law declared by the Supreme Court and is binding on all under article 141 of the Constitution of India. The judgment of the Adjudicating Authority impugned in the present Appeal follows the judgment of the Supreme Court in Spartek Ceramics India Ltd. (supra). When the Notification dated 24-5-2017, is not a valid Notification, there is no occasion to accept the submission that approved Rehabilitation Scheme dated 7-1-2005, which is foundation of the Application filed by the appellant under section 33 read with section 34 can be treated as a Resolution Plan within the meaning of IB Code. The very foundation of the application filed by the appellant under sections 33 and 34 having been knocked out, the application was rightly rejected by the Adjudicating Authority. (Para 13)

- It is viewed that judgment of the Supreme Court in Spartek Ceramics India Ltd. (supra) is a law declared by the Supreme Court, where Supreme Court has specifically approved the view of this Appellate Tribunal that Notification dated 24-5-2017 travels beyond the scope of removal of difficulties provisions. As per sub-section (1) of section 242, Central Government is empowered to issue an order, if any difficulty

arises in giving effect to provisions of this Code. The power under section 242 is thus confined to the powers of Central Government in removing difficulties arising in giving effect to the provisions of the IBC. The powers cannot be exercised by Central Government to remove any difficulty regarding review or monitoring of scheme sanctioned under Sick Industrial Companies (Special Provisions) Act, 1985 and the repeal of Sick Industrial Companies (Special Provisions) Act, 1985, which is the specific reason mentioned in the Notification dated 24-5-2017, noticing the difficulties, which has arisen for which the order has been issued. (Para 19)

- Thus, it is viewed that no error has been committed by the Adjudicating Authority in rejecting application filed by the appellant under sections 33 and 34. There is no merit in the appeal. The appeal is dismissed. (Para 20)

CASE REVIEW

Pramod Kumar Pathak v. *ARFAT Petrochemicals (P.) Ltd.* (2023) 148 taxmann.com 60 (NCLT - Ahd.) (para 20) *affirmed* (*See Annex*).

Spartek Ceramics India Ltd. v. *Union of India* (2019) 111 taxmann.com 535 (SC) (para 19) *followed*.

Ashapura Minechem Ltd. v. *UOI* (2017) 88 taxmann.com 135 (Delhi) (para 16) and *Girdharilal Sugar and Allied Industries Ltd.* v. *UOI* (2018) 97 taxmann.com 292 (MP.) (para 17) *distinguished*.

CASES REFERRED TO

Pr. Director General of Income-tax v. *Spartek Ceramics India Ltd.* (2018) 94 taxmann.com 1/148 SCL 450 (NCLAT - New Delhi) (para 3), *Spartek Ceramics India Ltd.* v. *Union of India* (2019) 111 taxmann.com 535 (SC) (para 3), *Surendra Singh Hada* v. *Arfat Petrochemicals (P.) Ltd.* (CP (IB) No. 469 of 2018, dated 5-4-2021) (para 3), *Gail (India) Ltd.* v. *Neycer India Ltd.* (Company Appeal (AT) (Insolvency) No. 294 of 2018, dated 29-1-2019) (para 4), *Ashapura Minechem Ltd.* v. *Union of India* (2017) 88 taxmann.com 135 (Delhi) (para 16) and *Girdharilal Sugar & Allied Industries Ltd.* v. *Union of India* (2018) 97 taxmann.com 292 (MP.) (para 17).

Pankaj Jain and **Sarthak Dugar**, Advs. *for the Appellant*. **Arvind Kumar Gupta**, **Ms. Purti Gupta**, **Ms. Henna George** and **Ms. Shivani Sharma**, Advs. *for the Respondent*.

† Arising out of order NCLT - Ahmedabad Bench in *Promod Kumar Pathak* v. *ARFAT Petro Chemicals (P.) Ltd.* (2023) 148 taxmann.com 60

For Full Text of the Judgment see
(2023) 148 taxmann.com 61 (NCLAT- New Delhi)

(2023) 147 taxmann.com 591 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Commissioner of Customs & Excise, Jp *v.* Ashika Commercial (P.) Ltd.

RAKESH KUMAR, JUDICIAL MEMBER AND

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS) NO. 891 OF 2021†

DECEMBER 16, 2022

Section 31, read with sections 30 and 60 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - Application in case of corporate debtor under section 7 was admitted by NCLT and RP was appointed - RP made a public announcement inviting claims from creditors of corporate debtor - Appellant-Commissioner of Custom and Excise had to recover an amount of Rs. 2.88 crores from corporate debtor for violation of various provisions of Central Excise Act, 1944 - Appellant had not filed its claim while RP invited claims from creditors of corporate debtor - Even claim had not been filed at belated stage prior to approval of resolution plan by CoC - Claim had been filed after plan had been approved by NCLT - At such belated stage no fund was available out of kitty of resolution plan, which could be earmarked to appellant - Both resolution applicant and RP had confirmed implementation of plan and nothing remained to be adjudicated - Whether therefore, appeal against impugned order passed by NCLT approving resolution plan as also non-provisioning for outstanding dues of corporate debtor in resolution plan could not be accepted - Held, yes (Para 11)

FACTS

- The Appellant Commissioner of Custom and Excise had stated that under the Central Excise Act, 1944, Central Excise Rules, 2002 and the Cenvat Credit Rules, 2004, a manufacturer of excisable goods was entitled to seek Cenvat Credit on inputs used in the manufacturing of certain goods manufactured and supplied by such manufacturer. However, in cases where such goods were rejected or returned by the buyer and were disposed without going through any manufacturing process, such manufacturer was required to pay excise duty equal to the amount of Cenvat credit claimed. Since the Corporate debtor had failed to pay such excise duty for the period of 2011-12, a show cause notice was issued to the Corporate debtor to show cause as to why Central Excise Duty amounting to Rs. 8,01,407/-

along with applicable penalty and interest not be recovered from the Corporate debtor. The show cause notice so issued to the Corporate debtor was adjudicated *vide* order passed by the Joint Commissioner, Central Excise Department, Jaipur, whereby the demand of Rs. 8,01,407/- and penalty amount to Rs. 4,31,213/- along with interest at applicable rate was confirmed against the Corporate debtor. The corporate debtor preferred statutory appeal before the Commissioner (Appeals), which came to be dismissed. The order in appeal was challenged by the Corporate debtor before the Custom, Excise and Service Tax Tribunal, New Delhi (CESTAT) which was dismissed by the CESTAT.

- Meanwhile the Adjudicating Authority initiated Corporate Insolvency Resolution Process (CIRP) or Corporate debtor on an application preferred under section 7 before the Adjudicating Authority by the Financial Creditors and Resolution Professional (RP) was appointed in the first Committee of Creditors (CoC) meeting. The RP invited Expression of Interest (EoI) and received four EoI from the resolution applicant. The CoC by 100 per cent vote approved the resolution plan submitted by 'Sanwarmal Jain' and the same was approved by the Adjudicating Authority.

- The Appellant had prayed for setting aside the impugned passed by the Adjudicating Authority as also non-provisioning for outstanding statutory dues of the corporate debtor in the Resolution Plan.

HELD

- It is not in dispute that the appellant has not filed the claim while it was so notified by the RP. Even the claim has not been filed at the belated stage prior to approval of Resolution Plan by the CoC. The appeal has been filed after the plan has been approved by the Adjudicating Authority. As a result of which the appellant has not complied with the provisions of sections 13 and 15.

- At this belated stage no fund is available out of the kitty of the resolution plan which can be earmarked to the appellant as informed by the RP and the Resolution applicant also. Both resolution applicant and RP has confirmed implementation of the plan and nothing remains to be adjudicated.

- It is very much clear that section 238 provides very clearly that provisions of this Code to override other laws as also section 14 provides for moratorium during CIRP. (Para 11)

- Thus, prayer of appellant could not be acceded and accordingly, appeal was dismissed. (Para 11)

CASE REVIEW

Order of NCLT-Kolkata in (IA (IB) No. 600/KB/2020 in CP (IB) No. 503/KB/2018, dated 12-8-2020) (para 11) *affirmed.*

Ghanashyam Mishra & Sons (P.) Ltd. v. *Edelweiss Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 (SC) (para 11) *followed.*

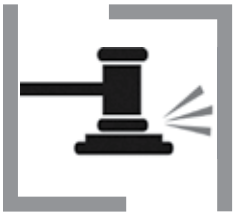
CASES REFERRED TO

State Tax Officer v. *Rainbow Papers Ltd.* (2022) 142 taxmann.com 157/174 SCL 250 (SC) (para 11) and *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 (SC) (para 11)

Sandeep Pathak and **Avnish Dave**, Advs. *for the Appellant.* **Vikrant Pachnanda**, **Ms. Shruti Swaika**, **Rituraj Choudhary** and **Chandan Kumar**, Advs. *for the Respondent.*

† Arising out of order of NCLT - Kolkata in IA (IB) No. 600/KB/2020 in CP (IB) No. 503/KB/2018, dated 12-8-2020.

