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ICSI IIP

INSOLVENCY AND BANKRUPTCY JOURNAL

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INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)

'ICSI House', 3rd Floor, 22, Institutional Area,
Lodhi Road, New Delhi - 110 003

NEWS FROM THE INSTITUTE

ICSI IIP'S INITIATIVES DURING THE MONTH OF JANUARY, 2022

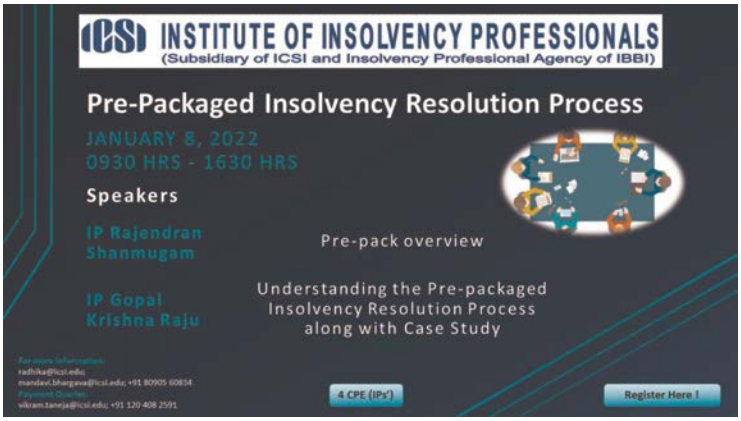
◆ Pre-Registration Educational Course

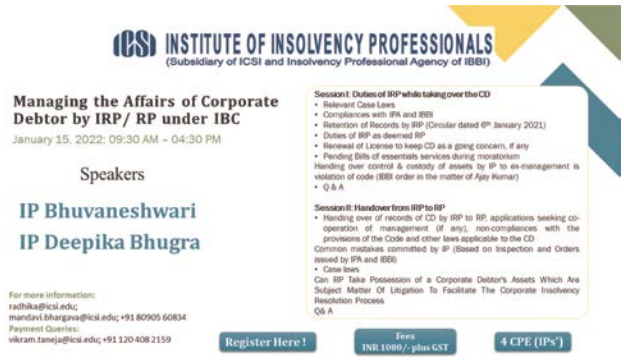
Pursuant to Regulation 5(*b*) of the IBBI (Insolvency Professionals) Regulations, 2016, individuals are eligible to register themselves as Insolvency Professionals (IP) only after undergoing through the mandatory 50 hours Pre-Registration Educational Course from an Insolvency Professional Agency after his/her enrolment as a Professional Member.

ICSI IIP jointly with the other three Insolvency Professional Agencies conducted one batch of pre-registration educational course from 15th January to 21st January, 2022.

◆ Workshops Organized

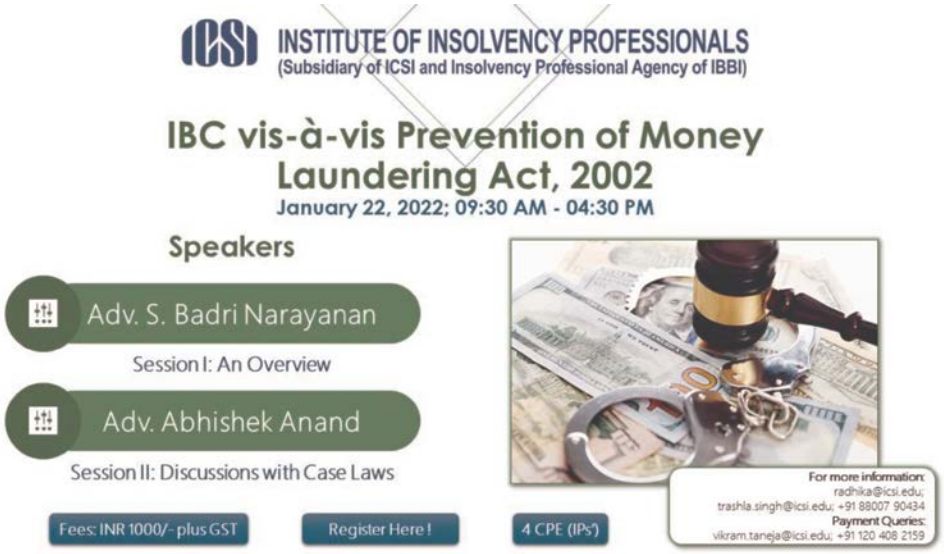
- Workshop on "Pre-Packaged Insolvency Resolution Process" on 8th January, 2022



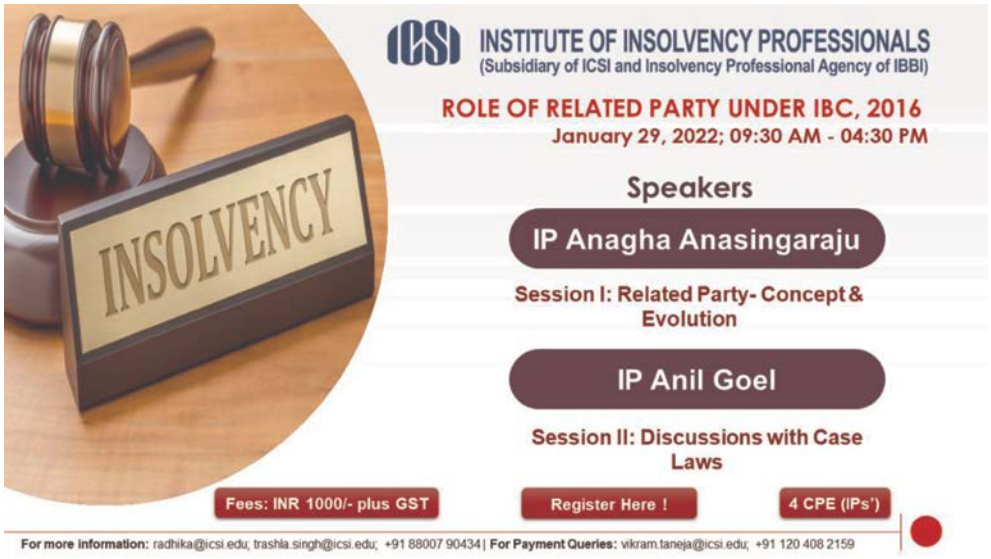


- Workshop on "Managing the Affairs of Corporate Debtor by IRP/RP under IBC" on 15th January, 2022

◆ Workshop on "IBC *vis-à-vis* Prevention of Money Laundering Act, 2002" on 22nd January, 2022



◆ Workshop on "Role of Related Party Under IBC, 2016" on 29th January, 2022



◆ Roundtable discussion

ICSI IIP organised roundtable discussion on "MCA notice dated 23rd December, 2021 on proposed changes in CIRP and Liquidation provisions under IBC"on 13th January, 2022

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At a Glance

No. 1 | Pg. 1-100 | January 2022

Section 5(13), read with section 62, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Insolvency resolution process cost - Whether where NCLT allowed only part of fee claimed by Resolution Professional (RP) and NCLAT confirmed said order, in view of fact that impugned orders were passed without citing any reasons and without considering RP's submissions, both orders were to be *set aside* and matter was to be remanded to NCLT to decide matter of RP's fees afresh - Held, yes (Para 17)

COVID 19 - Computation of limitation period - Supreme Court in its order dated 23-3-2020 in Congizance for Extension of

Limitation, In re (2020) 117 taxmann.com 66, ordered extension of period of limitation in filing petitions/suits/applications/appeals/all other proceedings on account of COVID-19 - Thereafter, on 8-3-2021 extension of limitation was regulated and brought to an end - Whether in view of spread of new variant of COVID-19 and drastic surge in number of COVID cases across the country, Supreme Court restored order dated 23-3-2020 and period from 15-3-2020 till 28-2-2022 shall stand excluded for purpose of limitation as may be prescribed under any general or special law in respect of all judicial or quasi-judicial proceedings - Held, yes - Whether in cases where limitation would have expired during period between 15-3-2020 till 28-2-2022, notwithstanding actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022; in event actual balance period of limitation remaining, with effect from 1-3-2022, is greater than 90 days, that longer period shall apply - Held, yes (Para 5)

- **Asif Abdullah Dalwai** *v.* **Arun Bagaria, Interim Resolution Professional of Windals Auto (P.) Ltd.**
  (2022) 136 taxmann.com 292 (NCLAT- New Delhi) • P-12

Section 12A of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Withdrawal of application - Whether where withdrawal application under section 12A has been filed prior to Constitution of CoC, there is no requirement of obtaining consent of CoC as required by section 12A - Held, yes (Para 6)

- **Edelweiss Asset Reconstruction Company Ltd.** *v.* **Peter Beck and Peter Vermoegensverwaltung Ltd.**
  (2022) 136 taxmann.com 359 (NCLAT - New Delhi) • P-15

Section 31, read with section 33, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Resolution plan in respect of corporate debtor was approved by Adjudicating Authority - Successful resolution applicant had failed to take steps towards implementation of resolution plan - An application could have been made to Adjudicating Authority for liquidation of corporate debtor - However, no such application for liquidation had been made by financial creditor or any other stakeholder, but on contrary financial creditor have sought for re-initiation of CIRP - Whether this was not a fit case for liquidation of corporate debtor because it was a going concern and all stakeholders seems to be interested that corporate debtor remains a going concern - Held, yes (Para 32)

- **Bank of Baroda v. MBL Infrastructures Ltd.**
  (2022) 134 taxmann.com 190 (SC) • P-16

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - An order for initiation of corporate insolvency resolution process was passed in case of corporate debtor - In course of said process, resolution applicant being promoter of corporate debtor submitted his resolution plan and same was approved by Adjudicating Authority - Financial creditor raised an objection that resolution applicant had furnished personal guarantee in its favour to secure debt of corporate debtor and such guarantee had been invoked by creditor, which remains unpaid and therefore, said resolution applicant was ineligible to submit a resolution plan by reason of a amendment to section 29A(h) - It was noted that ultimate object of code was to put corporate debtor back on rails - In instant case, resolution plan was accepted by majority of CoC and same was put into operation and as of now corporate debtor was ongoing concern - Resolution applicant had infused about Rs. 63 crores into corporate debtor and had further received approval of shareholders to raise Rs. 300 crores to revive corporate debtor - Whether thus, on peculiar facts of present case, resolution plan of resolution applicant leading to ongoing operation of corporate debtor ought not to be

disturbed and therefore, appeal against order passed by Adjudicating Authority was to be disposed of - Held, yes (Paras 64 and 65)

- **Angre Port (P.) Ltd.** *v.* **TAG 15 (IMO. 9705550)**
  (2022) 134 taxmann.com 48 (Bombay) • P-18

Section 14, read with sections 33 and 53, of the Insolvency and Bankruptcy Code, 2016, and section 2(*e*) of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 - Corporate insolvency resolution process - Moratorium - General - Defendant vessel entered plaintiff's port and started occupying berth space - Plaintiff supplied necessary berthing charges (as per its Tariff Booklet) to said vessel and thereafter raised invoices from time to time - Since, said invoices remained unpaid, plantiff invoked Admiralty jurisdiction by filing Commercial Admiralty suit under provisions of order XIII-A read with order XII rule 6 of Code of Civil Procedure against defendant seeking a judgment and decree against defendent for a sum of Rs. 9.37 crores as per particulars of claim - It was a case of defendant that its owners *i.e.* Tag Offshore went into liquidation and thus, present suit was not maintainable considering bar contained in section 33(5) - Defendant also submitted that claim of plaintiff was already adjudicated by liquidator of its owner Tag Offshore and thus, instant suit was barred under principles of *res judicata* - It was noted that section 33(5) prohibits institution of a suit or other legal proceeding against corporate debtor only, however, it does not in any way prohibit institution of a suit or other legal proceeding against a Vessel owned by corporate debtor because under Admiralty Act, Vessel is treated as a separate juristic entity which can be sued without joining owner of said Vessel to proceeding and thus, suit against defendant vessel even at stage of liquidation of corporate debtor was maintainable - Further, claims of plaintiff adjudicated by liquidator was pertaining to only one invoice, however, claim with reference to other invoices was neither submitted by plantiff nor adjudicated by Liquidator, and thus, principles of *res judicata* would not apply - Whether in view of aforesaid, suit filed by plaintiff seeking a summary judgment against defendant for a sum of Rs. 9.37 crore was to be allowed - Held, yes (Para 46)

- **Bank of Maharashtra** *v.* **Videocon Industries Ltd.**
  (2022) 134 taxmann.com 55 (NCLAT-New Delhi) • P-23

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether commercial wisdom of CoCs is non-justifiable and hence, power to reconsider any decision is within domain of CoC - Held, yes - Whether where resolution plan as approved in case of Videocon group provided a haircut of almost 95 per cent, *i.e.* a meagre amount of Rs. 2,900 crore for an admitted liability of Rs. 65,000 crore against amount claimed, section 31(1) had not been complied with - Held, yes - Whether further section 30(2) had also not been complied with as said plan provided for payment to Dissenting Financial Creditors by way of non-convertible debentures (NCDs) and equities which is impermissible as per IBC - Held, yes - Whether moreover, resolution applicant had accepted requirement of approval/permission of CCI in accordance with IBC, prior to approval of CoC, however, said approval of CCI had not been obtained as required by proviso to section 31(4), hence, approved Resolution Plan required review and reconsideration for legal compliances - Held, yes - Whether therefore, approved Resolution Plan not being in compliance with section 30(2)(*b*) read with section 31 was to be *set aside* and matter was to be remitted back to CoC for completion of process relating to CIRP in accordance with provisions of IBC - Held, yes (Paras 42, 45, 46, 49 and 50)

- **Rajeev R. Jain** *v.* **AASAN Corporate Solutions (P.) Ltd.**
  (2022) 134 taxmann.com 158 (NCLAT - New Delhi) • P-25

Section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Wheth-

er mortgage is an instrument and terms and conditions of mortgage cannot claim any superior status and proceedings under section 7 can be availed irrespective of any contrary or inconsistent condition in mortgage - Held, yes - Whether mortgage deed is an instrument which cannot come into way of section 7 application and shall be overridden by virtue of section 238 - Held, yes - Whether it is choice of mortgagee to recover his dues from secured assets or to take other recourse of remedy as provided under law - Held, yes - Whether where corporate debtor had obtained two loans from financial creditor by means of two deposit agreements and deposits were secured by deed of mortgage and mortgage entered between parties in instant case did not have any inconsistent condition, financial creditor could have taken recourse to section 7 on occurence of default - Held, yes (Paras 9 to 11)