For Full Text of the Judgment see
(2023) 147 taxmann.com 591 (NCLAT- New Delhi)



(2023) 148 taxmann.com 63 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Indo World Infrastructure (P.) Ltd. *v.* Mukesh Gupta Resolution Professional of Rohtas Projects Ltd.

JUSTICE ASHOK BHUSHAN, CHAIRPERSON AND BARUN MITRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS.) NO. 93 OF 2022†

DECEMBER 6, 2022

Section 18 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Interim resolution professional - Duties of - Corporate debtor was allotted a plot of land in Noida by Noida Authority by lease deed executed in favour of corporate debtor for setting up of a commercial complex - Later, corporate debtor entered into an Agreement to Sell with appellant and appellant got rights for construction and development of project land - However, corporate debtor got admitted to CIRP by Adjudicating Authority - Subsequent to triggering of CIRP, Resolution Professional took over possession of said plot of land of corporate debtor including project land and Adjudicating Authority approved Resolution Plan in respect of corporate debtor- Whether it is incumbent upon Resolution Professional under section 18 to embark upon necessary steps to take control and custody of assets of corporate debtor - Held, yes - Whether Agreement to sell does not convey a property from one person to another, either in present or even in future and, hence, appellant could not have relied upon Agreement to Sell to claim sub-lease rights and ownership rights of project land - Held, yes - Whether therefore, it could not be said that Resolution Professional had acted in a manner that transgressed statutory framework of IBC or that his conduct did not inspire confidence in credibility of insolvency process undertaken by him - Held, yes - Whether thus, having included project land in pool of assets of corporate debtor, Resolution Professional could not be held to be remiss in performance of his duties- Held, yes (Paras 19, 21 and 26)

Section 31, read with sections 29A and 30 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Corporate debtor was allotted a plot of land in Noida by Noida Authority by lease deed executed in favour of corporate debtor for setting up of a commercial complex - Later, corporate debtor entered into an Agreement to Sell with appellant and appellant got rights for construction and development of project land - Corporate debtor got admitted to CIRP by Adjudicating Authority - Subsequent to triggering of CIRP, Resolution Professional took over possession of said plot of land of corporate debtor including project

land and Adjudicating Authority approved resolution plan in respect of corporate debtor - Appellant submitted that it had filed two IAs which remained undisposed, while Adjudicating Authority went ahead and approved resolution plan of corporate debtor, which was not justified - However, on looking at prayers contained in IAs, central issue was exclusion of project land from CIRP and, thus, was akin to prayer in earlier IAs, which were dismissed - Whether since resolution plan approved by CoC did not contravene any of the provisions of law for time being in force, though IAs had not been disposed by Adjudicating Authority before approving Resolution Plan, same did not vitiate CIRP of corporate debtor - Held, yes (Paras 30 and 31)

FACTS

- The corporate debtor was allotted a plot of land in Noida by the Noida Authority for construction and setting up of an Information Technology Enabled Services (IT & ITES) commercial complex. By lease deed executed in favour of corporate debtor on 22-10-2008, the corporate debtor came to have possession of the said plot of land.
- The corporate debtor later entered into an Agreement to Sell (Agreement) on 14-4-2015 with present appellant by virtue of Company Appeal by which the appellant got rights for construction and development of 6 lakh sq. ft. of the land (Project land).
- The appellant in turn had entered into a sub-contract with 'A' on 7-11-2019 to carry out the construction and development of the project on the said plot of land.
- The corporate debtor got admitted to CIRP by the Adjudicating Authority on 30-9-2019. Subsequent to the triggering of CIRP, the Resolution Professional, being present respondent No. 1 took over the possession of the said plot of land of the corporate debtor including the 6 lakh sq. ft. of project land.
- The Resolution Professional/Respondent No. 1 with the approval of Committee of Creditors (CoC) with 99.12 per cent voting share placed the Resolution Plan submitted by Respondent No. 2 and Respondent No. 3 before the Adjudicating Authority. The Adjudicating Authority approved the Resolution Plan in respect of the corporate debtor on 13-12-2021.
- The appellant had also preferred two IAs before the Adjudicating Authority. In one application it sought an order directing the applicant's peaceful and vacant possession of the said property is not to be disturbed and an order directing that no adverse action should be taken against the applicant's title in respect of the said property. In the second application it sought an order directing the Resolution Professional not to make the Noida property as part of the

assets of the corporate debtor; directing Resolution Professional/ CoC to exclude the said property from resolution plan of the corporate debtor and directing Resolution Professional to return the possession of the said property to the applicant without any further delay.

- These two IAs filed by the appellant remained undisposed, while the Adjudicating Authority went ahead and approved the Resolution Plan of the corporate debtor.

- On appeal by appellant:

HELD

(*i*) ***Whether agreement to sell dated 14-4-2015 between corporate debtor and appellant vested ownership rights on appellant in respect of project land over which leasehold rights had been obtained by corporate debtor from Noida authority after executing a lease deed on 22-10-2008?***

- Clauses 14 and 15 of the lease deed with Noida Authority make it abundantly clear that for any sub-lease to be entered into by the corporate debtor, there were two pre-requisites to be met. First, that the unit was to be made functional and, secondly, that the prior approval of Noida authority being the lessor had to be obtained and that in the absence of such permission all actions for transfer of the demised land and thereby any claim of transfer of ownership rights will be deemed to be *ab initio null* and *void*. It has been noted that the appellant has not staked any claim of having completed the construction of the project. It has been brought to record by the respondent No. 1 in reply affidavit that the appellant in turn had entered into a sub-contract with 'A' on 7-11-2019 to carry out the construction and development of the project on the said plot of land and that the project land was in possession of 'A' at the time of taking possession by the Resolution Professional. This has not been denied by the appellant either in the submissions or during the pleadings. No prior clearance given by the Noida Authority allowing any sub-lease of the project land by the corporate debtor to the appellant has been found on record. Therefore, there is no hesitation to agree with the Resolution Professional/respondent No. 1 that the appellant cannot rely upon the Agreement to Sell to claim sub-lease rights and ownership rights of the project land sans the no objection from the lessor. (Para 19)

- It is a settled proposition of law that an Agreement to sell does not convey a property from one person to another, either in present or even in future. Agreement to sell is a promise of a future transfer of property ownership which outlines the terms and conditions under which the property will be transferred. An agreement to sell

an immovable property is therefore a bilateral contract under which the two parties, i.e. the buyer and the seller, agree to certain terms and conditions, subject to which the property in question would be transferred by the seller to the buyer for a decided sale consideration. It is only after such bilateral obligations are discharged that the execution of the sale deed kicks in and it is this sale deed, which is compulsorily registrable under the Registration Act, 1908, which upon being registered, would transfer the right, title and interest in the property in question on to the purchaser. In the present factual matrix, the agreement to sell was yet to culminate into a registered sale deed and therefore not ripe for transfer of the title of property in question from the corporate debtor to the appellant.(Para 21)

- For the above reasons, the claim of the appellant that upon execution of the Agreement to Sell, the ownership of the project land stood transferred from the corporate debtor to the appellant is therefore held in negative.(Para 22)

(*ii*) ***Whether Resolution Professional/ Respondent No. 1 by including project land in pool of assets of corporate debtor had acted beyond statutory framework of IBC?***

- Admittedly, section 18 enjoins upon the Resolution Professional to collect all information relating to the assets, finances and operations of the corporate debtor as well as control and custody of assets. However, the Explanation clause therein excludes assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements. (Para 24)

- A plain reading of Explanation clause to section 18 makes it amply clear that the term 'assets' will not include the assets owned by a third party in possession of the corporate debtor under Trust or Contractual Agreement. Keeping in mind the facts of the present case; the clause of the Lease Deed and the Agreement to Sell; the provisions of the Transfer of Property Act, 1882 and the Registration Act, 1908 as expounded in judgments of the Apex Court, it has already been concluded at Point No. 1 above that the instant Agreement to Sell between the corporate debtor and the appellant which conferred construction, development and sale rights on the appellant on the project land did not confer ownership rights on the appellant. That being the case there are no grounds to find faults or illegality on the part of the Resolution Professional in including the project land in the pool of assets of the corporate debtor under CIRP.(Para 25)