Section 7, read with section 238 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Whether principle behind doctrine of stare decisis is that when a law is declared by Court of Competent Jurisdiction in absence of any palpable mistake or error, it is required to be followed - Held, yes - Whether principle of stare decisis is fully applicable on judgments delivered by NCLT as well as NCLAT - Held, yes - Whether however, per incuriam is an exception to stare decisis, hence, where earlier decision was rendered without noticing an express provision of law, it was a decision which was per incuriam and was not a binding precedent - Held, yes - Whether therefore, where Tribunal while deciding Beacon Trusteeship Ltd. v. Neptune Ventures & Developers (P.) Ltd. (2022) 134 taxmann.com 102 (NCLT - Mum.) rendered in context of section 7 with reference to conditions of a mortgage deed did not advert to section 238 which had overriding effect on any clause of any debenture trust deed cum indenture of mortgage, thus said judgment was not a binding precedent to be followed by any other co-ordinate Bench - Held, yes - Whether thus, no error had been committed by Adjudicating Authority in not following above order and admitting section 7 application filed by financial creditor - Held, yes (Paras 15, 20 and 21)

- **Visisth Services Ltd.** *v.* **S.V. Ramani**
  (2022) 136 taxmann.com 325 (NCLAT-New Delhi) • P-30

Section 35, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Liquidator - Powers and duties of - Liquidator of corporate debtor company issued advertisements inviting bids from prospective buyers through e-auction for sale of company - Bid document duly clarifies that assets in liquidation were being sold as a 'going concern in an as is very basis' - In response to that, bid was received from appellant, who fulfilled criteria as laid down in advertisement of e-auction and agreed to takeover company as per terms and conditions of bid - Appellant also unconditionally agreed to abide by terms of e-auction which was inclusive of forfeiture of Earnest Money Deposit (EMD) upon withdrawal after acceptance of bid in its favour - Appellant was declared as successful bidder in e-auction - Liquidator issued a provisional sale letter in favour of appellant - Whether thus, appellant was now disentitled to withdraw from bid and to refund of amount paid during e-auction on ground that their offer was conditional and liabilities of company would not be foisted upon appellant - Held, yes (Para 18)

- **Varrsana Ispat Ltd.** *v.* **Varrsana Employee Welfare Association**
  (2022) 136 taxmann.com 327 (NCLAT-New Delhi) • P-33

Section 61, read with section 62, of the Insolvency and Bankruptcy Code, 2016 and section 420 of the Companies Act, 2013 read with rule 154 of the National Company Law Appellate Tribunal Rules, 2016 - Corporate person's adjudicating authorities - Appeals and Appellate Authority - Liquidation of corporate debtor was initiated and liquidation account was opened to operate receipts and payments - Adjudicating Authority permitted liquidator to

utilise amount of Rs. 18.00 crores from working capital and profit kept in account of corporate debtor/liquidator for operations of corporate debtor so that corporate debtor remain as going concern and to distribute said fund equally among stakeholders - Adjudicating Authority subsequently, by impugned order had virtually reversed its earlier decision by asking liquidator that stakeholders, who were in receipt of funds, would keep amount in an interest bearing account of corporate debtor and returnable if need arises for operating corporate debtor - It was noted that Adjudicating Authority had only power to rectify any mistake apparent from record in accordance with section 420 of Companies Act, 2013 read with rule 154 of NCLT Rules, 2016 and it does not have any power to review its own order - Whether thus, impugned order passed by Adjudicating Authority whereby it had reviewed and reversed its own order was to be *set aside* - Held, yes (Para 25)

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

From Chairman's Desk

If we become only goal oriented and have no interest in the ingredients, we will have to settle for something else which will have no semblance with the intended results. It is in the same manner as we cannot meditate, but if we become meditative, every action that we perform will have the necessary attributes of meditation.

As we are gaining more experience of running such an effective and efficient legal instrument like the IBC, we ourselves are now setting better goals for us, and it may not be wrong to say that we are not too far from meeting the standards of other mature global jurisdictions. The IBC came to be enacted on May 28, 2016, against the backdrop of mounting non-performing loans, and with a view to establishing a consolidated framework for insolvency resolution of corporations, partnership firms and individuals in a time-bound manner, seeking to tackle the non-performing asset (NPA) problem in two ways. The ways are: (*a*) introduce a behavioural change on part of the debtors to ensure sound business decision-making and to prevent business failures for reasons other than those which are beyond one's scope; (*b*) it envisages a process through which financially ailing corporate entities are put through a rehabilitation process and brought back up on their feet. Under the IBC, the insolvency legal regime in India shifted from a debtor-in-possession model to a creditor-in-control model. The creditor-in-control model hands control of the

debtor to its creditors and relies upon the managerial skills of a newly appointed management to take over an ailing company and ensure business continuance. The IBC has a larger public-welfare consideration in play. There are three categories of persons who can trigger the CIRP under the IBC. These are Financial Creditors (FCs), operational creditors (OCs) and the Corporate Debtors (CDs).There is also a bar on the right of certain category of persons from submitting a resolution plan or participating in the resolution process in order to take over the CD. In the case of Phoenix ARC v. Spade Financial Services, the SC had observed that IBC provides that any related party of CD does not have the right to be part of the CoC. The object of such a provision clearly is to prevent the decisions of the CoC from being sabotaged by related parties of CD. The IBC has completely changed the shape and text of Indian insolvency law landscape. The most evident results are in the form of development of a discipline in the lending-borrowing amongst bankers and corporates. Promoters are making their best efforts to not allow the situation to deplete to the extent of default as they are now fearful of losing control of their enterprises in the event of such a default. A substantial number of applications filed by the creditors against the CDs got resolved prior to being admitted. Post the implementation of IBC, as per the World Bank's report, India's rank in resolving insolvency went from 136 in 2017 to 52 in 2020. While the results are encouraging, there is a concern as regards law recovery rates too. There are matters wherein the creditors have taken a haircuts which is as high as 95 per cent under a resolution plan. Adding to this problem is the problem of pendency of insolvency proceedings.

There is also a challenge *vis-à-vis* realising the task of digitisation of IBC ecosystem. The delays caused can be substantially reduced on the strength of such digitisation. Often, the admission of cases in NCLT has proven to be a task. A Special Parliamentary Committee in its report opined that the NCLTs and the National Company Law Appellate Tribunal (NCLATs) should be digitised. Furthermore, it is also suggested that there should be a provision made available for virtual hearings to deal with the pending cases swiftly.

There are changes being envisaged and planned for finding a potential solution to the problems being faced in the resolution of insolvencies, this includes the cases of cross-border insolvencies

as well. These much-needed steps shall pave the way for the faster resolution of debt-ridden companies. The focus is also on speeding-up the process for voluntary winding up of companies. The much talked about cross-border insolvency rules shall be made operational which shall allow the lenders to recover their dues from defaulting borrowers disposing of foreign assets and promoters' personal assets parked in offshore locations. Such rules are likely to be inspired by the law framed by the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL plays a key role in developing that framework in pursuit of its mandate to further the progressive harmonisation and modernisation of the law of international trade. It does this by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law. This international body develops the text of the law through an international process involving a variety of participants. Its membership is structured so as to be representative of different legal traditions and levels of economic development, and its procedures and working methods ensure that such texts are widely accepted as offering solutions appropriate to many countries at different stages of economic development. To implement its mandate and to facilitate the exchange of ideas and information, it maintains close links with international and regional organisations, both inter-governmental and non-governmental, that are active participants in different programme conducted in the field of international trade and commercial law. Now, India being a part of a global economy wherein there is an economic interdependent of different nations, the importance of developing and maintaining a robust cross-border legal framework for the facilitation of international trade and investment cannot be underestimated or undermined. The changes may also include a code of conduct for the Committee of Creditors (CoC), since it is the CoC which takes the commercial call and is empowered to decide on the fate of insolvency resolution process.

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

Managing Director's Message

It is only with involvement that one knows life. It does not matter whether you are doing art, music or spirituality. If you are not absolutely involved, you will miss it all.

As we stand today, IBC has become the most preferred mechanism/route for resolution of insolvency for the creditors. The rate at which insolvency petitions are being admitted and disposed-off has also now gained pace.This itself is an encouragement to the creditors to take this route for an efficient resolution of their NPA problem. IBC being a relatively nascent law the initial hiccups were on expected lines and were anticipated by the law framers. In the pre-IBC era, NPAs were a major challenge for both public as well as private sector banks in India. In the exuberant milieu that started in the year 2005 and continued for around three years (till the Global Financial Crisis (GFC) of 2008), large corporations conceived major projects in capital-intensive sectors such as power, ports, airports, housing and highway construction. Banks were very keen to lend as a support to the capacity build up in the core sectors (including power and steel sector, as also companies engaged in infrastructure development across roads, ports and real estate sectors). Considering huge

consumer market that is there in the country, a big opportunity to grow by spending and lending was envisaged. Infact, banks invariably got into severe competition with each other to fund mega projects. The Global Financial Crises of 2008 was followed by a period wherein the large projects initiated remained a work-in-progress owing to factors including delayed approvals. As project owners did not realise their anticipated cash flows over an extended periods of time, they were not able to service their loans, resulting in mounting of NPA in the banking sector.

Prior to IBC coming into force, we had a legislation by the name of Sick Industrial Companies (Special Provisions) Act, 1987 (SICA in short) which was meant to address issues related to sickness in the industry. It was under this enactment that the Board for Industrial and Financial Reconstruction (BIFR) was established which had the mandate to oversee the rehabilitation of sick units. However, instead of addressing sickness in the industry, BIFR itself became an institution whose process was put to a great misuse by the borrowing industrialists so as to take the protection of iron curtains which prevented them from any legal recovery action by the creditors. Therefore SICA became a refuge ground for defaulting borrowers who tried to take advantage of the indefinite moratorium under SICA. Another legislation which was brought in to dealt with NPA issues was the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) allowed and empowered banks as well as other financial institutions to auction commercial or residential properties of the borrowers which are secured with it for the purpose of loan recovery. Infact, Asset Reconstruction Company India Limited (ARCIL), which was the first asset reconstruction company, was established under this statute. However, SARFAESI too had its own set of limitations. The RBI had also framed several mechanisms to deal with NPAs from time to time.This included (*a*) Corporate Debt Restructuring (CDR), which was purely a contractual arrangement between the lender and the corporate which thrived and met with success given the revised prudential norms on restructuring of advances. However, once prudential norms were withdrawn in 2015, the CDR mechanism also lost its purpose; (*b*) Joint Lenders' Forums (JLFs), which mandated banks to adopt measures for early identification to tackle stressed loans, giving them a jumpstart, especially in large and complex cases of corporate debt where creditors differed on a resolution process. Under the JLF framework, at least 75% of creditors (by value of the loan) and 60% by number of lenders in the JLF needed to agree on the restructuring plan. Reaching at a consensus was the major bone of contention in the entire

process and it reduced the effectiveness of JLF mechanism;(*c*) Strategic Debt Restructuring (SDR) mechanism was introduced, but did not yield much resolutions. While the scheme seemed interesting initially, it soon became evident that there were no buyers in cases where it was being invoked;(*d*) The RBI then introduced the S4A Scheme, which only covered projects that had already started commercial production. Furthermore, the scheme was also silent about unsecured creditors, who could always approach a court of law and play spoilsport. These measures, though in the right direction, did not produce the desired results. Then came the IBC which was institutionalised with the objective to ensure speedy resolutions while signalling a break from the past. There were large macroeconomic objectives at play such as solving the twin balance-sheet problem, developing a robust corporate bond market, improving the credit environment, and consequently providing a fillip to India's competitiveness as a business destination. IBC is designed to streamline the insolvency resolution process for corporates and other entities, which among other things, prevents value destruction if there is distress. The CIRP is a representative action for the general body of creditors and not for the recovery of money of an individual creditor. Being a time-bound process to resolve cases within 180 days extendable to 270 days, the IBC has received praise since its inception from the World Bank and IMF and has materially contributed to India's jump in its ranking in `Ease of Doing Business' index. The Code also received significant attention from foreign investors. IBC has brought-in a paradigm shift in the recovery and resolution process by introducing the concept of `creditor in control' instead of `debtor in possession'. This encourages value enhancement of CD as once this process starts, the board ceases to have a control over management of CD, and it gets replaced by the IP who with the help of advisors manages the affairs of CD. IBC which is a new dawn consolidated multiple schemes announced earlier and focused on a time-bound resolution coupled with maximisation of value. The RBI, in order to align the resolution mechanism with IBC subsequently withdrew all circulars such as the CDR, the Flexible Structuring of Existing Long Term Project Loans, SDR, Change in Ownership outside SDR, 5 by 25 scheme and S4A. The JLF, as an institutional mechanism for resolution of stressed assets, was also subsequently discontinued. IBC is modelled towards maximisation of value of assets, striking a balance between liquidation and reorganisation, ensuring equitable treatment of similarly situated creditors, provision of timely resolution etc.

INTERVIEW

AMIT GUPTA

Company Secretary & Insolvency Professional

1. It has been almost six long years since the introduction of this Insolvency law, how has this law evolved in your opinion?

Though it has been well known for ages that "No business is risk free and has fairly equal chances for failure as well", but for the first time the business failure has got recognised in the legislative framework in structured manner with mandate for its resolution in a time bound manner, thereforeenactment of the Insolvency and Bankruptcy Code in 2016 (Code) is certainly landmark, laudable and perhaps can be considered as the biggest economic reform next to GST. Prior to the enactment of the Code, the country was struggling with the problem of multiplicity. There existed multiple legislations, multiple debt resolution frameworks and multiple jurisdictions leading to conflicts and chaos.

While the Presidential towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 meant for personal insolvency were out dated and hardly in use, the other legislations like the Recovery of Debts Due to Banks and Financial Institution Act, 1993, the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interests Act, 2002 (SARFAESI), the Sick Industrial Companies (Special Provisions) Act, 1985

(SICA) and the Companies Act, 2013, providing multiple strategies for dealing with distress assets were also bogged down with situation of conflicts, delays and value erosion.