- It is incumbent upon the Resolution Professional under section 18 to embark upon necessary steps to take control and custody of the

assets of the corporate debtor and under section 20 of IBC to protect and preserve the value of the property of the corporate debtor. Thus in having included the project land in the pool of assets of the corporate debtor, the Resolution Professional could not be held to be remiss in the performance of his duties.(Para 26)

- No cogent grounds are found to agree with the appellant's contention that Resolution Professional had acted in a manner that transgressed the statutory framework of IBC or that his conduct did not inspire confidence in the credibility of the insolvency process undertaken by him.(Para 27)

(*iii*) ***Whether approval of Resolution Plan of corporate debtor by Adjudicating Authority without deciding two IAs filed by appellant suffered from impropriety?***

- On looking at the prayer contained in IAs , the central issue is exclusion of the project land from the CIRP thus being akin to prayer in earlier IAs which were dismissed. Thus the prayer of the appellant in earlier IAs having raised similar grounds, were squarely liable to be dismissed on the same grounds of having been filed much after the approval of resolution plan by the CoC. In fact it is also germane to note that the Resolution Professional/ respondent No. 1 has vehemently contended that at a time when the appellant did not file any claim before the Resolution Professional when the Information Memorandum was being firmed up, now at such a belated stage when CoC has already approved the Resolution Plan, they cannot clamour that their interests have been jeopardised. Moreover, it is found that the Adjudicating Authority has noted in the impugned order while approving the Resolution Plan that the plan was approved by the CoC in its 15th meeting with 99.12 per cent voting share. The Adjudicating Authority had also noted that the resolution plan filed with the Application met the requirements of sections 30 and 31 of IBC, 2016 and regulations 37, 38, 38(IA) and 39(4) of the IBBI (CIRP) Regulations, 2016; that the provisions of section 29A of IBC were not attracted and that the Resolution Plan approved by the CoC does not contravene any of the provisions of the law for the time being in force.(Para 30)

- Therefore, it is held that though the IAs had not been disposed by the Adjudicating Authority before approving the Resolution Plan, this did not vitiate the CIRP of the corporate debtor.(Para 31)

- In view of the above discussions, it is opined that there are no convincing reasons to interfere with the order of the Adjudicating Authority approving the Resolution Plan of the corporate debtor under section 31(1). The appeal being devoid of merit there are no reasons to entertain it. In the result, the appeal is dismissed.(Para 32)

CASE REVIEW

Gautam Mullick v. *Rohtas Projects (P.) Ltd.* (2023) 148 taxmann.com 62 (NCLT - New Delhi) (para 31) *affirmed* (***See Annex***).

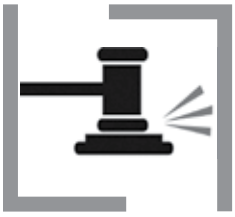
CASES REFERRED TO

Narandas Karsondas v. *S.A. Kamtam* AIR 1977 SC 774 (para 8), *Suraj Lamp & Industries (P.) Ltd.* v. *State of Haryana* (2011) 14 taxmann.com 103/202 Taxman 607 (SC) (para 8), *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 10) and *Pratap Technocrats (P) Ltd.* v. *Monitoring Committee of Reliance Infratel Ltd.,* (2021) 129 taxmann.com 132/167 SCL 508 (SC) (para 11).

Kunal Tandon, **Sumit Kalra** and **Ms. Niti Jain**, Advs. *for the Appellant.* **Abhishek Anand** and **Prateek Kushwaha**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT - New Delhi in *Gautam Mullick* v. *Rohtas Projects (P.) Ltd.* (2023) 148 taxmann.com 62.

For Full Text of the Judgment see
(2023) 148 taxmann.com 63 (NCLAT- New Delhi)



(2023) 148 taxmann.com 57 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Keshav Kantamneni *v.* Kishan Chand Suresh Kumar

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

COMPANY APPEAL (AT) (CH) (INS.) NO. 260 OF 2021†

DECEMBER 12, 2022

Section 5(6), read with sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Dispute - Whether in law, Adjudicating Authority, is only to ascertain, if there is a debt due in fact and in law, payable by opposite party and that a default, is committed - Held, yes - Whether if a debt sum, of more than Rs. 1 lakh (now 1 crore) is admitted, an application under section 9, is to be admitted, by an Adjudicating Authority - Held, yes - Appellant/ex-Managing Director of corporate debtor entered into a business relationship, wherein, petitioner/operational creditor, had supplied ply, plywoods and boards to appellant, under various consignments - Operational creditor, based on purchase orders of corporate debtor, had raised invoices - However, corporate debtor failed to make payments - Operational creditor issued a notice of demand under section 8 to corporate debtor - Application was filed under section 9 by operational creditor for initiation of CIRP against corporate debtor - Corporate debtor sought time on pretext that settlement was about to arrive at between parties, however, thereafter, there was no representation on behalf of corporate debtor - Subsequently, NCLT passed an *ex parte* order against corporate debtor admitting section 9 application - Whether since there was no pre-existing dispute between parties and appellant had not repudiated that sum of Rs. 3.25 crores was due and payable to operational creditor by corporate debtor and that debt of corporate debtor was very clearly established from memorandum of compromise and other materials available on record, admission of section 9 application, by Adjudicating Authority was free from any legal infirmities - Held, yes (Paras 59, 60, 62, 65 and 66)

FACTS

- The appellant 'Ex-Managing Director of the corporate debtor 'UIL', entered into a business relationship, wherein, the 1st respondent/petitioner/operational creditor, had supplied ply, plywoods and block boards to the appellant, under various consignments.
- The operational creditor, based on the purchase orders of the corporate debtor, had raised invoices. The principal amount due and payable by the corporate

debtor was Rs. 3.25 crores and that the corporate debtor despite having its liability with respect to the outstanding sum, failed to make payments notwithstanding several requests and reminders and it was evident that there was no dispute with regard to the existence of the said operational debt.

- Under such circumstances, the operational creditor issued a notice of Demand as stipulated under section 8 to the corporate debtor, which was received by the corporate debtor.
- Hence, application had been filed by the operational creditor before the Tribunal, for initiation of CIRP as against the corporate debtor.
- In relation to the corporate debtor, it could be seen from the record of proceedings that when the matter came up for hearing on numerous occasions, the corporate debtor was represented by an Authorised Representative and time was sought on the pretext that the settlement was about to arrive between the parties. Thereafter, there was no representation on behalf of the corporate debtor. Subsequently, NCLT passed an *ex parte* order against the corporate debtor. The NCLT observed that the corporate debtor under the garb of settlement was trying to delay proceedings before Tribunal. Hence, NCLT proceeded to initiate CIRP in relation to corporate debtor and admitted the section 9 application and declared Moratorium etc.
- On appeal:

HELD

Dispute:

- It is pointed out that a dispute, does not mean a mere denial, namely no payment is due, because there is a dispute. To decide whether, there exists a dispute, whether there is plausible contention, which requires further investigation and ensure that the dispute, is not based on feeble arguments or assertion of facts, which are unsupported' by evidence. (Para 39)
- The dispute of privity of contract, has no relevance, if the debt payable, is more than Rs. one lakh. Even if the sum, is disputed, if the claim, is more than Rs. one lakh (now Rs. one crore), the Corporate Insolvency Resolution Process, can be initiated. (Para 40)
- A corporate debtor, must exhibit, a pre-existing dispute. Further, the disputed questions, pertaining to claims and counter claims, cannot be decided by an Adjudicating Authority, in an application, under section 9. (Para 41)

Admission:

- Admission, is a self harming statement, express or implied, oral or written, which is adverse to an individual's case. Further, admissions, are substantive evidence, even though, the makers of the same are not confronted with their statements. In law, admissions, are

receivables, to establish, matters of mixed fact/law. (Para 42)

Acknowledgement of Debt:

- An acknowledgement, is a candid admission, by a debtor, to the creditor, indicating that he owes money to the creditor. Insofar as an acknowledgement of debt is concerned, it does not create a new debt. If an individual, acknowledges the invoices or ledger account, maintained by the operational creditor, it implies an acknowledgement, in respect of the same and implies, a promise to pay, should the balance turnout, to be against a person, making it. (Para 43)
- An acknowledgement, to whomsoever made, is a valid acknowledgement, if it points with reasonable certainty, to the liability under a dispute. To put it differently, a person, acknowledging, must be aware of his liability and the commitment, should be towards that liability. (Para 44)
- Section 18 of the Limitation Act, 1963, applies not only where liability is admitted, unconditionally, but also, where the admission is conditional, provided the condition is satisfied. Moreover, actual payment of money, is not required under section 18 of the Limitation Act, 1963, but, it is essential under section 19 of the Limitation Act, 1963. (Para 45)
- An acknowledgement, has the effect of creating a new period run from the date of acknowledgement. It does not create a new contract. Therefore, it is distinct from a novation of contract, with the meaning of section 62 of the Indian Contract Act, 1872. (Para 46)
- An acknowledgement, extends the period of limitation. An acknowledgement of liability, ought to be a necessary implication, so that the acknowledgement, is clear and unequivocal. (Para 47)

Discussions:

- Before the Adjudicating Authority, the 1st respondent/petitioner/operational creditor, in Form No. 5 (filed under section 9 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules, 2016), under Part IV particulars of operational debt, had averred that the principal sum of Rs. 3.25 crores was due and the interest till 30-6-2020 was calculated at 24 per cent per annum and the total amount due, was mentioned as Rs. 3.99 crores. (Para 48)
- Further, as per clause 5 of the 'memorandum of compromise', the debtors, undertook to pay a sum of Rs. 5.25 crores, to the operational creditor, in accordance with the schedule of payment, specified in the said Clause. Also that, the corporate debtor, had issued six post dated cheques from its account in favour of the operational creditor, for a total sum of Rs. 5.25 crores, which was the agreed payable sum, as per the said

'memorandum of compromise'. The six cheques, issued by the corporate debtor, along with their respective cheques were dishonoured on being presented to the banker of the corporate debtor. (Para 49)

- It is further mentioned before the 'Adjudicating Authority', by the '1st respondent/petitioner' that, from and out of the 'Total Admitted Sum', payable by the 'corporate debtor' to the 'operational creditor', the 'corporate debtor', had till date, made payment of Rs. 2 crores only on numerous dates through Bank RTGS/NEFT, in complete 'violation' and 'disregard', to the agreed 'Schedule' in the 'Memorandum of Compromise', into the account of the 'operational creditor'. (Para 50)

- According to the '1st respondent/petitioner/operational creditor', a sum of Rs. 3.25 crores is the 'unpaid operational debt', payable by the 'corporate debtor' to the '1st respondent/operational creditor'. The breakup of Rs. 3.99 crores (being the amount claimed to be in default) is 'Principal Sum *i.e.*, Rs. 3.25 crores and the 'Interest *i.e.*, Rs. 74.55 lakhs (Interest calculated at 24 per cent per annum till 30-6-2020). (Para 51)

- It comes to be known that the 'operational debt' fell due on various dates between May, 2019 and October 2019. (Para 52)

- Before the 'Adjudicating Authority', the '1st respondent/petitioner/operational creditor', under Part V of Form No. 5, had mentioned that the 'Ledger Account' of the 'corporate debtor', maintained by the 'operational creditor' along with 'Letter of Explanation', was filed. (Para 53)

- In the instant case, although on the side of the 'appellant', a plea is taken, that the 'unpaid dues', under a 'settlement agreement', is not an 'operational debt', and also that, a 'Violation' of the 'Memorandum of Compromise' dated 30-4-2019, cannot be a basis to initiate 'corporate insolvency resolution Process', against the 'corporate debtor', it is evident from the 'Memorandum of Compromise' dated 30-4-2019, and other materials available on record that the 'outstanding principal amount', remains 'unpaid' and on this ground alone, the instant 'appeal', deserves to be dismissed, in the considered opinion of this 'Tribunal'. (Para 54)

- In the present case, the 'defaults', took place in the year 2018 and later in the year 2019, with a promise to effect payments, by October 2019, prior to the 'COVID-19 Pandemic', in March 2020. (Para 55)

- Apart from that, the 'Appellant', in the instant 'Appeal Memorandum', had tacitly admitted that, till date, a payment of Rs. 2 crore, was made in favour of the 'Respondent' by the 'Appellant' and 'UDL' as against the 'outstanding sum' of Rs. 5.25 crores, which was admitted

by the respondent. Therefore, the 'balance outstanding sum', payable was Rs. 3.25 crores. (Para 56)

- Continuing further, the 'appellant', had averred that, so far paid an amount of Rs. 3.20 crores towards 'settlement', and an 'outstanding' of Rs. 2.05 crores, is yet to be paid by the 'appellant'. (Para 57)
- In the instant 'Appeal Memorandum', the 'appellant', has expressed a desire to make payment, but the same is not accepted by the 'respondent', because of the fact that, inspite of ample opportunities and time granted, the 'appellant', has not made payment, in respect of 'outstanding principal amount' of Rs. 2.05 crores, barring the 'outstanding interest factor', as opined by this 'Tribunal'. (Para 58)
- In law, the Adjudicating Authority, is only to ascertain, where there is a debt due in fact and in law, payable by the opposite party and that a default, is committed. In reality, the extent or details of debt, to be decided or not to be gone into by the Adjudicating Authority, in dealing with the application, preferred by the 'operational creditor. (Para 59)
- No wonder, if a debt sum, of more than Rs. 1 lakh' is admitted, an application, under section 9, is to be admitted, by an Adjudicating Authority'. (Para 60)
- Needless to point out, that if the debt sum is more than Rs. 1 lakh (now it is 'Rs. 1 crore), then, an application under section 9, is not to be rejected, by an Adjudicating Authority. (Para 61)
- In the present case, there is no material brought on record on the side of the 'appellant', to exhibit, the 'existence' of a 'pre-existing 'dispute', in regard to the 'interest'. In fact, the 'Memorandum of Compromise', dated 30-4-2019 is a document, filed in support of the section 9 'application', before the 'Adjudicating Authority', by the 1st respondent/operational creditor, to establish an acknowledgement of debt, by the appellant/corporate debtor. (Para 62)
- Besides the above, an 'affidavit' along with the 'ledger account' of the 'appellant', maintained in the 'books of account' of the '1st respondent/operational creditor', along with the 'copy of statement of accounts', was filed by the '1st respondent/petitioner/operational creditor'. (Para 63)
- It cannot be brushed aside, that the 'invoices' and the 'ledger account', were the cementing platform, for the '1st respondent/ petitioner/operational creditor', to prefer an 'application' , before the 'Adjudicating Authority'. (Para 64)
- In the instant case, the 'appellant', had not produced any 'document', to the subjective satisfaction of this 'Tribunal', evidencing the 'prevalent' of 'pre-existing dispute', either prior to the 'issuance of

notice', under section 8, or in 'reply', to the 'notice', issued under section 8 of the Code, by the '1st respondent/petitioner/operational creditor'. Also, the 'appellant', had failed to exhibit any 'interest'/'controversy'/'dispute', when the section 9 'application', was pending before the 'Adjudicating Authority'. (Para 65)

- In view of the detailed upshot, on a careful consideration of the respective contentions advanced on either side, keeping in mind the facts and circumstances of the instant case, in a 'conspectus manner', it is consequently concluded that the 'appellant', has not repudiated that the 'sum' is 'due' and 'payable' to the '1st respondent/petitioner/operational creditor', by the 'corporate debtor', and that the 'debt' of the 'corporate debtor', is very clearly established, by the '1st respondent/petitioner/operational creditor', and because of the fact that, the 'operational debt' and 'default', were committed by the 'corporate debtor' and therefore, the section 9 'application', before the 'Adjudicating Authority', was filed by the '1st respondent/petitioner/operational creditor', well before the 'Covid-19 Pandemic', and on going through the 'impugned order' dated 4-10-2021 passed by the 'Adjudicating Authority', this 'Tribunal', without any haziness, holds that the act of 'admitting' the section 9 'application', by the 'Adjudicating Authority', as per section 9(5), is free from any 'Legal Infirmities'. Resultantly, the instant 'Appeal' fails. (Para 66)

Disposition:

- In fine, the instant Company Appeal is dismissed. (Para 67)

CASE REVIEW

Order passed by NCLT Chennai in IBA/751/2020, dated 4-10-2021 (para 66) *affirmed*.