The Code enacted on May 28, 2016 on the recommendations of the Bankruptcy Law Reforms Committee (BLRC) to suggest reforms in insolvency and bankruptcy both for corporates and for individuals and was substantially implemented effective from December 1, 2016 with focus on the time bound resolution of insolvency than recovery of loan for value maximisation and balancing the interest of all stakeholders, with a fundamental shift from debtor in controlto creditor in control model.

The greatest achievement of the Code brought in the eco system is in behaviour and I can say with my experience that more number of cases have been settled because of this behaviourial change, than those were brought before Adjudicating Authorities for Insolvency resolution.

The Code has evolved well in past near to six years since its enactment and has been modified as many as six times to make it more user friendly, prevent unintended consequences and address the concerns of various stakeholders. Few notable evolutions in the Code are:

- Introduction of section 29A in the Code by prescribing disqualifications of Resolution Applicants to ensure that the objects of the Code are not defeated by allowing the management (who have run the company aground) to return to the corporate debtor as resolution applicants.
- Reduction in threshold of 75% voting share to 66% for approval of Resolution plan by the Committee of creditors to facilitate more and more resolutions.
- Introduction of section 238A in the Code to clarify regarding the applicability of the Limitation Act, 1963 for filing of an application for commencement of Insolvency resolution process.
- Recognition of an amounts raised from an allottee under a real estate project as financial debt giving rights to the homebuyers to initiate insolvency against real estate developers and represent in the Committee of Creditors (CoC) bringing them at par with banks and other financial creditors in real estate projects.
- Clarity provided to prevent premature insolvency actions brought by trade creditors against debtors who have *bona fide* disputes regarding the existence of such debts.
- The process of initiation of insolvency for foreign suppliers and vendors eased out by doing away the requirement of certification from an Indian financial institution.
- Introduction of new section 21(6A) to facilitate appointment of Authorised Representative to protect the interets of a class of creditors.
- Clarity provided that moratorium will not be applicable to a surety in a contract of guarantee as the scope of the moratorium is restricted to

the assets of the corporate debtor only. Therefore, there is no bar against enforcement actions taken against the assets of a guarantor to a corporate debtor during the moratorium period.

- Specific exemption given to corporate debtors which are MSMEs, by permitting a promoter who is not a wilful defaulter, to participate as a Resolution Applicant for the MSME in insolvency.
- Related Party in relation to an Individual defined to bring clarity in eligibility of Resolution Applicants.
- Introduction of new section 12A, to enable the Adjudicating Authority to allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors.
- A new explanation inserted into the definition of resolution plan to clarify that a resolution plan seeking the insolvency resolution of corporate debtor as a going concern may include the provisions for corporate restructuring, including by way of merger, amalgamation and demerger.
- Code amended to clarify that insolvency resolution process of a corporate debtor shall not extend beyond 330 days from the insolvency commencement date. It has been further clarified that such timeline will include the time taken in legal proceedings.
- Code amended to provide that while approving a resolution plan, the CoC is permitted to consider the manner of distribution of proceeds and can take into account the order of priority amongst creditors, including the priority and value of the security interest of a secured creditor.
- Code amended to provide that a resolution plan must allow for payment to operational creditors of an amount that is higher of the: (i) liquidation value of their debt or (ii) amount that would have been received if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in section 53 of the IBC.
- The concept of fair and equitable distribution in line with the observation of Hon'ble Supreme court in the matter of Swiss Ribbon v. Union of India.
- Clarity given that the CoC may take the decision to liquidate the corporate debtor any time after the constitution of the CoC until the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.
- To encourage the Resolution Applicants, section 32A introducted to the Code to provide that on approval of a resolution plan, the corporate debtor's liability for prior offences ceases, or where prosecution has already been initiated, the corporate debtor shall

stand discharged and also that this protection shall also extends to any person who acquires property through the CIRP or through liquidation proceedings.

- Notification of the provisions regarding Individual Insolvency Resolution and Bankruptcy in reference to the Personal Guarantor to Corporate Debtor, effective from December 1, 2019.
- To protect the business in backdrop of Covid 19 pandemic the default threshold for initiation of CIRP was increased from Rs. 1 lacs to Rs. 1 crore effective from March 25, 2020 and further the initiation of fresh insolvency proceedings for the defaults committed by a corporate debtor during March 25, 2020 to March 24, 2021 was restricted.
- To provide consensual resolution framework for MSME's, the Code was amended effective from April 1, 2021 to enable pre-pack Insolvency Resolution process

2. What changes are you looking forward to in this already implemented law?

I would be suggesting five fold changes to further strengthen the Code and achieve the desired objectives:

(*a*) Changes required to increase the possibilities of Resolution:Introspection needs to be made to identify reasons and necessary corrective steps may be taken. Few reasons could be:

- Non availability of exclusive platform for potential Resolution Applicants to search business as per their interest area and size -Lesser number of Resolution Applicants due to economic recession or non viability can be understood. However, the biggest challenge that industry is facing is on account of mismatch.On one hand there are people who are looking for a distress asset are not getting one, asstructured details are not available on any single platform and on other hand the same distress asset is put to liquidation for want of proposal for its resolution, because it could not reach to the right person having interest therein. IBBI, being a regulator, having complete data, perhaps is most appropriate and well placed to create such type of data pool for facilitating match making;
- Economic value of Business being ignored - In the present system only fair value of business or liquidation value of business is being considered for benchmarking and economic value of the business is ignored. Moreover, the present system is based on fundamental premise that there are no information assymyteries and there are sufficient persons always available in market for each kind of assets, which is

far from reality in real world and may take a long time to mature the market to such a level. Accordingly, can we work out an alternate model for deferment of liquidation where Resolution Plan has not been approved, but economic value is higher than liquidation value? Can we have an entity on lines of Bad Bank which can hold onto such businesses which have a high economic value?

(*b*) **Strengthening first pillar of IBC *i.e.* IP's:**

- Education and training
- Regulation
- Insolvency Professional Entity - Institutionalisation of Insolvency Professionals by increasing role of Insolvency Professional Entities (IPE's) in Insolvency Resolution and Liquidation to enable specializing in specific business sectors or resolution plans etc. so that a thorough and tailor-made service can be provided to the potential investor.

(*c*) **Protection to certain business:** India being a consumer-based economy gives a strong possibility for re-bouncing for a lot of business, however certain business may not re-bounce or take more time because of the peculiar nature and challenges associated with such businesses. These businesses need a little longer protection before being put to liquidation for example hotels and the travel industry, after Covid 19 pandemic. Similarly certain business being run by Government which are in nature of essential services also needs adequate protection from being subjected to liquidation, where the Government anyway works towards protecting the same. This will also reduce burden of Adjudicating authorities from unwanted litigation. Similarly, we may also consider keeping real estate companies out of the purview of IBC. No homebuyer wants a haircut but wants a home, and focus is required to be placed on a sui generis law or amendment in RERA which can cater to the niche requirements of this sector just like is the case with NBFCs which are out of the purview of IBC.

(*d*) **Separation of Avoidance Transaction Process:** Separate the process of avoidance transaction application to a separate institution to take these avoidance applications to the logical end. (This has been deliberated separately in subsequent question)

(*e*) **Extension of Pre-package Provisions to other Entities:** Can we think have in a stage wise migration of extension of these pre-packaged provisions to the other companies also, so that we can have a larger benefit in respect of pre-packaged insolvency resolution.(This has been deliberated separately in subsequent question).

3. One of the major challenges faced by IPs in this profession is fees paid to Insolvency Professionals, so do you experience this challenge in your cases and how you deal with it?

The present framework regarding fees of IP's which provides determination of fees on the basis of market dynamics, is sufficient and does not require any changes and as soon as Code of Conduct for Committee of Creditors shall be in place, the biggest concern of IP's regarding realising of fees from the CoC shall also get addressed.

4. How has your experience of working with the promoters, Board of Directors, etc. of different Corporate Debtors been? Do they co-operate with the IP assigned?

This was certainly a big concern, when I started my journey as a Insolvency Professional in 2016-17, but in last five years with intervention of Adjudicating Authority and Regulator, the situation has improved as lot and I can say the position has changed from co-operation from the promoters, board members, KMP's as an exception to the position of non co-operation as an exception. IBBI may undertake drives for creating necessary awareness regarding Insolvency Resolution Process and position of Insolvency Professional and take necessary pro active initiatives to prevent undesirable incidences like threatening, manhandling, arrest etc.

5. One of the major duties of Insolvency professionals is to identify avoidable transactions and seek appropriate reliefs from Adjudicating Authority. How far filing of these applications have benefitted the corporates under insolvency? Further, what is your take on its implementation success?

The provisions regarding the avoidance transactions have played a very significant role in successful evolution of the Code by bringing necessary behavioural changes primarily due to psychological reasons, as the number of cases in which avoidance transaction application has been logically concluded by Adjudicating Authority are very few and can be counted on fingers. There are inherent challenges in bringing success to these applications and even if assume that we can make an attempt to overcome all challenges by necessary hand holding, decluttering Adjudicating Authorities, evolving transaction audits and necessary regulatory changes, however the constraint on account of time frame perhaps is quite difficult. Time limit for forming an opinion for avoidance transaction is 75 days from commencement of CIRP and in next 40 days the Resolution Professional has to determine such transactions by collecting necessary evidences and in next 15 days he has to file the same with Adjudicating Authority. The key reasons for failing such avoidance transaction applications before the Adjudicating authority is primarily due to inconclusive transaction audit reports, lack of necessary supporting evidences etc., which is attributable mainly to non-availability of necessary data from the Corporate Debtor or its previous management. In my experience detterence factor has started getting diluted as majority of the applications remains inconclusive and gets aborted with closure of CIRP. This motivates the wrong

doers for adoption of delaying tactics. In my view the law should be amended to enable the handover of process of avoidance transaction to a separate institution (may be to IBBI) in cases where such applications remain unconcluded during CIRP, so that such Institution can continue the baton to take it to logical end.This will prevent the abortion of such application because of time and the punishment to wrong does shall continue tobring necessary behavioural changes in the ecosystem.

6. What is your take on the implementation of Pre-packaged Insolvency Resolution Framework for Corporate MSMEs which has been introduced through "The Insolvency and Bankruptcy Code (Amendment) Act, 2021?"

In my limited experience the change in management is generally not a feasible resolution startegy in case of MSME's and Pre-packaged Insolvency Resolution Framework is indeed commendable initiative for them. However due response from the Industry is yet awaited as in case of MSME's though negotiated settlements are taking place, but Pre-packaged Insolvency Resolution Frameworkis used only in exceptional cases. In my view the Regulators may consider a stage wise migration of extension of these pre-packaged provisions to the other companies also with necessary safegaurds, so that we can have a larger benefit. Pre-packaged insolvency resolution is an excellent concept, conceived well and has a very noble objective with a potential to bring many success stories of resolution.

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

All challenges being faced by the Insolvency Professionals are well in the notice of the Regulators. The regulator needs to appreciate the fact that the Insolvency Resolution Process is effective in cases of normal business failures, however it may not be very effective in cases of frauds and especially in cases where the process has been initiated but there are virtually no assets. As the Committee of Creditors is also not constituted in such cases, the Insolvency Professional has to suffer on each count including his fees, CIRP expenses & compliances. There should be separate process for dealing such cases of fraud and Insolvency Professional should be allowed to make necessary application to Adjudicating Authority for closing CIRP and referring such matters to separate authority for Investigation and logical conclusion.

8. Any piece of advice for the Fresh Insolvency Professionals who are seeing their career in Insolvency Law?

Don't wait for your engagement as a Resolution Professional to begin your journey of learnings in the Insolvency Resolution, rather prepare well by reading the law, case studies, discussions & simulations, so you are able to utilise quality time for addressing unforseen situations while running CIRP/Liquidation assignments. You can develop your own templates and trackers for entire CIRP to get hold of the

entire process and run the process without trigger of panic mode, when you get an assignment. As the law is quite dynamic and continiously evolving, developing your own case law directory for all important aspects of CIRP, for clear understanding of the position settled through various judicial pronouncements from time to time shall be exteremly useful in keeping you organised and compliant.

9. How significantly do you think the IBBI and IPAs serves the profession of Insolvency Professionals and what suggestions you want to give for the improvement?

The contribution of IBBI being super regulator and IPA's being regulator for development of Insolvency Professionals had been commendable. Few suggestions for consideration of the regulators are:

- Duplicacy in reporting compliances by Insolvency Professional to respective IPS's as well as to IBBI may be removed;
- Duplicacy in disciplinary mechanism of IPA's and IBBI for the same default may be removed;
- IPA's to play a larger role in hand holding and standardising the CIRP by taking inputs from professionals;
- IBBI to create necessary awareness regarding Insolvency Resolution Process and position of Insolvency Professional and take necessary pro active initiatives to prevent undesirable incidences like threatening, manhandling, arrest etc.
- Institutionalisation of Insolvency Professionals by increasing role of Insolvency Professional Entities (IPE's) in Insolvency Resolution and Liquidation to enable specializing in specific business sectors or resolution plans etc. so that a thorough and tailor-made service can be provided to the potential investor;
- Sharing of data files, Resolution Plans etc. (may be after necessary masking, hiding name and other confidential data) in respect of matters where CIRP/Liquidation process has been closed to the Insolvency Professionals to enable research, standardisation, learnings and further improvisation.

10. However, as per your experience so far, what do you think is the future of this law?

I am quite positive about future of this law as business is integral part of any eco system and each business has inherent risk leading to the possibilities of distress, that requires appropriate legislative framework for its resolution. In my view the Code has all necessary ingredients and is based on sound fundamentals which shall continue to meet the stakeholders expectations regarding dealing with distress assets, ofcourse with changes as required from time to time. In short, the profession of Insolvency Resolution is there to stay and shall continue to grow with each evolution. My best wishes to all my professional colleagues for their endeavours for taking this noble profession to the next level.

●●●

Insight!

Analysis of Disciplinary Cases under IBC

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Background

The Author in a series of Articles seeks to analyze the disciplinary cases that have been instituted against the Insolvency Professionals by IBBI/IPA along with the outcome of such cases. These proceedings are taken up by the Disciplinary Committee of Insolvency Professional Agency (IPA) and of Board (IBBI).

Up-till now, out of the total inspections made by the Inspection Authority, 87 orders are passed by the Disciplinary Committee of IBBI for various non compliances (source listing on IBBI website till January 26, 2022 - last case uploaded is of December 29, 2021.)

The first such article was based on the disciplinary proceedings in 26 cases where the subject matter was Authorization for Assignment.

In this second article, the author attempts to analyze 27 cases of disciplinary proceedings which could be stated to be Generic in nature, as these are not specifically arising out of the subject matter of the specific CIRP case but are cases which arose due to lapse on part of IP mainly on procedural matters and delay in adherence of timelines.

Resolution Process under Insolvency Code and Regulations:

The Insolvency and Bankruptcy Code, 2016 and regulations, describe the resolution process (CIRP, Voluntary Liquidation and Liquidation) of a corporate person as a time bound process, which include various time lines for completion of the process and various compliance an Insolvency Professional have to follow while going through a process. Each process has its defined procedure in which it has to start and end.

For this purpose, various sections defining the duties and responsibilities of the insolvency Professional are also laid down in the Code. These very sections have been used for trying the Insolvency Professionals of misconduct. Some of the relevant sections are given hereunder:

A. Relevant Section & Regulation for disciplinary proceedings:

IBBI/IPA referred to Sections 17, 18, 20, 23, 25 and 208 of the Code as the governing sections while proceeding against the IPs.

B. Types of defaults/issues arising out of the disciplinary proceedings:

All the 27 cases have been analyzed and main causes underlying such cases are given in a tabulated form for the convenience of the readers:

S. No.	Type of Defaults/Issues
1	Using misleading name in formation of LLP
2	Demanding of bribe
3	Exorbitant Fees charged
4	Taking up too many assignments
5	Engagement signed with Operational creditor/parties not competent to engage the IP thus preempting the right of CoC. This indicated collusion and compromised the independence of the IP
6	Fees charged in name of Firm instead of in name of IP
7	Appointment of unregistered valuer
8	Appointment of independent professional for verification of claims and carrying out duties an Insolvency Professional is supposed to carry.
9	Laxity in taking over the management of Corporate Debtor
10	Laxity in appointment of valuers
11	Laxity in submission of information Memorandum
12	Laxity in issuing invitation Expression of Interest and inviting Resolution Plans
13	Relinquishing the office as Resolution Professional
14	Non-filing of application u/s 19(2) for non-cooperation of directors/promoters
15	Not running the business of Corporate Debtor as going concern as required u/s 20
16	Failure to take effective custody and control of assets as laid down u/ss 18 and 25
17	Delay in public announcement
18	Continuation of same auditor in voluntary liquidation thereby violating Regulation 11(2) of Voluntary Liquidation Regulation.

S. No.	Type of Defaults/Issues
19	Failure to complete CIRP in stipulated period
20	Incorrect compilation of claims
21	Illegal distribution of assets despite Adjudicating Authority (AA) order
22	Fees charged for Liquidation not in conformity of Regulation 4 of Liquidation Regulations
23	Violation of Moratorium in favour of Financial Creditor
24	Non-consideration of interest to be paid to employees as per AA Order
25	Consideration and payment of expenses incurred prior to CIRP commencement
26	Delay in relationship disclosure and Form I and Form II
27	Non-inclusion of security interest in admitted claims
28	Interim finance taken without approval of CoC
29	Paying excess fees to Authorized Representative
30	Non-ratification of CIRP expenses by CoC
31	Uploading of confidential information on website
32	Inclusion of cost of legal counsel of CoC even though this is not part of CIRP cost
33	Failure to identify preferential transaction
34	Providing incomplete and limited documents

As can be seen from the above table that all of the matters contained herein are arising out of the fact that somewhere the IP did not diligently apply the Code and/or did not act in a manner as required under the circumstances.

C. IBBI Decision:

The decision by IBBI in above matters as decided in the 27 cases is tabulated below:

Particulars	Nos.	Authority	General Outcome of Order and Penalty
Guilty of professional misconduct	22	11 cases by IIIPI - ICAI 8 cases by - ICSI-IIP 3 cases by IPA-ICMAI	1. Cancel the Registration of IP. 2. Suspended Registration of IP for a period. 3. Penalties imposed.
Not Guilty of professional misconduct	5	All cases by IIIPI - ICAI	NIL

Individual case wise summary is given hereunder:

D. Conclusion:

From the above summary and Board's decisions, it clear that for an Insolvency Professional is required to take full care, due diligence and to be alert in every step taken in the process, since the role of an Insolvency Professional is extremely crucial for all stakeholders and parties involved in the CIRP process.

General Category

A. Guilty of Professional Misconduct.

S. No.	Date	In the Matter of	Issue	IBBI Decision
1	7-Sep-18	Kapil Goel, Ref. No IBBI/DC/09/2018	Mr. Goel, along with Mr. Tilak Raj Chawla, incorporated an LLP with the name "IBBI Insolvency Practitioners LLP" on 8th November, 2017	IP's conduct was in violation of IBC, 2016. IP shall not take up any new assignment till "IBBI Insolvency Practitioners LLP" is removed from the Company/LLP Master Data of the Ministry of Corporate Affairs Penalty: IP's registration be suspended for three months.
2	1-Dec-20	Mr. Sanjay Kumar Agarwal, Ref.No. IBBI/DC/47/2020	Demand of Bribe by IP	The DC has also taken in record the voluntary undertaking submitted by the Mr. Agarwal stating that he would not take up any fresh assignment under the Code, till he is exonerated from the criminal case.
3	1-Dec-20	Mr. Arun Mohan, Ref.No. IBBI/DC/48/2020	Demand of Bribe by IP	The DC also notes that the FIR against IP is yet to culminate into a charge sheet, however, the submission of Mr. Mohan that before issuing of the SCN, statutory requirements of sections 217, 218, 219 and 220 of the Code were not complied with by the IBBI since no independent investigation was conducted and thus, the SCN is illegal, unlawful and void *ab initio* is untenable. The DC also notes that a criminal writ petition has also been filed by IP before Hon'ble High Court of Delhi against CBI praying that the Petitioner is not a public servant and, for quashing the FIR and any other proceeding emanating therefrom which was admitted *vide* order date 24-2-2020. The Hon'ble High Court of Delhi, *vide* Order dated 3-11-2020, adjourned the matter at the request of the counsel appearing for CBI on the ground of medical emergency. Thus, the matter is next posted on 15-12-2020 and the Hon'ble Court also clarified that no further adjournments would be granted Penalty: IP shall not seek or accept any process or assignment in any capacity under the Code, till he is exonerated of the charges.

S. No.	Date	In the Matter of	Issue	IBBI Decision
4	3-May-18	Ms. Bhavna Sanjay Ruia, Ref. No IBBI/DC/04/2018	1. The fees quoted by IP for CIRP Process was highly exorbitant 2. The IP signed the term sheet with the applicant (operational creditor), as operational creditor has no role whatsoever under the law in the appointment of RP or fixing of fees of the RP. Also, IP locked in her appointment as RP even before the commencement of the CIRP. This attempt indicates collusion with operational creditor and compromises independence as an IP.	DC of IBBI finds the conduct of IP is in contravention: Penalty: Cancels the registration of IP and debars her from seeking fresh registration as an insolvency professional.
5	21-Feb-19	Ms. Bhavna Sanjay Ruia, Ref.No. IBBI/DC/15/2019	1. IP consented to act as IRP of 15 CIRPs for which applications were filed by a professional, who is her husband. In the process, she compromised her independence, integrity and impartiality 2. IP contracted to act as IRPs for exorbitant fees. 3. Further, she entered into contracts to act as RPs of 15 CIRPs with the parties who are not competent to engage her as RP and thereby pre-empted	The DC notes, as rightly stated by Ms. Ruia, that her registration as an insolvency professional was suspended *vide* order dated 3rd May, 2018 for contravention in CIRP of Madhucon Projects Ltd. She has repeated the same contravention in CIRPs of 15 CDs Penalty: Cancels the registration of IP and debars her from seeking fresh registration as an insolvency professional.

S. No.	Date	In the Matter of	Issue	IBBI Decision
			the committee of creditors (CoC) of their legitimate rights to appoint an IP of their choice as RP and fix the fees of the RP.	
6	24-Aug-18	Mr. Dinkar T. Venkatasubramanian Ref. No IBBI/DC/08/2018	IP was partner with E&Y LLP. IP illegally paid the professional fee to M/s E&Y LLP thereby escaping his personal income tax liability. M/s E&Y LLP was neither appointed by the CoC nor the NCLT to carry the IRP/RP nor any professional activity.	Penalty: DC of IBBI impose a monetary penalty of one lakh rupees on him as IRP and RP.
7	9-Aug-21	Ms. Kumudini Paranjape, Ref. No. IBBI/DC/75/2021	Invoice for fees raised by Liquidator in name of her firm instead of her individual account.	Penalty: 1. IP shall undergo pre-registration educational course from the IPA. 2. IP shall pay a penalty equal to ten percent of the fee she had received in the six assignments of voluntary liquidations
8	24-Aug-18	Mr. Rajneesh Singhvi, Ref. No. IBBI/DC/27/2020	The IRP was appointed *vide* Order dated 2nd January 2019. On 2nd March 2019, he appointed an unregistered valuer even though IBBI specifies that only valuers registered with the IBBI under the Valuation Rules may be appointed. Also, there was delay in appointment of valuers.	DC disposes of the SCN with the following directions:- The IP shall not seek or accept any process or assignment or render any services under the Code for a period of three months. He shall, however, continue to conduct and complete the assignments/processes he has in hand as on date of this order.

S. No.	Date	In the Matter of	Issue	IBBI Decision
9	4-Sep-20	Mr Avishek Gupta, Ref. No. IBBI/DC/28/2020	It has been observed that the IP in the present matter has appointed RK Associates (which was not registered with the IBBI under the Rules) as one of the valuers in the CIRP on 12th April 2019.	DC disposes of the SCN with the following directions:- (*i*) IP shall not seek or accept any process or assignment or render any services under the Code for a period of two months from the date of coming into force of this Order. He shall, however, continue to conduct and complete the assignments/processes he has in hand as on date of this order.
10	18-Sep-20	Mr. Dinesh Sood, Ref.No. IBBI/DC/30/2020	IP has appointed an unregisterd valuer for 3 CDs.	DC disposes of the SCN with the following directions:- The IP shall not seek or accept any process or assignment or render any services under the Code for a period of three months from the date of coming into force of this Order. He shall, however, continue to conduct and complete the assignments/processes he has in hand as on date of this order.
11	9-Dec-21	Mr. Jaswant Singh, Ref. No. IBBI/DC/80/2021	1. An Independent professional appointed for Verification of Claims 2. Fees payable to such Independent Professional	1. Verification of Claims is Duty of IP, he/she cannot outsource any of Its duties and Responsibility to independent professional. The expense incurred in verification of claims separately in the CIRP cost which is in contravention of provisions of section 18(1)(*g*) Penalty: IP shall pay a penalty equal to the fee paid to the Independent Professional.
12	7-Jan-19	Mr.Vasudeo Agarwal, Ref. No. IBBI/DC/13/2018	1. The IP did not proceed expeditiously during the CIRP period 2. IP did not take over the management of operations of the CD. 3. IP did not appoint valuers, prepare information memorandum, issue invitation for expression of interest, invite resolution plans, etc., and, therefore, did not conduct the	Penalty: The DC imposes a monetary penalty equal to one hundred percent of the total fee payable to him as IRP and as RP in the CIRP of Upadan Commodities Private Ltd.

S. No.	Date	In the Matter of	Issue	IBBI Decision
			CIRP. 4. He recused himself from being appointed as the Liquidator without any cogent reasons for the same.	
13	28-Jan-19	Mr.Sandip Kumar Kejriwal, Ref.No. IBBI/DC/14/2018	1. IP did not carry out responsibilities and submit reports on time. He invited resolution plan only from the sole member of the CoC, without providing information memorandum, asking him to submit resolution plan in four days. 2. IP did not run the CDs as a going concern.He did not seek direction of the AA if he did not receive the required co-operation from the CDs. 3. IP resigned as RP in two CIRPs, without prior permission of the AA, though he consented to act as IRP and as RP in both cases. The CoC appointed him as RP.	Penalty: 1. The DC Imposes on IP a monetary penalty equal to one hundred percent of the total fee payable to him as IRP and as RP in the CIRPs. 2. Directs IP to undergo the pre-registration educational course from his Insolvency Professional Agency to improve his understanding of the Code and the regulations made thereunder, before accepting any assignment under IBC, 2016
14	6-Nov-20	Mr. Manmohan Jhawar, Ref.No. IBBI/DC/38/2020	1. IP failed to take effective control and custody of seven properties (agricultural lands) of the CD in respect of which title deeds were also handed over by the promoters. 2. IP failed to take any action	1. IP should have appointed surveyors for identification of the properties based on the 180 title deeds which were provided to him by the ex-directors. This lapse on his part has pushed the CD into liquidation. 2. IP failed to take any action against the ex-directors for their non-cooperation despite directions by the AA. Penalty: IP shall not seek or accept any process or assignment or render any services under the Code for a period of six months