Hastimal v. *Shankar* AIR 1952 Raj. 7 (Full Bench) (para 46) and *Sarangdhar Singh* v. *Lakshmi Narayan* AIR 1955 Patna 320 (para 47) *followed*.

CASES REFERRED TO

Amrit Kumar Agrawal v. *Tempo Appliances (P.) Ltd.* (2021) 125 taxmann.com 406/164 SCL 763 (NCLAT - New Delhi) (para 19), *Alhuwalia Contracts (India) Ltd.* v. *Logix Infratech (P.) Ltd.* (IB-882/ND/2022, dated 3-6-2022) (para 20), *Nitin Gupta* v. *International Land Developers (P.) Ltd.* (IB No. 507/ND/2020, dated 25-6-2022) (para 21), *Brand Reality Services Ltd.* v. *Sir John Bakeries (India) (P.) Ltd.* (2020) 118 taxmann.com 269/162 SCL 789 (NCLT - New Delhi)/ MANU/NC/7776/2020) (para 22), *Bajaj Rubber Company (P.) Ltd.* v. *Saraswati Timber (P.) Ltd.* (CB No. (IB)-1441 (ND)/2018, dated 11-8-2022) (para 23), *Delhi Central Devices (P.) Ltd.* v. *Fedders Electric & Engg. Ltd.* (CP (IB) No. 343/ALD/2018, dated 14-5-2019) (para 24), *Infobay Interactive India (P.) Ltd.* v. *Clear Channel India (P.) Ltd.* MANU/NC/2605/2021/CP (IB)-1243 (MB)/2019, dated 28-10-2021) (para 30),

Jakson Engineers Ltd. v. *Refex Energy Ltd.* (Comp. APP (AT) (INS) No. 12 of 2019/SCC Online NCLAT 1244 (para 31), *Sahaj Bharti Travels* v. *HCL Technologies Ltd.* (MANU/NC/0095/2022, dated 17-1-2022) (para 32), *Schneider Electric India (P.) Ltd.* v. *Apex Electro Devices (P.) Ltd.* (MANU/NC/1466/2021, dated 8-6-2021) (para 33), *Uniworld Telecom Ltd.* v. *Asia Telecom (P.) Ltd.* (MANU/NC/3871/2022, dated 1-7-2022) (para 34), *Brand Realty Services Ltd.* v. *Sir John Bakeries India (P.) Ltd.* (2022) 136 taxmann.com 230/171 SCL 460 (NCLAT - New Delhi)/MANU/NL/0162/2022, dated 10-3-2022) (para 35), *Ashok Agarwal* v. *Amitex Polymers (P.) Ltd.* (Comp. APP (AT) (INS) No. 608 of 2020/MANU/NL/0034/2021, dated 5-2-2021) (para 36), *Consolidated Construction Consortium Ltd.* v. *Hitro Energy Solutions (P.) Ltd.* (2022) 135 taxmann.com 97/171 SCL 56 (SC)/MANU/SC/0152/2022 (para 37), *South India Insurance Co. Ltd.* v. *Union of India* (1971) 1 MLJ 373 (para 45), *Hastimal* v. *Shankar* AIR 1952 Raj. 7 (FB) (para 46) and *Sarangdhar Singh* v. *Lakshmi Narayan* AIR 1955 Patna 320 (para 47).

Akhil Bhansali, Adv. *for the Appellant.* **Ajit Sharma** and **Vijay Vigneshwar**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT Chennai in IBA/751/2020, dated 4-10-2021.

For Full Text of the Judgment see
(2023) 148 taxmann.com 57 (NCLAT - Chennai)

(2023) 147 taxmann.com 590 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Aswathi Agencies *v.* Bijoy Prabhakaran Pulipra, Resolution Professional PVS Memorial Hospital (P.) Ltd.

M. VENUGOPAL, JUDICIAL MEMBER AND

KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH) (INS.) NO. 179 OF 2021†

DECEMBER 5, 2022

I. Section 3(23) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Person - Whether word 'person', as defined under section 3(23)(*d*), also includes a trust, and, therefore, there is no fetter/embargo or a legal impediment for a trust to be a resolution applicant in submitting a resolution plan - Held, yes (Para 67)

II. Section 61, read with section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's adjudicating authorities - Appeals and Appellate Authority - Whether commercial wisdom of CoC is not be interfered with, except in limited ambit, as contemplated under section 30(2), in respect of an Adjudicating Authority, and as per section 61(3), in regard to an Appellate Authority - Held, yes - CIRP was initiated against corporate debtor and Resolution Professional (RP) was appointed - RP filed an application before NCLT seeking approval of resolution plan submitted by successful resolution applicant, which was approved by CoC with a majority of 100 per cent voting share - NCLT by impugned approved said resolution plan - Appellant-operational creditor filed instant appeal against approval of resolution plan on ground that said resolution plan was not genuine one and in fact intention of resolution applicant was absolute purchase of corporate debtor for a meagre price and that appellant was not provided with an opportunity to present its views or claims, while determining admitted claim - It was noted that plan submitted by successful resolution applicant had satisfied requirements mentioned under Code and Regulations, thereunder and a compliance certificate was filed by RP in terms of regulation 39 of CIRP Regulations - It was also noted that resolution plan, was fully implemented - Further, appellant had not made out a case in its favour and had not proved any grounds for filing an appeal against impugned order - Whether thus, appeal against impugned order passed by NCLT in approving resolution plan was to be dismissed - Held, yes (Paras 70 and 73)

FACTS

- The CIRP was initiated against corporate debtor and Resolution Professional (RP) published invitation for EoI for submission of resolution plan.

- The successful resolution applicant (LMI) submitted its resolution plan and said plan was approved by CoC with 100 per cent voting share. RP filed an application before NCLT for approval of resolution plan. The NCLT by impugned order approved the same.
- The appellant operational creditor challenged order passed by NCLT on ground that Resolution Professional, had committed a mistake in not taking into account the exact value of the land and properties of the corporate debtor. Moreover, the RP, had purposefully, not disclosed the valuation of the item-wise land property, hospital equipments and machineries and the hospital facilities viz. the number of operation theatres, intensive care units, surgical wards, etc., held by the corporate debtor. The appellant comes out with a plea that the resolution plan, given by 'LM', was not a genuine one, and in fact, the intention of the said 'Medical Institution' was the absolute 'Purchase of another Hospital for a meagre price'.
- The other emphatic stand of the appellant was that itself and other creditors were completely in dark about the proceedings of the 'RP' and the 'Committee of Creditors'. Further, the 'appellant' was not provided with an 'opportunity' or any of the workmen to present their views or 'claims', while determining the admitted claim, which was an 'irrational', unjust and 'breach of natural justice'.

HELD

- The 'RP', in tune with the ingredients of section 30(2), is to examine each 'Resolution Plan', received by him, to affirm that the 'Resolution Plan', prescribes for the payment of 'Insolvency Resolution Process Costs', payments of 'Debts of Creditors', the 'management of affairs of the corporate debtor', 'implement and supervision of the Resolution Plan', other requirements as may be specified by the 'Board' and does not 'violate' any 'Section of Law', for the time being in force. As a matter of fact, the 'Committee of Creditors', may approve the 'Resolution Plan', by voting of not less than 75% of voting share on 'Financial Creditors', as per section 30(4). An 'Adjudicating Authority', can examine the 'reasoning of accepting or rejecting or any objection or suggestion and express his views in the matter. (Para 52)
- In tune with the ingredients of section 31, even an 'Adjudicating Authority', is satisfied with the 'Resolution Plan', being 'approved', by the 'Committee of Creditors', as per section 30(4), that it fulfils the requirements, as visualised in section 30(2), it shall by an 'Order' approve the 'Resolution Plan', which shall be binding on the 'corporate debtor', 'Members', 'Employees', 'Creditors' and other 'Stakeholders', involved in the 'Resolution Plan'. (Para 53)

- One of the objects of the code, is to promote 'entrepreneurship', 'availability of credit' and 'balancing interest'. It is pointed out that a 'Resolution Plan' is not a 'Recovery'/not a 'Sale'/not an 'Auction'. No individual is either buying and selling the 'corporate debtor'. However, a 'Resolution Plan', is not to be a 'Discriminatory one'. (Para 54)

- If there is a 'Resolution Applicant', who can continue to run the 'corporate debtor', every endeavour is to be made, to try and see that is quite possible. There is no vested right in the 'Resolution Applicant', to get its/his 'Resolution Plan' approved. (Para 55)