S. No.	Date	In the Matter of	Issue	IBBI Decision
			for non-cooperation by promoters/directors even after AA recommended that appropriate action under the Code may be initiated.	
15	15-Mar-21	Mr. Kiran Chinubhai Shah, Ref. No. IBBI/DC/69/2021	1. Delay in appointment of Valuer in 4 CIRP cases. 2. IP did not file application u/s 19 for non-cooperation by Suspended board of director. 3. IP inflated CIRP costs in the matter of Shri Jalaram Rice Industries Private Limited since appointment as well as the fee of valuers was neither approved nor ratified by CoC 4. Cost disclosures, as submitted by IP to his respective IPA in respect of valuers' fees, were not made in accordance with the approval of CoC.	1. Delay in appointment was due to non availability of data the RVs cannot commence there work. IP realized his mistake and took corrective action. DC takes a lenient view. 2. CD was non operational from last 7-8 years and had no employee. Filling of application must not have served much purpose and might hence resulted further delay. Therefore DC took a lenient view. 3. The DC also notes that as the fee paid to valuers did not exceed the total amount approved for valuers by CoC. Hence, the DC takes a lenient view. 4. The DC observes that the fee of the RVs must be approved/ratified by CoC during CIRP and not by the Stakeholders' Consultation Committee. IP was held contravened the provision of code. Penalty: IP shall not seek or accept any process or assignment or render any services under the Code for a period of two month
16	20-Mar-20	Mr. Tarun Jaggi,	1. In the matter a Corporate Debtor public announcement for voluntary liquidation was after a delay of 18 months and not within five days as required. 2. In the matter of another Corporate Debtor, the Liquidator appointed Deloitte Haskins &	1. The Liquidator has contravened the provisions 2. The Liquidator's reply of members deciding to continue auditor in voluntary winding is not tenable, regulations clearly prohibits the IP from engaging professional who has served as an auditor to the corporate person at any time during the five year preceding the liquidation commencement date. The Liquidator thus compromised his independence Penalty: The DC hereby imposes on Mr. Tarun Jaggi a monetary penalty of Rs. 1,00,000/-

S. No.	Date	In the Matter of	Issue	IBBI Decision
			Sells for auditing the books of accounts of the CD. However, they were providing auditing services to the CD even before commencement of voluntary liquidation proceedings.	
17	13-Apr-18	Mr. Dhaivat Anjaria, IBBI/Ref-Disc. Comm./02/2018	1. Failure and negligence of IP to consider the claim of Claimant (Operational Creditor), the IP neither included the claim in the list of operational creditor nor responded to the claimant. 2. IP failed to complete CIRP within the specified period.	IP was held guilty for contravention of provision of code. Penalty-Impose a monetary penalty equal to one tenth of the total fee payable to him as IRP and RP in the CIRP of Electrosteel Steels Ltd.
18	29-Oct-20	Mr. Anil Goel, Ref. No. : No. IBBI/DC/35(INTERIM)/2020	1. Illegal distribution of funds by IP despite direction of the AA 2. Fee Charged by Liquidator in Violation of Regulation 4 of Liquidation Regulations 3. Non-payment of 'Interest' part to the employees by the Liquidator as directed by AA. 4. Violation of Moratorium during CIRP by Financial Creditor	DC disposes of the SCN: 1. IP is hereby debarred from undertaking any new assignment, either as an Interim Resolution Professional, Resolution Professional, Liquidator or otherwise, under the Code. 2. The direction under (*a*) above shall come into force with immediate effect and shall cease to have effect on expiry of 90 days from the date of the order.
19	29-Oct-20	Mr. Sundaresh Bhat, Ref. No.: No. IBBI/DC/37/2020	1. IP made payment towards routine expenses pertaining to the period prior to CIRP commencement date after initiation of CIRP	DC disposes of the SCN: IP to pay a penalty equal to twenty five percent of the fee he has received in this process.

S. No.	Date	In the Matter of	Issue	IBBI Decision
			2. IP raised invoice, in respect of IRP fees in the name of BDO Restructuring Advisory LLP (BRAL), which is an IPE instead of in his own name. 3. IP has made a delay of around eight months in submitting relationship disclosure. 4. IP delayed of around 6 months in submitting Form I and delay of eight months in submitting Form II regarding fee and other expenses incurred for CIRP.	
20	20-Apr-20	Mr. Koteswara Rao Karuchola, Ref . No. IBBI/DC/21/2020	1. RP has outsourced his responsibility to verify claims of the financial creditors to the IPE. 2. RP has failed to include the details of security interest of the admitted claims even though these details were provided to him by the secured financial creditors, in the Information Memorandum. 3. Pursuant to Section 43 (1) of the Code, the IP filed an application the AA for avoidance of preferential transactions made by the corporate debtor but failed to include an amount of Rs. 63,20,43,151/-	1. The RP act of outsourcing is in clear contravention. 2. In the present case, the RP undoubtedly failed to mention the details regarding security interest in the original IM, however, upon perusal of the other documents and emails shared by the RP, it seems that there was no deliberate concealment of information by the RP regarding security interest from the members of CoC. Thus, in the absence of any *mens rea* or *mala-fide* intention *mens rea*, the RP cannot be strictly held liable for contravening the provisions of the Code. 3. In the absence of any *mens rea* to hide anything relating to the tripartite agreement specifically when paragraph 7 of IA no. 377 of 2018 mentions that, "It is seen that against an receivable amount of Rs. 63, 20, 43, 151/- the same has been adjusted against the payable credit balances.", the RP cannot be held liable for contravening the provisions of the Code. The DC hereby imposes on IP, a monetary penalty of Rs. 1,00,000/- (Rs. One Lakh only).

S. No.	Date	In the Matter of	Issue	IBBI Decision
			as preferential transactions by the RP on the ground that such amount was adjusted against the amounts payable.	
21	20-Jul-21	Mr. Prabhjit Singh Soni, Ref. No. IBBI/DC/73/2021	1. Interim finance taken without prior approval of CoC 2. IP had entered into an engagement with the applicant of CIRP, wherein he had proposed his fees as RP. In addition, IP also mentioned that he will take 5% of recovery of value of assets as insolvency cost while working as RP. 3. Paying excess fees to AR 4. IP uploaded confidential information on Website 5. IP did not get CIRP expense ratified from CoC	DC Disposes of the SCN: 1. IP shall not seek or accept any process or assignment or render any services under the Code for a period of 30 days from the date of coming into force of this Order. 2. IP should take reasonable care and due diligence while publishing data on the website and also while performing his functions under the IBC, 2016.
22	4-Dec-20	Mr. Balaknath Bhattacharyya, Ref. No. IBBI/DC/51/2020	1. RP failed to file application before the AA for avoidance of preferential transaction in accordance of the Code.	1. This is a major lapse on the part of IP. 2. Though the RP has observed that preferential transaction has taken place, no further scrutiny or any action to recover the amount has been undertaken. The vague reply of the ex-Directors and complacency of the CoC was not sufficient for RP to not investigate any further into the attempts to defrauding the creditors of CD. Even though he was not aware of Court procedures, the RP should have been more diligent to recover the amount instead of whiling away 180 days of the CIRP period. Penalty: IP shall not seek or accept any process or assignment or render any services under the Code for a period of six months.

Personal Guarantors to Corporate Debtors under Insolvency and Bankruptcy Code 2016

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Abstract

Insolvency and Bankruptcy Code was introduced in India in 2016. Initially it was introduced for corporate persons (companies and LLPs). On 01/12/2019 part of the Act relevant to Personal Guarantors to Corporate Debtors was notified.

Accordingly, new applications are being filed in respect of Personal Guarantors to Corporate Debtors.

Proceedings against Personal Guarantors start with insolvency resolution process wherein a repayment plan acceptable to the creditors needs to be developed by the debtor.

When repayment plan could not be developed or implemented, the creditors or the debtor can file for bankruptcy.

This comprehensive article discusses, in simple language, all aspects of details of filing of insolvency application, appointment of resolution professional, process of insolvency resolution; filing of bankruptcy application, subsequent processes.

Insolvency professional, legal practitioners working in this domain and also businesspeople who borrow money for businesses would find this useful.

The question of guarantee

While setting up and running our businesses, we need to borrow money from banks, NBFCs and such other financing organisations. The lenders typically ask for guarantees from the promoters, directors and such individuals; while sanctioning the loans. This has become a standard practice.

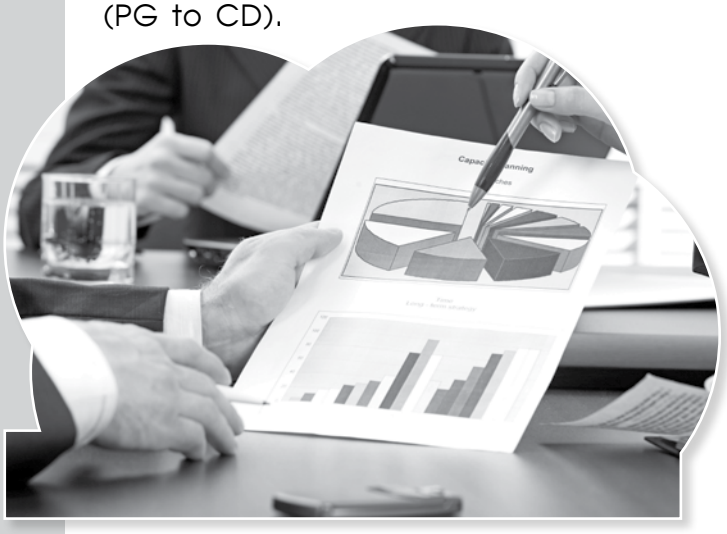
We know that under the other laws (contracts - S 126 etc.) the liability of the guarantor is co-terminus with the liability of

the Principle Borrower. That means until the Principle Borrower has not repaid the loan, the liability of the guarantors (jointly and severally) will exist.

We also are aware that if the guarantor has paid some money to the lenders under the contract of guarantee, the guarantor is entitled to recover the sum from the Principle Borrower.

In pre-IBC era, if a company defaulted, the lender would proceed against them to recover the money under RDDB (Recovery of Debts due to Banks and Financial Institutions Act 1993) or SARFAESI (Securitisation and Reconstruction of Financial Assets and Security Interests Act, 2002). The lenders also could invoke guarantees.

Insolvency and Bankruptcy Code 2016 provides for insolvency and bankruptcy of limited liabilities entities (like companies and LLPs), and others (individuals and partnerships under the 1932 Act) separately. While those parts applicable to Companies and LLPs were notified earlier, the individual insolvency parts were not notified at that time. With effect from 01/12/2019, provisions of the Act have been made applicable to Personal Guarantors to Corporate Debtors (PG to CD).



Two stages

Like corporate insolvency, there are two stages in respect of Personal Guarantors. In the first stage, called Insolvency Resolution Process (IRP), attempt is made to come up with a repayment plan that is acceptable to the creditors. When it turns out that it is not a workable option, the second step is Bankruptcy of the debtor, wherein the assets of the debtor are sold and the money recovered is distributed to the creditors.

In the earlier remedies, each loan was separately treated and recovery initiated. Under IBC, the Insolvency Professional has to go through public announcement and seeking claims from all creditors. All the liabilities and assets of the debtor are aggregated. It will only exclude only the excluded debts and excluded assets, specified under the Act. The discharge order, however does not discharge the debtor from debts not included qualifying debts or liabilities not included in 92 (3).

For whom the bell tolls

Corporate Debtor (CD) S 3(8) is a Corporate Person who owes debt to any person. Corporate Person S 3(7) is a Company (under Companies Act, 2013) or LLP (under LLP Act 2008) or any other person incorporated with limited liability under any law for the time being, but does not include a financial service provider.

Personal Guarantor (PG) S 5A(22) means an individual who is the surety in a contract of guarantee to a corporate debtor.

If you, as an individual, have given written guarantee to a company or LLP and the

said company or LLP defaults in their repayments, the lender may proceed against you. If the guarantee is given in respect of Principle Borrower who is an individual or Partnership Firm under 1932 Act, the IBC provisions, as of now, will not apply.

What assets of guarantor are getting affected

All assets except excluded assets will be included in the statement of affairs of the guarantor. Excluded assets (S 79(14) are -

(a) unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation,

(b) unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family;

(c) any unencumbered personal ornaments of such value, as may be prescribed (presently this value is Rs. 1 lac), of the debtor or his immediate family which cannot be parted with, in accordance with religious usage;

(d) any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family; and

(e) an unencumbered single dwelling unit owned by the debtor of such value as may be prescribed (presently this value prescribed is Rs. 20,00,000 in urban area and Rs. 10,00,000 in rural area);

If the value of the dwelling unit is higher than the stated amounts, the guarantor shall pay the creditors any excess over the specified amount; or the asset be sold and the guarantor be paid the specified amount by the resolution professional.

In case of joint ownership, the RP should obtain no objection letters from other joint owners seeking partition before including in the repayment plan.

Which debts are included

All debts except the excluded debts are to be included. Excluded debt means (Section 79 (15))

(a) liability to pay fine imposed by a court or tribunal;

(b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;

(c) liability to pay maintenance to any person under any law for the time being in force;

(d) liability in relation to a student loan;

How does it start

Either the Debtor can file application under section 94 or any Creditor can file application under section 95. In either case, the application may be filed directly by the debtor or creditor or through Resolution Professional.

If creditor is filing an application, the creditor needs to send a notice of demand to the PG to pay the debt within 14 days of the service.

The application is to be filed to the Adjudicating Authority (AA). Now the Adjudicating Authority for corporate entities is NCLT (National Company Law Tribunal) and that for individuals is DRT (Debt Recovery Tribunal). If proceedings under IBC are underway in respect of the Corporate Debtor (insolvency or liquidation), application can be filed with NCLT. (*Insta Capital Pvt. Ltd.* v. *Ketan Vinod Kumar Shah*). Even if application has been filed and pending to commence Corporate Insolvency Resolution Process against a Corporate Debtor, an application in respect of insolvency of PG to the Corporate Debtor can be filed with NCLT. (*PNB Housing Bank* v. *Mohit Arora*). It is not necessary that the application has to be admitted by NCLT in respect of the Corporate Debtor.

What is very important to understand is when an application is submitted to NCLT, from that date onwards, interim moratorium S 96, comes into force. This will remain so in force till NCLT admits (or rejects) the application. During this Interim moratorium any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed. The creditors shall not initiate any proceedings in respect of any debt.

In case of a partnership firm, the moratorium will operate against all partners of the firm.

NCLT, based on the application, appointments the RP within 7 days of the application, (when application is through such RP or when one is suggested), subject to any disciplinary proceedings against such RP. If no RP is suggested, or the if the suggested RP has disciplinary proceedings against him, NCLT shall nominate a suitable RP.

What happens next

The RP, within 10 days of his appointment must submit a report to Adjudicating Authority recommending whether Adjudicating Authority should accept or reject the application. The Adjudicating Authority would then pass an order admitting or rejecting the application within 14 days of the report from RP.

When NCLT admits an application against a PG, moratorium (S 101) comes into force and shall remain in force for 180 days or the date on which Adjudicating Authority passes an order approving the repayment plan.