Application of Mind

- A 'Judicial' mind is to be applied by an 'Adjudicating Authority' to the 'Resolution Plan' submitted, and he may take a call for 'accepting' or 'rejecting' the 'Plan', of course, within the 'parameters of law'. (Para 56)

Evaluation

- In the instant case on hand, this 'Tribunal', points out that the '1st Respondent/Resolution Professional', had averred in his 'Counter', in the instant 'Appeal' that the 'Fair Value' and the 'Liquidation Value' of the 'corporate debtor' were arrived at by both the groups of 'Registered Valuers', were not significantly different and as such, there was no requirement to appoint another 'Registered Value', by the 'Resolution Professional', to submit an estimate of the 'Value', computed in the same manner, as per 'Regulation 35(b) of the 'Corporate Insolvency Resolution Process' Regulations. (Para 57)

- As a matter of fact, the 'Value', arrived at by the 'Registered Valuers', are only estimates and the same cannot be construed as an 'Accurate Value' of the 'corporate debtor. In this regard, it is useful to mention the summary of the 'Valuation Reports', submitted by the 'Two Registered Valuers'. (Para 58)

Judicial Review

- The scope of 'Judicial Review', by an 'Adjudicating Authority', revolves around a 'restricted and narrow field'. (Para 61)

- Furthermore, the 'Resolution Plan', given by the 'Resolution Applicant', had satisfied the requirements, mentioned in the Code, and the Regulations, thereunder and a 'Compliance Certificate', was filed by the '1st Respondent/ Resolution Professional' in this regard, before the 'Adjudicating Authority' ('National Company Law Tribunal'), in terms of the Regulation 39(4) of the 'Corporate Insolvency Resolution Process Regulations'. (Para 62)

- It cannot be ignored, that the 'Commercial Wisdom' of the 'Committee of Creditors', is not

be interfered with, except in the limited ambit, as contemplated under section 30(2), in respect of an 'Adjudicating Authority', and as per section 61(3), in regard to an 'Appellate Tribunal'. Besides these, in 'Law', it is not open to an 'Adjudicating Authority' or an 'Appellate Authority', to consider 'any other feature than the one' mentioned in 'section 30(2) or section 61(3). (Para 63)

- Dealing with the plea of the 'Appellant' that a 'Resolution Applicant', cannot be a 'Charitable Public Trust'. To put it precisely, the word 'Person', is defined as per section 3(23)(d), which includes a 'Trust', therefore, there is no 'Fetter'/'Embargo' or a 'Legal Impediment', for a 'Trust', to be a 'Resolution Applicant', in submitting a 'Resolution Plan' (in the present case), the candid fact, is that the 'Successful Resolution Applicant'/'Lessie Medical Institutions', being a 'Registered Charitable Trust', under the 'Indian Trust Act, 1882'), in 'Corporate Insolvency Resolution Process', in the cocksure earnest opinion of this 'Tribunal'. Looking at from that perspective, the contra plea taken on behalf of the 'Appellant' is not acceded. (Paras 66 and 67)

- Indeed, the 'Validation of an Approved Resolution Plan', is to 'Demerge' the 'Assets' of the corporate debtor and 'Amalgamate' the same with the 'Resolution Applicant', which is functioning in the same field of 'corporate debtor' viz. 'Healthcare'. (Para 68)

- It is significantly pointed out, that according to the 'Monitoring Agency', the 'Resolution Plan', is fully implemented, etc. (Para 69)

- It is not out of place, to point out that the 'Committee of Creditors', had approved the 'Resolution Plan' with 100% vote after satisfying itself about the compliance of section 30. To put it succinctly, the 'Adjudicating Authority', was subjectively satisfied as to the compliance of the requirements under the Code and 'Approved' the 'Resolution Plan', in conformity with section 31. (Para 70)

- Any person 'Aggrieved', occurring in section 61(1), is of the view that in section 61(1), the words 'Party Aggrieved', are not employed. For an affected person, the 'Order' of an 'Adjudicating Authority', must cause a 'Legal Grievance', by wrongfully depriving him of something and in the process, his 'Legal Right' is breached, by the act complained of. (Para 71)

- Be that as it may, in view of the detailed qualitative and quantitative upshot, taking note of the divergent contentions advanced on either side, entire gamut of the factual matrix and attendant facts and circumstances of the instant case, in an integral manner, concluded that the 'Appellant' has not made out a case in its favour and has not proved any of the grounds

adumbrated in section 61(3), for filing an 'Appeal', against the 'impugned order', passed by the 'Adjudicating Authority', ('National Company Law Tribunal', Kochi Bench, Kerala), in approving the 'Resolution Plan', under section 31. Viewed in that perspective, the 'Appeal' fails. (Para 73)

CASE REVIEW

Order dated 16-3-2021, passed by the NCLT, Kochi Bench, Kerala, in IA(IBC)/13/KOB/2021 in TIBA/11/KOB/2019) (para 73) *affirmed.*

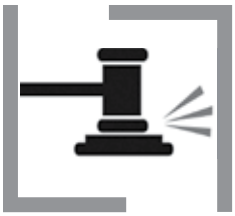
CASES REFERRED TO

Dr. Periasamy Palani Gounder v. *Radhakrishnan Dharmarajan, RP of Appu Hotels Ltd.* (2022) 135 taxmann.com 319 (NCLT - Chennai) (para 22), *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567 (SC) (para 32), *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 35), *Swiss Ribbons (P.) Ltd* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 36), *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 (SC) (para 37), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 38), *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.* (2021) 125 taxmann.com 194/166 SCL 583 (SC) (para 64) and *Sole Trustee Loka Shikshana Trust* v. *CIT* (1976) 1 SCC 254 (para 66).

M.G. Pranava Charan, Adv. *for the Appellant.***Bijoy P. Pulipra**, Adv., and **Pradeep Joy**, Adv. *for the Respondent.*

† Arising out of Order passed by NCLT, Kochi Bench, Kerala, in IA(IBC)/13/KOB/2021 in TIBA/11/KOB/2019, dated 16-3-2021.

For Full Text of the Judgment see
(2023) 147 taxmann.com 590 (NCLAT - Chennai)



(2023) 147 taxmann.com 553 (NCLT-Chd.)

NATIONAL COMPANY LAW TRIBUNAL, CHANDIGARH BENCH

Punjab National Bank *v.* Dinesh Polytubes (P.) Ltd.

HARNAM SINGH THAKUR, JUDICIAL MEMBER AND
SUBRATA KUMAR DASH, TECHNICAL MEMBER
IA NO. 174/2021 IN CP (IB) NO. 104/CHD/2017
DECEMBER 8, 2022

Section 31 of the Insolvency and Bankruptcy Code, 2016, read with regulation 12 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Corporate insolvency resolution process (CIRP) was initiated against corporate debtor and Resolution Professional (RP) was appointed - RP filed an application for approval of resolution plan under section 31, which was approved - Applicant, Excise and Taxation Commissioner filed instant application seeking acceptance of claim/revised claim regarding statutory dues of department by RP and for modifying/setting aside resolution plan as approved by Committee of Creditors - Whether regulation 12 of CIRP Regulations, 2016 provides for an outer limit of 90 days from Insolvency commencement date for submission of claims and, therefore, allowing a claim well after approval of resolution plan would derail entire post-CIRP process and would negate all efforts put at insolvency resolution of corporate debtor and was in teeth of objectives of IBC - Held, yes - Whether since claim in instant case was submitted after a period of more than one year after approval of resolution plan by Adjudicating Authority, same could not have been accepted - Held, yes (Paras 7, 8 and 10)

CASE REVIEW

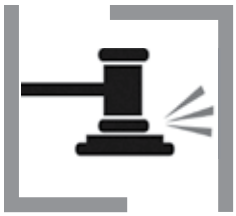
State Tax Officer v. *Rainbow Papers Ltd.* (2022) 142 taxmann.com 157/174 SCL 250 (SC) (para 8) *distinguished.*

CASES REFERRED TO

State Tax Officer v. *Rainbow Papers Ltd.* (2022) 142 taxmann.com 157/174 SCL 250 (SC) (para 8) and *T.S. Murali* v. *Liquidator of Helpline Hospitality (P.) Ltd.* (Company Appeal (AT) (Insolvency) No. 234 of 2021 dated 18-10-2022) (para 9).

Piyush Bansal, Adv. *for the Applicant* **G.S. Sarin**, PCS and **Deepankur Sharma**, Adv. *for the Respondent.*

For Full Text of the Judgment see
(2023) 147 taxmann.com 553 (NCLT-Chd.)



(2023) 147 taxmann.com 552 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

Thomas George *v.* K. Easwara Pillai Resolution Professional Mathstraman Manufacturers and Traders (P.) Ltd.

M. VENUGOPAL, JUDICIAL MEMBER AND

MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH) (INSOLVENCY) NO. 293 OF 2021†

DECEMBER 5, 2022

Section 66 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Fraudulent or wrongful trading - Whether look back period under IBC is three years from date of default - Held, yes - Whether however, section 66 does not provide for any look back period as far as fraudulent transactions are concerned - Held, yes (Para 12)

Section 66 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Fraudulent or wrongful trading - CIRP was commenced against corporate debtor and RP was appointed - While inspecting factory of manufacturing unit of corporate debtor, RP found that erstwhile directors of corporate debtor *i.e.* appellants had transferred ownership of land mortgaged to financial creditor in favour of R3 to settle liabilities of corporate debtor - RP thus, filed an application under section 66 declaring transactions as fraudulent transactions and directing appellants to make good losses caused to creditors of corporate debtor - Though notice was served on appellants, they did not appear before NCLT - Advocate for appellant was very much present before NCLT but did not choose to contest matter and, hence, appellants were set as *ex-parte* - It was a case of appellants that impugned order passed by NCLT was a non-speaking order devoid of any finding to arrive at conclusion that appellant had done any fraudulent act and there was no investigation done nor any report filed to prove that fraud was committed by appellants and, thus, matter be remanded to consider afresh by NCLT - However, absolutely no ground was made out for not having filed reply despite service of notice on appellants - Whether having not contested their case before NCLT despite service of notice, appellants could not now wriggle out of observation made by NCLT - Whether in absence of any reason given by appellants, there was no sufficient cause for setting aside *ex parte* order or giving any additional opportunity to appellant to present their case as RP had produced sufficient material to evidence that appellants had committed fraudulent act - Held, yes - Whether thus, appeal against order of NCLT was to be dismissed - Held, yes (Paras 10 and 13)

CASE REVIEW

Order of NCLT - Kerala in IA Bo 38/KOB/2021 in IBA/04/KOB/2020 dated 9-7-2021 (para 14) *affirmed.*

Pradeep Joy, Adv. *for the Appellant.* **S. Sethuraman** and **G.R. Lakshmanan**, Advs. *for the Respondent.*

† Arising out of Order of NCLT - Kerala in IA No. 38/KOB/2021 in IBA/04/KOB/2020, dated 9-7-2021.

For Full Text of the Judgment see
(2023) 147 taxmann.com 552 (NCLAT - Chennai)

IBBI suspends IP's Registration for 1 year

CASE NO.	IBBI/DC/143/2023
DATE OF ORDER	10th Jan, 2023

Contravention - 1

Handing over of major operation of CD's plant to one of the Resolution Applicants, without CoC's approval.

Provision(*s*) Referred

Section 28, IBC which reads as follows:

> "*28. Approval of committee of creditors for certain actions. - (1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely: - (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting; (b) create any security interest over the assets of the corporate debtor; (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company; (d) record any change in the ownership interest of the corporate debtor; (e) give instructions to financial institutions maintaining*

accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting; (f) undertake any related party transaction; (g) amend any constitutional documents of the corporate debtor; (h) delegate its authority to any other person; (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties; (j) make any change in the management of the corporate debtor or its subsidiary; (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business; (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of 1 (sixty-six) per cent. of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code."

Clauses 1, 2, 3, 12 and 14 of the Code of Conduct under IBBI (IP) Regulations, 2017, which read as follows:

"*CODE OF CONDUCT FOR INSOLVENCY PROFESSIONALS*

Integrity and objectivity.

1. An insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships.

2. An insolvency professional must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession.

3. An insolvency professional must act with objectivity in its professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.

12. An insolvency professional must not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder, as applicable.

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

IP's submissions

That as an RP, he was under a legal obligation under IBC provisions and NCLAT's order directing to maintain CD as a going concern for which a job working agreement was executed with an entity which had a common director as that of a resolution applicant. The IP, however, submitted that all transactions were carried out at arms' length. The IP also submitted that the CoC was informed of the Job Work Agreement in its 18th CoC Meeting.

Analysis and Findings

The resolution plan was submitted before execution of Job Work Agreement. Resolution plan provided details of directorship of RA, and therefore, the fact that there was a common director between RA and entity to which job work was assigned was known to IP. Therefore, it is clear that the IP did not inform CoC of engaging a related party of one of the RAs for the job work when resolution plans were being negotiated with CoC.

The DC found the IP to be guilty of violating Clauses 1, 2, 3, 12 and 14 of the Code of Conduct under IP Regulations for not having disclosed material information concerning executing a job work agreement between CD and one of the members of RA, particularly at a stage when resolution plans were being negotiated with CoC.

DECISION

In view of the aforesaid contraventions, IBBI suspended IP's registration for a period of 1 year.

FAQs on Interim Finance

1. Why interim finance is raised?

For the purpose of dischargingits duties *vis-à-vis* the CD as provided u/ss 20 and 25 of IBC, the IRP or the RP (as the case may be) is empowered to raise interim finance for the purposes of carrying out resolution process for the corporate debtor.

2. What do you mean by Interim finance?

Section 5(15) of the Code defines "interim finance" as any financial debt raised by the resolution professional during the period of the corporate insolvency resolution process or the pre-packaged insolvency resolution process.

3. Whether approval of CoC is required for raising interim finance?

The action of raising interim finance needs approval of CoC, which may approve by casting a vote of 66% of the voting share in favour of the proposal. This is provided in Section 28(*a*) of the Code.

The same was confirmed by NCLAT in the case of *Edelweiss Asset Reconstruction Company Ltd.* v. *Sai Regency Power Corporation Private Limited & Other* (Company Appeal (AT) (Ins) No. 887 of 2019)and *Sajeve Bhushan Deora* v. *Axis Bank Ltd. & Ors.* (Company Appeal (AT) (Ins) No. 741 of 2019).

4. Whether interim finance can be raised during liquidation?

Interim finance cannot be raised during liquidation process as there is no such provision in the Code which permits the liquidator to raise interim finance.

5. What are the safeguards available to the lenders who give interim finance under the Code?

The resolution professional can raise interim finance only in respect of unencumbered assets of the corporate debtor or encumbered assets after taking consent or approval of the secured creditors.

Moreover, interim finance is a part of CIRP and Liquidation cost, and therefore, it is required to be paid in priority over other payments under the waterfall mechanism.

Further, as per Regulation 2(1)(*ea*) of IBBI(Liquidation) Regulations, 2016, after conclusion of a CIRP process, creditors can claim the interest accrued on the interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower.

6. Whether the provisions of interim finance are applicable when company is not a going concern?

As per Section 20 of the Code, interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern and for that purpose interim finance may be raised.

Accordingly, provisions are only applicable whose operations are running on the date of commencement of the insolvency resolution process.

7. Does RBI give any relaxation in the provisioning norms for the treatment of interim finance?

The Reserve Bank of India on 7th June, 2019 had issued a circular on"the prudential framework for resolution of stressed assets"whichprovides that any interim finance extended by the lenders to debtors undergoing insolvency proceedings may be treated as standard asset during the CIRP.

8. What is the priority of repayment of interim finance?

As per section 53 (read with section 5(13)), "*the amount of any interim finance and the costs incurred in raising such finance*" being a part of insolvency resolution process cost takes the first priority under sec. 53 (1)(*a*). This is true for both the repayment of principal as well as payment of interest on interim financing. Both of these qualify, along with other insolvency resolution and bankruptcy process costs for the first layer of payment to be made in the waterfall, in priority to any payments to any other stakeholders.

Regulatory updates

- IBBI on 12th December, 2022 issued *Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees* (*Recommendation*) (*Second*) *Guidelines, 2022*. The Guidelines can be accessed at **https://ibbi.gov.in/uploads/legalframwork/15fd41484696472007c3bf90e8f76e45.pdf**

- IBBI *vide* its circular No. IBBI/LIQ/57/2022 dt. 21st December, 2022 notified regarding Proforma for reporting liquidator's decision(*s*) different from the advice of Stakeholders' Consultation Committee (SCC) under proviso to sub-regulation (*10*) of regulation 31A of IBBI (Liquidation Process) Regulations, 2016. The circular can be accessed at **https://ibbi.gov.in/uploads/legalframwork/2d5613091cded4721f7f0297f4416a8e.pdf**

Pre Pack Insolvency System in Netherlands

Three different types of insolvency proceedings are defined in the Dutch Bankruptcy act. These are bankruptcy, moratorium, and debt restructuring.