During this moratorium, any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed. The creditors cannot initiate any legal action or legal proceedings in respect of any debt. These two points are common with the Interim Moratorium. In addition, this Moratorium puts restriction on the debtor that the debtor shall not transfer, alienate, encumber or dispose of any of the assets or his legal right or beneficial interest therein.

Unlike Corporate Insolvency, where the possession of the assets of the Corporate Debtor is with the IRP/RP; in case of Insolvency of the PG, possession remains with the debtor, but with prohibition on transfer of assets.

Within 7 days of Adjudicating Authority's order of admission, the RP must issue public notice (S 102 - ads in papers - one English and one in local language where the guarantor resides. In addition it is to be published in Adjudicating Authority website and affixed in Adjudicating Authority premises). This notice will invite claims from creditors within 21 days of public notice.

The RP collects claims received and prepares a list of creditors after verification. This list needs to be circulated to the guarantor, to the creditors and the Adjudicating Authority. This list is also to be presented to the creditors at the meeting of creditors. If the guarantor has a website, the list should be put up on the website also. The time limit for list of creditors is 30 days from public notice.

The RP also has to prepare a statement of affairs of the guarantor.

Repayment plan Section 105

The repayment plan is a key to the whole process. This is a plan document that debtor has to prepare in consultation with the RP. The repayment plan contains proposal made to the creditors to restructure the debt.

The repayment plan must include - justification for the plan, why creditors should agree to the plan; and provision for fees of the resolution professional.

The plan may authorise or require the resolution professional to carry on the business of the debtor on his behalf or on his name, to realise the assets or the debtor and to dispose of or administer any funds at the disposal of the debtor.

The RP has to submit a report (S 106) on the repayment plan to Adjudicating Authority within 21 days from last date or receipt of claims. The RP needs to report on whether the plan is complaint with present laws, whether it has reasonable prospect to get approval from creditors and whether a meeting of creditors needs to be convened.

This meeting (S 107) may be convened between 14 and 28 days from submission of the report. A notice shall be required to be sent to the creditors at least 14 days before the date. The notice should be accompanied by copies of repayment plan, statement of affairs, report of resolution professional on the plan, and proxy form. This meeting is not mandatory, but the resolution professional should specify reasons for not convening it.

Creditors decide on approving, rejecting or modifying the repayment plan through the voting process. Voting share is based on proportion of their debt to the total debt. Associates of debtor, even though they may be creditors cannot vote. Any modifications suggested by the creditors need to be accepted by debtor before the can be finally accepted.

Associates of debtor are defined in S 79 (2). Associates include immediate family, relatives of the debtor and those of spouse of the debtor, persons in partnership of debtor and their spouses and relatives, employer or employee of the debtor, trustee of a trust the beneficiaries of which include the debtor. Associates include a company where the debtor along with his associates hold 51% or more share capital, or control the appointment of BOD of the company.

Creditors can be secured or unsecured. Secured creditors must decide whether they will forfeit their right to enforce their security or would like to enforce it. If they want to enforce their security, they cannot vote in the creditors meeting. However, one creditor can be partly secured and partly unsecured, and can vote in respect of unsecured part, with prior clarification of the fact. If secured creditor votes in the creditors meeting, it implies that he is forfeiting his right to security.

Creditors cannot, in insolvency or bankruptcy, vote for unliquidated amount of debt.

Plan approval must be with at least 75% vote in value of credit, present and voting. Present includes present in person or through proxy.

RP should then circulate the minutes of the meeting electronically in 48 hours of the meeting. RP also should seek vote of those creditors who did not vote or who were not present, within 24 hours of closing of the vote.

RP should, (S 112) prepare a report on the vote and circulate it (S 113) to debtor, creditors and Adjudicating Authority. RP finally sends copies of the filed documents to debtor and creditors.

Adjudicating Authority may finally approve or reject the repayment plan submitted, and may pass suitable order (S 114). Once this order is passed, moratorium ends. If no such order is passed, the moratorium ends after 180 days from the date of admission.

Effect of plan getting accepted by Adjudicating Authority

The repayment plan then has to be supervised by the RP till completion. Within 14 days of completion of the repayment plan, RP shall forward relevant documents to Adjudicating Authority and others who are bound by the plan, *i.e.* debtor and creditors. RP, at this stage, shall file an application with Adjudicating Authority for a discharge order (S 119).

Once Adjudicating Authority passes the discharge order, the IRP process is complete.

Un-co-operative guarantors

Anytime during the resolution process or during progress of the repayment plan, if the RP finds that the debtor is not co-operating, he should file an application with the Adjudicating Authority to that effect for appropriate directions.

Effect of plan getting rejected by Adjudicating Authority

If Adjudicating Authority rejects the plan under S 114, the debtor and the creditors become entitled to file an application for bankruptcy of the guarantor. The bankruptcy order is not automatic on failure of resolution; separate application has to be made.

Bankruptcy

If resolution cannot be reached, the next possible action is bankruptcy. This has to be specifically initiated, unlike corporate insolvency, in which case liquidation can be automatic.

Bankruptcy can be initiated by debtor or creditor under the following circumstances-

1. Adjudicating Authority rejecting application for insolvency resolution process
2. Repayment plan rejected by Adjudicating Authority
3. Repayment plan not implemented by the concerned persons, ending the repayment plan prematurely.

Initiation of bankruptcy

S 121 application can be made by a creditor within 3 months of the relevant order if Adjudicating Authority has passed any of the following orders-

a. S 100(4) - rejection of application under S 94 or 95 on the basis of the report submitted by the RP or if the application was made with intentions to defraud the creditors or the RP.

b. S 115(2) - when Adjudicating Authority rejects the repayment plan

c. S 118(3) - repayment plan not fully implemented

S 122 application can be filed by the debtor. For this the debtor will need to submit copies of the insolvency proceedings, statement of his affairs and order of Adjudicating Authority. The debtor may propose RP.

S 123 application may be filed by creditor/s. The creditor needs to submit proceedings of insolvency and Adjudicating Authority order as above. In addition, creditors have to submit details of the debt. A secured creditor making an application either gives up his right to security or can make an application only on respect of any unsecured debt owed to him.

When an application is made, interim moratorium, as in insolvency resolution comes into force. Any disposition of property made by the bankrupt from the date of application to the date of commencement of bankruptcy shall be void under S 158.

Appointment of Insolvency Professional as Bankruptcy Trustee (BT)

An insolvency professional will be appointed by the Adjudicating Authority as the Bankruptcy Trustee. If one is proposed, the same may be appointed subject to any disciplinary proceedings against him. If none is proposed, or if one is proposed but has disciplinary proceedings against him, the Adjudicating Authority will appoint one in consultation with IBBI.

Within 14 days (timeline as a guide in such cases) of confirmation of nomination, the Adjudicating Authority issues Bankruptcy order (BO) (S 126). This order has a validity (S 127) till the debtor is discharged under S 138. Date of this order is the date of commencement of bankruptcy.

Within 7 days of this Bankruptcy Order, the bankrupt shall submit a statement of affairs to the Bankruptcy Trustee.

When a Bankruptcy Order is passed, the estate of the bankrupt vests with the Bankruptcy Trustee S 154. The vesting does not need any conveyance, assignment or transfer. The debtor, his banker or any other agent who may be holding estate on behalf of the bankrupt is to deliver

the property and documentation to the Bankruptcy Trustee (S 156). The Bankruptcy Trustee shall take possession (S 157) and control of all property, books, papers and records. Any actionable claims are deemed to have been transferred. Also the moratorium applies.

Estate of the bankrupt also includes any after acquired property (S 159). *i.e.* any property the bankrupt acquires after the Bankruptcy Order or becomes entitled to. Bankruptcy Trustee needs to issue a notice to the Bankrupt within 15 days of him coming to know of such property.

Disqualifications and Restrictions on the bankrupt

With the commencement of bankruptcy, certain disqualifications and restrictions apply on the debtor.

Disqualifications S 140 state that such debtor cannot be appointed as a trustee or cannot represent a trust of estate; cannot be appointed or cannot continue acting as a public servant. He cannot be elected to public office or be elected or sitting or voting as a member of any local authority.

Restrictions (S 141) include that he cannot continue as a director, cannot directly or indirectly promote, form or manage a company. He cannot create a charge on his estate without prior consent of the Bankruptcy Trustee. He must inform his partners about commencement of bankruptcy. He must communicate to his business associates before entering into transactions (where value of business is higher than the specified value (that he is undergoing bankruptcy). He cannot travel abroad without the approval from Adjudicating Authority. He cannot maintain legal action in respect of his bankruptcy debt, without prior approval of Adjudicating Authority.

These restrictions apply till they are removed with modification or recall of Bankruptcy Order under S 142; or with Discharge Order under S 138.

The Bankruptcy Order can be modified or recalled by Adjudicating Authority under S 142. This may be done for any errors apparent on the face of the order; or when the bankruptcy debts and the expenses for bankruptcy process are paid off or are adequately secured.

Public Notice

Although in all other processes - Corporate Insolvency Resolution Process, Liquidation, PG Insolvency cases, the public notice is issued by the RP, in this case it is issued by Adjudicating Authority (S 130). This will be issued inviting claims from creditors. Adjudicating Authority also shall issue notices to creditors (within 10 days) mentioned in statement of affairs or the application submitted.

Creditors have to submit claims within 7 days of the public notice. The Bankruptcy Trustee must make a list of creditors within 14 days of commencement date including claims submitted, information disclosed by bankrupt and statement of affairs filed.

Claims

Within 14 days of preparing a list of creditors, the Bankruptcy Trustee shall give notice

to creditors to provide proof of debt. This will include value of the debt and date on which the debt was contracted along with full particulars. Bankruptcy Trustee shall also ask full particulars of the security, if any. If any debt does not have specific value, Bankruptcy Trustee shall estimate the value. If Bankruptcy Trustee asks for proof of security and it is not furnished within 30 days of such request, such property shall be treated as free of security (S 171 (8)).

Secured creditors can enforce their security or surrender their security. In the former case, they still can file a claim for balance money, and in the latter case for the entire money (S 172).

Creditors' meeting

Within 21 days of commencement, Bankruptcy Trustee shall conduct a meeting of creditors (S 133). The quorum for the meeting shall be decided by the Bankruptcy Trustee (S 134). The business will include constitution of committee of creditors and any other business Bankruptcy Trustee deems fit. Proxy will be allowed.

Minutes of this meeting shall be recorded, signed and retained as a record of proceedings of the Bankruptcy process.

Voting rights of the creditors, shall be as determined by the Bankruptcy Trustee (proportional to the share of debt). Like in insolvency situation, creditors cannot vote in respect of unliquidated amounts. Also associates of the debtor cannot vote. (S 135)

Bankruptcy Trustee shall be responsible (S 136) for administration and distribution of the estate.

Aftermath

When administration is complete, *i.e.* debt has been repaid or the debtor has no more assets for distribution, the Bankruptcy Trustee shall convene a meeting of the creditors with a report of the administration of the estate (S 137). The committee approves the report of the Bankruptcy Trustee and makes decision whether Bankruptcy Trustee can be released under S 148. Expenses of this meeting are also to be paid with the proceeds of the estate of the bankrupt.

Within 7 days of this approval (S 138) from committee of creditors or on the expiry of one year from the commencement date; Bankruptcy Trustee shall make an application to the Adjudicating Authority for discharge of the debtor. Adjudicating Authority may pass an order of discharge (DO) as it deems fit.

As per S 139, with Discharge Order, the debtor is discharged from debts covered under this bankruptcy. However, there is no relief from excluded debts. Also there is no relief from any debt incurred by breach of trust or fraud.

Even after Discharge Order, the Bankruptcy Trustee is not relieved till formalities under S 148 are complete.

The Adjudicating Authority may modify or recall the Bankruptcy Order under S 142. In such cases, transactions carried out prior to such recall or modifications shall be valid. The property of the bankrupt shall vest with a person appointed by Adjudicating Authority and in absence of such appointment, with the debtor, with any conditions imposed by Adjudicating Authority.

Bankruptcy Trustee

Bankruptcy Trustee is not relieved with the Discharge Order.

Committee of creditors may determine if the Bankruptcy Trustee should be replaced (S 145), and make an application to the Adjudicating Authority. The Bankruptcy Trustee may resign (S 146) if there is a conflict of interest or if he intends to cease to be an IP. Likewise a replacement Bankruptcy Trustee shall be appointed by Adjudicating Authority if a vacancy gets created (S 147).

The fees of Bankruptcy Trustee shall be a (prescribed) percentage of the value of the estate (S 144).

Release of Bankruptcy Trustee (S 148) shall be when he has completed administration of the estate or has been replaced by another Bankruptcy Trustee.

Administration and distribution of property of Bankrupt

Administration and distribution is governed by Chapter V, sections 149 - 178.

The Bankruptcy Trustee is responsible for investigating into the affairs of the bankrupt, realise the assets and distribute the estate (S 149).

The bankrupt has certain duties towards Bankruptcy Trustee. The Bankrupt must provide information to the Bankruptcy Trustee as required. The Bankrupt also must update the Bankruptcy Trustee on any new property acquired or devolved upon the bankrupt, and communicate any increase in income (S 150).

The Bankruptcy Trustee is empowered under S 151 to enter into contracts, hold property of any description, enter into engagements with respect to the property of the bankrupt, sue and be sued. Bankruptcy Trustee can execute POA, hire employees and do any other act as may be necessary.

Likewise Bankruptcy Trustee has certain powers under S 152 to sell part of the estate, issue receipts. Bankruptcy Trustee can prove, rank, claim and draw a dividend in respect of debts due to the bankrupt.

If any property is held by another person by way of pledge, hypothecation, Bankruptcy Trustee can exercise the right of redemption by giving notice to the concerned persons.

In respect of any securities held in any company or any transferable securities, exercise the rights to transfer as the Bankrupt would have exercised.

Bankruptcy Trustee will require approval of creditors for certain acts (S 154)

- carry on any business of the bankrupt as far as may be necessary for winding it up beneficially;
- bring, institute or defend any legal action or proceedings relating to the property comprised in the estate of the bankrupt;
- accept as consideration for the sale of any property a sum of money due at a future time subject to certain stipulations such as security;
- mortgage or pledge any property for the purpose of raising money for the payment of the debts of the bankrupt;

- where any right, option or other power forms part of the estate of the bankrupt, make payments or incur liabilities with a view to obtaining, for the benefit of the creditors, any property which is the subject of such right, option or power;
- refer to arbitration or compromise on such terms as may be agreed, any debts subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt;
- make compromise or other arrangement as may be considered expedient, with the creditors; or with respect to any claim arising out of the estate or incidental thereto
- appoint the bankrupt to supervise the management of the estate of the bankrupt or any part of it; carry on his business for the benefit of his creditors; assist the bankruptcy trustee in administering the estate of the bankrupt.

Estate of the bankrupt Section 155

Estate of the bankrupt comprises of all the estate, including tangible and intangible assets, including capacity to exercise and initiate proceedings; except the excluded assets and any estate held on trust on behalf of any other person. The estate shall also exclude any sums due to workman or employee from PF, gratuity or pension funds.

Onerous property of bankrupt

As in Corporate Insolvency Resolution Process or Liquidation cases, there may be onerous property in respect of a bankrupt.

Onerous property is an unprofitable contract or a property that is not readily saleable or unsaleable, or such that it may give rise to a claim.

The Bankruptcy Trustee must give a notice under S 160 about disclaiming such onerous property to the bankrupt and any other person who may be interested in such property. This notice shall determine the rights, interests and liability of the Bankrupt in respect of such property, and discharge the Bankruptcy Trustee from all personal liabilities in respect of such property from date of his appointment. Such notice will require prior permission of committee of creditors if it has been claimed as a part of the estate of the Bankrupt under S 155.

If any person sustains a loss due to such disclaimer, he shall be deemed to be a creditor to the bankrupt to the extent of his loss.

This notice is not necessary (S 161) if any person interested in that property has applied to Bankruptcy Trustee in writing requiring him to determine if the property is onerous, and the decision is not taken by the Bankruptcy Trustee within 7 days of receipt of such request. If such property cannot be disclaimed, it shall remain a part of the estate of the bankrupt.

Leasehold property can be disclaimed only with a notice of disclaimer (S 162) served on every interested person, and where no application objecting to the

disclaimer by the interested person has been filed (with Adjudicating Authority) with respect to such leasehold interest in 14 days of serving of the notice. If an application is made to Adjudicating Authority, the Adjudicating Authority may pass suitable orders.

Challenge against disclaimed property (S 163) can be raised by any person who claims an interest in the disclaimed property; or any person who is under any liability in respect of the disclaimed property. If the disclaimed property is a dwelling house, any person who on the date of application for bankruptcy was in occupation of or entitled to occupy that dwelling house.

Specific transactions of interest

Like in Liquidation, the Bankruptcy Trustee will need to consider undervalued (S 164), preferential (S 165) or extortionate credit (S166) transactions if any. Bankruptcy Trustee will need to make applications to Adjudicating Authority in respect of such transactions.

Undervalued transaction may be a gift, or no consideration has been received, or in consideration for marriage, or a consideration has been received but of a value significantly less than the value of what has been provided by the bankrupt.

Undervalued transactions should have been entered in the period of 2 years ending on filing of application for bankruptcy. A transaction between bankrupt and his associate during the period of two years shall be deemed to be undervalued transaction. It is important that such transaction should have triggered bankruptcy process.

Bankrupt can prove that the transaction was entered in the normal course of business (transaction other than associate) and in such case Adjudicating Authority shall not declare it as undervalued transaction.

Preferential transactions would be with creditor, surety or guarantor and such transaction would put that person in a position, in the event of bankruptcy, better than what would have been in absence of this transaction.

Preference transaction should have been entered with an associate in the past 2 years and with others in the past 6 months. Such transaction should have triggered bankruptcy.

Bankruptcy Trustee may apply to Adjudicating Authority in respect of preferential transactions and the Adjudicating Authority may pass suitable orders, if the Adjudicating Authority is satisfied that the bankrupt was influenced in his decision of giving preference by a desire to put the person he was transacting with, in the event of bankruptcy, in a better position; than if the transaction was not carried out. Such influence will be presumed in the even the transaction is with an associate.

Extortionate credit transactions are transactions involving provision of credit to the bankrupt on terms that require the bankrupt to pay exorbitant payments; that are unconscionable under principles of the law of contract. A debt extended by a person regulated for the provision of financial services in compliance with any applicable law shall not be treated as exorbitant credit transaction. Such transactions should have been entered in the past 2 years.

Bankruptcy Trustee shall make an application in respect of such transactions and seek orders from Adjudicating Authority.

Contractual obligations Section 168

In case of contract entered prior to the date of commencement of bankruptcy, a party other than the bankrupt can apply to Adjudicating Authority for discharge of any obligation of the applicant or the bankrupt; or seek damages by the party or the bankrupt for non-performance of the contract (which will become part of the bankruptcy debt), and the Adjudicating Authority shall pass suitable orders.

Deceased Bankrupt

Section 169 states that bankruptcy proceedings shall continue even after death of the bankrupt. Administration of the estate shall continue as before. Bankruptcy Trustee shall have regard to the claims by legal representative of the deceased bankrupt for funeral and testamentary expenses. Claims in respect of these two shall rank equally to the claims of secured creditors.

Any surplus remaining after paying the creditors and costs of administration should be paid to the legal representatives of the estate.

Distribution of money (interim dividend Section 174, final dividend Section 176)

As and when the Bankruptcy Trustee has enough money, the Bankruptcy Trustee may distribute it after giving notice. Bankruptcy Trustee should, however make provisions for any disputed debts, any potential claims that may not have been received, and for cost of administering the estate.

Property difficult to sale

Any property which is not readily or advantageously saleable, shall be divided among the creditors based on estimated value, with prior approval of the committee of creditors for each transaction.

When the Bankruptcy Trustee has distributed all the property or most of what could be disposed off, he shall give a notice of final dividend and that no further dividend shall be declared. Any person interested may make an application to Adjudicating Authority to defer the date of such dividend. The Bankruptcy Trustee shall pay out bankruptcy expenses pending, if any and then distribute the money to the creditors. Any surplus after paying the creditors shall belong to the bankrupt.

When a creditor had not proved his debt earlier, and interim dividend was distributed; and later such creditor proves his debt, shall be entitled to dividends paid later, including the dividends he had failed to receive (S 177).

Priority of Payments Section 178

Like liquidation, priorities in respect of distribution of money in case of bankruptcy is also specified, as a waterfall mechanism.

a. costs and expenses incurred by the Bankruptcy Trustee in respect of the bankruptcy proceedings.

b. dues to workmen (24 months) and secured creditors. In case

of deceased bankrupt, expenses relating to funeral and testamentary purpose.

c. wages and unpaid dues to employees other than workmen (12 months)

d. money to central and state government

e. all other debts

f. any surplus shall be applied in paying interest in respect of the period during which they are outstanding from the date of commencement. This interest payment shall rank equally irrespective of the nature of the debt.

Summary

Action can be initiated against personal guarantors to corporate debtors under IBC. The action can start as insolvency resolution process. This involves arriving at a repayment plan to the satisfaction of the creditors.

If such plan cannot be arrived at, or cannot be executed completely, the further course of action is bankruptcy of the debtor. This involves disposing off the estate of the debtor and paying the creditors, and any surplus money, to the debtor.

The process can be tedious, but after discharge the debtors and creditors can close the chapter and start anew. For Insolvency Professional, it is a lot of responsibility and compliances.

●●●

(2022) 134 taxmann.com 57 (SC)

SUPREME COURT OF INDIA

Devarajan Raman *v.* **Bank of India Ltd.**

DR. DHANANJAYA Y CHANDRACHUD AND A. S. BOPANNA, JJ.

CIVIL APPEAL NO. 3160 OF 2020†

JANUARY 5, 2022

Section 5(13), read with section 62, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Insolvency resolution process cost - Whether where NCLT allowed only part of fee claimed by Resolution Professional (RP) and NCLAT confirmed said order, in view of fact that impugned orders were passed without citing any reasons and without considering RP's submissions, both orders were to be *set aside* and matter was to be remanded to NCLT to decide matter of RP's fees afresh - Held, yes (Para 17)

FACTS

- The respondent bank filed a petition under section 7 against the corporate debtor. Said petition was admitted by National Company Law Tribunal (NCLT) and the appellant was appointed as an Interim Resolution Professional.
- Subsequently, the order of the NCLT was set aside by the NCLAT at the behest of the Directors of the corporate debtor. By the order of the Appellate Authority, the proceedings were remitted to the NCLT to decide upon the fee and costs of the Corporate Insolvency Resolution Process incurred by the appellant which was to be borne by the respondent as a financial creditor.
- The appellant addressed a letter to the respondent enclosing a

statement showing the amount payable as fee and costs. The amount was quantified in the amount of Rs. 14.75 lakh. An amount of Rs. 5.66 lakh was reimbursed by the respondent leaving in balance, according to the appellant, an amount of Rs. 9.08 lakh.

- The appellant moved the NCLT for obtaining the release of the remaining fee and costs. NCLT disposed of the application filed by appellant and directed respondent bank to pay Rs. 5 lakh to appellant towards his fee.

- The NCLAT dismissed the appeal filed by appellant for balance amount on ground that appellant had worked for about three months as RP; expenses had been allowed in full and the consolidated amount of Rs. 5 lakh plus GST allowed as fee of the RP for the entire period was not unreasonable; and fixation of the fee was not a business decision depending on the commercial wisdom of the CoC.

HELD

- The Insolvency and Bankruptcy Board of India has issued a circular. The circular, inter alia, requires the insolvency professional to ensure that the fees payable to him during the CIRP are reasonable and the approval of the CoC for the fee or other expenses is obtained, wherever approval is required. (Para 15)

- In the present case, after the NCLAT set aside the order of the NCLT initiating the CIRP, the proceedings were remitted back for determining the insolvency resolution costs. It is material to note that the appellant had addressed a letter to the respondent prior to the filing of the application to which the respondent responded stating that, upon verification, the costs and fees were found in conformity with both the technical and financial bid, based on which the assignment was awarded. In the application which was filed by the appellant before the NCLT, the appellant annexed a statement of costs, the amount which was reimbursed with the balance dues. The order of the NCLT, however, reveals that none of the submissions of the appellant have been considered. The adjudicating authority merely directed the respondent to pay the expenses incurred and an amount of Rs. 5 lakh plus GST towards the fee of the RP. Neither the basis of the claim nor its reasonableness has been considered by the adjudicating authority. The appellate authority has merely proceeded in an ad hoc manner on the ground that the amount of Rs. 5 lakh as fee, in addition to the expenses, appears to be reasonable. Both the orders suffer from an abdication in the exercise of jurisdiction. In the absence of any reasons either in the order of the NCLT or the appellate authority, it is impossible for the Court to deduce the basis on which the payment of an amount of Rs. 5

lakh together with expenses has been found to be reasonable. Consequently, an order of remand becomes necessary. (Para 16)

- The appeal against order of NCLAT was allowed and impugned judgment and order of the NCL-AT was set aside. Similarly, the order of NCLT is set aside and application filed by appellant for his fees is restored to the file of the NCLT for a decision afresh. (Para 17)

CASE REVIEW

Devarajan Raman, Resolution Professional Poonam Drum & Containers (P.) Ltd. v. Bank of India Ltd. (2021) 133 taxmann.com 445 (NCLAT - New Delhi) (para 17) *reversed* (***See Annex***).

CASES REFERRED TO

Alok Kaushik v. *Bhuvaneshwari Ramanathan* (2021) 5 SCC 787 (para 10).

Ms. Anjali Sharma, Adv., **Ms. Shagun Matta**, AOR and **Deepak Bashta** *for the Appellant.* **Vadlamani Seshagiri**, **Shreyuss Shankar Joshi**, Advs. and **Mrs. Bela Maheshwari**, AOR *for the Respondent.*

JUDGMENT

Dr. Dhananjaya Y. Chandrachud, J. - This appeal arises from a judgment of the National Company Law Appellate Tribunal[1] dated 30 July 2020 in *Devarajan Raman, Resolution Professional Poonam Drums & Containers (P.) Ltd.* v. *Bank of India Ltd.* (Company Appeal (AT) Insolvency No 646 of 2020).

2. The issue in dispute relates to the payments of costs and expenses incurred by the Resolution Professional[2]. Pursuant to an email dated 4 February, 2019 of the respondent, who was a financial creditor of Poonam Drums and Containers Private Limited (the Corporate Debtor), the appellant submitted his technical and financial bid on 5 February, 2019 for appointment as an Interim Resolution Professional. On 8 March, 2019, the respondent filed a petition under section 7 of the Insolvency and Bankruptcy Code 2016[3] against the Corporate Debtor. On 20 September, 2019, the Corporate Debtor was admitted to the insolvency resolution process by the National Company Law Tribunal[4] and the appellant was appointed as an Interim Resolution Professional. The order of appointment of the appellant is reflected in operative direction VI of the order of the NCLT, which reads as follows :

> "VI. That this Bench at this moment appoints Mr. Devarajan Raman, a registered Insolvency Resolution Professional having Registration Number (IBBI/IPA-002/IP-N00323/2017-Number 18/10928) as Interim Resolution Professional to carry out the functions as mentioned under I&B Code. The fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/ Directions issued in this regard."

3. On 19 December, 2019, the order of the NCLT was *set aside* in appeal[5] by the NCLAT at the behest of the Directors of the Corporate Debtor. By the order of the appellate authority, the proceedings were remitted to the NCLT to decide upon the fee and costs of the Corporate Insolvency Resolution Process[6] incurred by

the appellant which was to be borne by the respondent as a financial creditor.

4. On 30 December, 2019, the appellant addressed a letter to the respondent enclosing a statement showing the amount payable as fee and costs. The amount was quantified in the amount of Rs. 14,75,660 until 19 December 2019. An amount of Rs. 5,66,667 was reimbursed by the respondent leaving in balance, according to the appellant, an amount of Rs. 9,08,993.

5. The appellant moved the NCLT in an application on 17 January, 2020 for obtaining the release of the remaining fee and costs. The principal relief which was claimed was in the following terms:

> "1. That the Respondent Bank of India, be directed to make payment of the CIRP cost including fees of the Applicant Resolution Professional as per the details furnished in the Annexure D."