Dutch companies and policy makers expected another option to become available to businesses when facing insolvency, as the Netherlands' House of Representatives adopted the Continuity of enterprises act I in June 2016. Initially, the expectation was that this law would enter into force in 2017. However, formal parliamentary questions and responses from social partners delayed the acceptance of this law. The senate intends to examine and consult further on this proposed law after a pending ECJ ruling, together with the proposal for the law on transferring an enterprise during bankruptcy. The act outlines an insolvency rescue procedure known as pre-pack, or 'silent administration', which has already been utilised to varying degrees in the Netherlands. The act would give the practice a statutory basis and ensure uniform implementation across the country.

Continuity of enterprises act I

The act includes stipulations for employee safeguarding, as it requires the works council or staff representation to be involved in the pre-pack proceedings. However, the creditors' interests always take precedence,

as the works council or staff representation can be excluded from the proceedings on the basis of this being contrary to the interests of the company and, thereby, the creditors. The act also outlines the inclusion of the employees' voices in the formal bankruptcy proceedings, as it states that a representative from the works council or staff representation is to be included in the creditors' committee, should the court decide to form such a committee.

The discussion of WCO I has been postponed by the senate because another bill, the 'Law on transfer of undertaking in bankruptcy' (WOVOF), is in preparation. The bill regulates the position of employees in the event of such a restart. The senators have pointed out that the bills are interrelated and therefore want to discuss them jointly. At the moment, there is only a preliminary ruling procedure pending before the Court of Justice of the European Union. The outcome of that procedure may influence how the WOVOF should ultimately look like.

Employer organisations are generally in favour of the WCO I, with the following caveats:

- The court should shortly but thoroughly examine whether a pre-pack would be beneficial to creditors, the company and its employees;
- The pre-pack should only be applicable if this is the case;
- It should not be an exclusionary condition if the company filing for a pre-pack is not able to pay current creditors, as this would render the pre-pack obsolete.

In a Dutch pre-pack the debtor will - prior to filing for a bankruptcy proceeding - explore the possibilities to secure a going-concern sale of its assets to a third party. This is carried out under the supervision of a preliminary liquidator and a preliminary supervisory judge. The pre-negotiated going-concern sale is to be executed - after the debtor is declared bankrupt - by the now formally appointed liquidator.

The aim of a pre-pack is to prepare for formal insolvency in a relatively calm and confidential manner, to ensure that there is a better chance that a company's viable parts can be sold to the highest bidder. This should limit the disruption for the company and its activities, and create value for the involved stakeholders. Preliminary liquidators and preliminary supervisory judges are typically appointed as the liquidator and supervisory judge upon commencement of a bankruptcy proceeding. A well-prepared pre-negotiated deal - under the supervision of a preliminary liquidator - has the advantage that later, the liquidator is typically able to swiftly approve and execute the deal.

ESTRO/SMALLSTEPS CASE

In 2017, the use of pre-packs in the Netherlands was halted as a consequence of the judgment of the European Court of Justice (**ECJ**) in the *Estro* case. Estro was the largest childcare company in the Netherlands with close to 380 childcare centres throughout the Netherlands and with around 3600 employees. When it suffered financial distress, the business was sold using a pre-pack in an attempt to rescue the business. In the context of that transaction, approximately 250 childcare centres were purchased by Smallsteps. It

should be noted that Smallsteps, as the purchaser of part of the business of Estro, was affiliated with (the shareholder of) Estro. Estro's bankruptcy trustee terminated all employees of Estro, following which almost 2600 of those (former) employees were offered a new employment contract by Smallsteps.

In the *Estro* case, the question was whether the (former) employees of Estro were transferred to Smallsteps by operation of law based on the principles of the European Directive on 'Transfer of Undertakings and Protection of Employees' (TUPE), or whether these principles did not apply to the Estro pre-pack on the basis of the exception in bankruptcy (the bankruptcy exception). The bankruptcy exception to the automatic transfer of employment contracts is applicable to a transfer of an undertaking, business, or part of an undertaking or business, if:

- the transferor is the subject of bankruptcy proceedings (or any analogous proceedings);
- such proceedings have been instituted with a view to the liquidation of the assets of the transferor; and
- the transfer is under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority)

The ECJ considered that, in the given circumstances, it was apparent that the pre-pack was "*aimed at ensuring the continuation of the undertaking where that procedure is designed to preserve the operational character of the undertaking or its viable units*". As such, the ECJ held that the pre-pack proceedings were ***not*** instituted with a view to the liquidation of the assets of Estro. The ECJ further considered that this view is not altered by the possibility that a pre-pack also maximises satisfaction of the creditors' collective claims.

In addition, the ECJ held that the pre-pack procedure had no basis in Dutch national legislation that the prospective bankruptcy trustee and prospective supervisory judge had no formal powers, and accordingly, the pre-pack procedure was not supervised by a public authority.

The ECJ concluded that the pre-pack for Estro, therefore, did not meet the requirements of the bankruptcy exception under TUPE or its implementation in Dutch law.

HEIPLOEG CASE

The judgment of the ECJ in the Estro case effectively ended the use of the pre-pack in the Netherlands, leaving exceptional cases aside. With the *Heiploeg* case, however, the Dutch Supreme Court had the chance to request the ECJ to—in essence—reconsider its decision on Dutch pre-packs. In that request, the Dutch Supreme Court indicated that (in its preliminary view) the bankruptcy exception did in fact apply to the *Heiploeg* pre-pack on the basis that, contrary to what the ECJ ruled in the *Estro* case, the *Heiploeg* pre-pack was instituted with the purpose of liquidating assets of the transferor, as well as the fact that the pre-pack was conducted under the supervision of a competent public authority.

The Dutch Supreme Court found that the purpose of the pre-pack was to liquidate

the assets of the bankrupt debtor, given that the bankruptcy of *Heiploeg* was inevitable absent the going concern sale, the purchaser of the business was not affiliated with *Heiploeg* and the District Court had appointed a prospective bankruptcy trustee and prospective supervisory judge with the aim to achieve the highest possible return for the creditors of the potentially (soon to be) bankrupt company.

The Dutch Supreme Court further concluded that pre-packs involve actual supervision by a competent authority because the pre-pack is monitored by a prospective bankruptcy trustee and prospective supervisory judge who, although being appointed by the court without any legal powers when carrying out their tasks, have duties that do not differ from the duties of the bankruptcy trustee and supervisory judge in insolvency proceedings. Furthermore, the prospective bankruptcy trustee should act in the interest of the collective creditors and other societal interests, such as preservation of employment, under supervision of the prospective supervisory judge. In addition, the Dutch Supreme Court concluded that the deal that is negotiated pre-bankruptcy is actually signed and closed by the bankruptcy trustee, with approval of the supervisory judge in bankruptcy, and that the court may appoint a different bankruptcy trustee and supervisory judge if the prospective bankruptcy trustee and the prospective supervisory judge have not taken the interests of the creditors into account. Finally, the Dutch Supreme Court found that the prospective bankruptcy trustee may be held liable in the same way as a bankruptcy trustee in insolvency proceedings.

In sum, based on the further information provided by the Dutch Supreme Court, the ECJ held that the pre-pack proceedings at issue were carried out with a view to the liquidation of the assets of the transferor and under the supervision of a competent public authority if the following exist:

- the transfer of (part of) the undertaking has been prepared prior to the institution of insolvency (or analogous) proceedings with which the liquidation of assets is envisaged and during which the transfer is carried out;
- this transfer is carried out in the context of a pre-pack that has as its primary objective to facilitate a liquidation of the undertaking as a going concern during the insolvency (or analogous) proceedings that satisfies a maximum disbursement to the creditors of the debtor and preserves employment to the extent possible; and
- the pre-pack procedure is governed by statutory or regulatory provisions.

The ECJ set forth an important prerequisite: the pre-pack must be governed by statutory or regulatory provisions.

Currently in 2021, a draft law is being developed and consulted upon, regarding the transition of an enterprise into bankruptcy. This would be an adjustment to Continuity of enterprises act I.

Some more general changes include the establishment of a central, national insolvency register for enterprises. This central register replaces locally held registers in an effort to make the information collection by courts across the country more efficient.

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