6. On 24 January, 2020, the respondent replied to the appellant's letter dated 30 December, 2019 stating that it had verified the details of the fee and costs stated by the appellant and found them in conformity with the technical and financial bid based on which he had been awarded the assignment, together with the approval of the Committee of Creditors[7]. The respondent stated that it would release the payment to the appellant, upon receipt of an order of the NCLT. By its order dated 7 February, 2020, the NCLT disposed of the application in the following terms :

> "MA 223/2020 is filed by the Resolution Professional for his fees. On hearing both sides, the Respondent Bank is directed to pay all the expenses incurred by RP and Rs. 5,00,000/- plus GST towards the fee of the RP.
>
> Accordingly, MA 223/2020 is allowed and disposed of."

7. The appellant filed an appeal before the NCLAT. Among the grounds of appeal, the relevant ground of challenge is extracted below :

> "(*vi*) That the abovementioned application filed by the appellant was taken up and heard by the National Company Law Tribunal, Mumbai Bench, on 7th February, 2020. On the said date, even though the appellant explained to the Hon'ble Bench that the financial creditor had duly accepted the fee quoted by him, and there was no contest whatsoever on the part of the respondent financial creditor to the payment of the c.i.r.p. cost incurred by the appellant, including his fee, the Hon'ble Mumbai Bench proceeded to pass the impugned order reducing the c.i.r.p. costs and fee quoted by the appellant, without citing any reasons for the same, or even noticing the appellant's contentions in the said regard. In fact, the respondent bank affirmed during the course of the hearing on 7th February, 2020, that it was agreeable to paying the said amount. However, the same was also disregarded, and in fact, was not even noticed in the order. Copies of the minutes of meeting between the appellant and respondent financial creditor, and of the other documents evidencing their agreement as to the fee to be paid to the appellant, are

annexed herewith and marked as Annexure - C (Collectively). Annexed as Annexure D is a statement showing the amount paid by the respondent to the appellant after the passing of the impugned order, which is a sum of Rs. 7,09, 154/-. An amount of Rs. 1,99,839/- therefore yet remains to be paid, and this is reflected in the said statement as well."

8. The NCLAT, while dismissing the appeal, observed that :

(i) The appellant had worked for about three months as RP ;

(ii) The expenses had been allowed in full and the consolidated amount of Rs. 5,00,000 plus GST allowed as fee of the RP for the entire period was not unreasonable ; and

(iii) Fixation of the fee is not a business decision depending on the commercial wisdom of the CoC.

9. Ms. Anjali Sharma, counsel appearing on behalf of the appellant, challenged the order of the NCLAT principally on the following grounds :

(i) The statement of fee and expenses submitted by the appellant was in terms of the technical and financial bid ;

(ii) It was categorically stated in the letter of the appellant dated 30 December, 2019 that the fourth CoC meeting held on 10 December, 2019 had ratified all the expenses up to 30 November, 2019, after which no meeting took place ;

(iii) The respondent, as a matter of fact, by its letter dated 24 January, 2020, found, upon verification, that the fee and expenses as claimed were admissible ;

(iv) The NCLT did not scrutinize or verify the factual position and merely awarded an ad hoc figure of Rs. 5,00,000 while the NCLAT has committed a similar error on the ground that an amount of Rs. 5,00,000 was found to be reasonable; and

(v) The appellant worked as an IRP for three months which is half the period of one hundred and eighty days envisaged for completing the process.

10. In this backdrop, counsel submitted that in terms of the decision of this Court in *Alok Kaushik* v. *Bhuvaneshwari Ramanathan* (2021) 5 SCC 787, the adjudicating authority would have jurisdiction under section 60(5)(*c*) of IBC. In the present case, the jurisdiction has (it is urged) been improperly exercised in the sense that there has been no application of mind to the basis of the claim and the figures which were accepted by the financial creditor.

11. On the other hand, Mr. Vadlamani Seshagiri, counsel appearing on behalf of the respondent, submitted that the appellant accepted the order of the NCLAT dated 19 December, 2019 remitting the proceedings back to the NCLT for determining the costs and fee payable to the RP. Moreover, it was sought to be urged that the payment which has been made to the RP is commensurate with

the work which was done over a period of three months.

12. Responding to the above submissions, it has been urged on behalf of the appellant that the appellant did not challenge the order of the NCLAT remitting the proceedings back to the NCLT for determination of the costs and fee because it was not necessary for the appellant to do so. Moreover, it has been submitted that the real grievance of the appellant is that the claim has not been assessed or analyzed in terms of what was agreed, when the appellant submitted his bid or in terms of the circular of the Insolvency and Bankruptcy Board of India dated 12 June, 2018.

13. At the outset, it must be noted that the jurisdiction of the adjudicating authority to consider the claim of a registered valuer was considered in the judgment of this Court in *Alok Kaushik* (*supra*). In that case, the NCLT held that once the CIRP was set aside, it was rendered *functus officio*. The order of the adjudicating authority was upheld in appeal. In that context, this Court, after adverting to the provisions of the relevant Regulations, observed as follows :

> "19. Though the CIRP was *set aside* later, the claim of the appellant as registered valuer related to the period when he was discharging his functions as a registered valuer appointed as an incident of the CIRP. NCLT would have been justified in exercising its jurisdiction under section 60(5)(*c*) of the IBC and, in exercise of our jurisdiction under article 142 of the Constitution, we accordingly order and direct that in a situation such as the present case, the adjudicating authority is sufficiently empowered under section 60(5)(*c*) of the IBC to make a determination of the amount which is payable to an expert valuer as an intrinsic part of the CIRP costs. Regulation 34 of the IRP Regulations defines "insolvency resolution process cost" to include the fees of other professionals appointed by the RP. Whether any work has been done as claimed and if so, the nature of the work done by the valuer is something which need not detain this Court, since it is purely a factual matter to be assessed by the adjudicating authority.

14. Regulation 34 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides as follows :

> `34. *Resolution professional costs.*—The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.
>
> *Explanation*.—For the purposes of this regulation, "expenses" include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.'

15. The Insolvency and Bankruptcy Board of India has issued a circular on 12 June, 2018. The circular, *inter alia*, requires the insolvency professional to ensure that the fees payable to him during the CIRP are

reasonable and the approval of the CoC for the fee or other expenses is obtained, wherever approval is required.

16. In the present case, after the NCLAT *set aside* the order of the NCLT initiating the CIRP, the proceedings were remitted back for determining the insolvency resolution costs. It is material to note that the appellant had addressed a letter to the respondent on 13 December, 2019 prior to the filing of the application to which the respondent responded on 24 January, 2020 stating that, upon verification, the costs and fees were found in conformity with both the technical and financial bid, based on which the assignment was awarded. In the application which was filed by the appellant before the NCLT, the appellant annexed a statement of costs, the amount which was reimbursed with the balance dues at Annexure 'D'. The order of the NCLT, however, reveals that none of the submissions of the appellant have been considered. The adjudicating authority merely directed the respondent to pay the expenses incurred and an amount of Rs. 5,00,000 plus GST towards the fee of the RP. Neither the basis of the claim nor its reasonableness has been considered by the adjudicating authority. The appellate authority has merely proceeded in an *ad hoc* manner on the ground that the amount of Rs. 5,00,000 as fee, in addition to the expenses, appears to be reasonable. Both the orders suffer from an abdication in the exercise of jurisdiction. In the absence of any reasons either in the order of the NCLT or the appellate authority, it is impossible for the Court to deduce the basis on which the payment of an amount of Rs. 5,00,000 together with expenses has been found to be reasonable. Consequently, an order of remand becomes necessary.

17. We accordingly allow the appeal and *set aside* the impugned judgment and order of the NCLAT dated 30 July, 2020. Similarly, the order of NCLT dated 7 February, 2020 is set aside. MA No 223/2020 in CP (IB) 970/MB/2019 is restored to the file of the NCLT for a decision afresh. The NCLT, upon remand, is requested to expedite the disposal of the MA and to complete the process within a period of one month from the date of receipt of a certified copy of this order on its record.

18. The appeal is disposed of in the above terms.

19. Pending application, if any, stands disposed of.

ANNEX

(2021) 133 taxmann.com 445 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Devarajan Raman, Resolution Professional Poonam Drum & Containers (P.) Ltd. v. Bank of India Ltd.

JUSTICE BANSI LAL BHAT, ACTING CHAIRPERSON ANANT BIJAY SINGH, JUDICIAL MEMBER AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 646 OF 2020

JULY 30,2020

Devrajan Raman and **Ms. Anjali Sharma**, Advs. *for the Appellant*.

ORDER

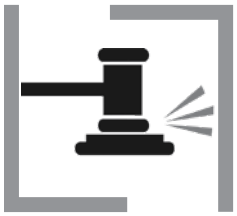
1. While disposing of Company Appeal (AT) (Insolvency) No. 1092 of 2019, this Appellate Tribunal directed the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench to decide the fee of Resolution Professional and cost of the Corporate Insolvency Resolution Process as incurred by the Resolution Professional and to be borne and paid by the 'Bank of India Ltd.' (Financial Creditor). Learned Adjudicating Authority in terms of the impugned order dated 7th February, 2020 allowed all the expenditure incurred by the Resolution Professional and directed payment of a consolidated amount of Rs. 5 Lakhs + GST towards the fee of the Resolution Professional.

2. Learned counsel for the Appellant submits that the fee is inadequate and there are some judgments from this Appellate Tribunal where the fee has been left to the commercial wisdom of the Committee of Creditors.

3. On a query, learned counsel for the Appellant replied that the Resolution Professional has worked for about three months. Since the expenses have been allowed in full and the consolidated amount of Rs. 5 Lakh + GST has been allowed as fee of the Resolution Professional for entire period, we find the same is not unreasonable. Fixation of fee is not a business decision depending upon the commercial wisdom of the Committee of Creditors. We accordingly find this appeal lacking merit. The appeal is accordingly dismissed. No costs.

†. Arising out of judgment of the NCLAT, New Delhi in *Devarajan Raman, Resolution Professional Poonam Drum & Containers (P.) Ltd.* v. *Bank of India Ltd.* (2021) 133 taxmann.com 445.

1. "NCLAT or appellate authority"
2. "RP"
3. "IBC"
4. "NCLT or adjudicating authority"
5. Company Appeal (AT) Insolvency No. 1092 of 2019
6. "CIRP"
7. "CoC"



(2022) 134 taxmann.com 307 (SC)

SUPREME COURT OF INDIA

Cognizance for Extension of Limitation, In re

N.V. RAMANA, CJI. L. NAGESWARA RAO AND SURYA KANT, JJ.

MISCELLANEOUS APPLICATION NOS. 665 OF 2021 AND

21 & 29 OF 2022 SUO MOTU WRIT PEITION (C) NO. 3 OF 2020

JANUARY 10, 2022

COVID 19 - Computation of limitation period - Supreme Court in its order dated 23-3-2020 in Cognizance for Extension of Limitation, In re (2020) 117 taxmann.com 66, ordered extension of period of limitation in filing petitions/suits/applications/appeals/all other proceedings on account of COVID-19 - Thereafter, on 8-3-2021 extension of limitation was regulated and brought to an end - Whether in view of spread of new variant of COVID-19 and drastic surge in number of COVID cases across the country, Supreme Court restored order dated 23-3-2020 and period from 15-3-2020 till 28-2-2022 shall stand excluded for purpose of limitation as may be prescribed under any general or special law in respect of all judicial or quasi-judicial proceedings - Held, yes - Whether in cases where limitation would have expired during period between 15-3-2020 till 28-2-2022, notwithstanding actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022; in event actual balance period of limitation remaining, with effect from 1-3-2022, is greater than 90 days, that longer period shall apply - Held, yes (Para 5)

Shivaji M. Jadhav, Ms. Manoj K. Mishra, Dr. Joseph Aristotle S., Ms. Diksha Rai, Nikhil Jain, Atulesh Kumar, Dr. Aman M. Hingorani, Ms. Anzu Varkey, Aljo Joseph, Sachin Sharma, Varinder K. Sharma, Advs. **Abhinav Ramkrishna,** AOR., **Neeraj Kishan Kaul,** Sr. Adv. **Himanshu Chaubey,** AOR, **Prem Dave, Raghav Agrawal,** and **Toshiv Goyal,** Advs. *for the Petitioner.* **K.K. Venugopal, AG** and **Tushar Mehta, SG Rajat Nair, Kanu Agrawal, Siddhant Kohli, Chinmayee Chandra,** Advs **Arvind Kumar Sharma, Ms. Uttara Babbar,** AORs**, Manan Bansal,** Adv., **Arjun Garg,** AOR, **Aakash Nandolia,** Adv., **Sagun Srivastava,** Advs., **Ms. Sunieta Ojha,** Adv., **P.I. Jose,** AORs **Jenis V. Frensis,** Adv., **Prashant K. Sharma,** Adv's. **Ms. Anindita Mitra, Sahil Tagotra,** AOR **Subhro Mukherjee,** Adv., **Amit Sharma,** AOR **Sameer Parekh, Kshatrashal Raj, Ms. Tanya Chaudhry, Ms. Pratyusha Priyadarshini, Ms. Nitika Pandey,** Advs. **Vinod Sharma, Mukesh K. Giri, Kunal Chatterji,** AOR **Ms. Maitrayee Banerjee, Rohit Bansal,** Advs. **Ms. Pratibha Jain,** AOR **Soumya Chakraborty,** Sr. Adv. **Sanjai Kumar Pathak,** AOR **Ms. Shashi Pathak,** Adv., **Divyakant Lahoti,** AOR **Parikshit Ahuja, Ms. Praveena Bisht, Ms. Madhur Jhavar,** Advs. **Ms. Vindhya Mehra, Kartik Lahoti, Rahul Maheshwari, Ms. Shivangi Malhotra,** Advs., **Tapesh Kumar Singh,** AOR **Aditya Pratap Singh, Aditya Narayan Das, Ms. Binu Tamta, Dhruv Tamta, Siddhesh Kotwal, Ms. Ana Upadhyay, Ms. Manya Hasija, Ms. Pragya Barsaiyan, Akash Singh,** Advs. **Ms.**

Taruna Ardhendumauli Prasad, AORs. **Sibo Sankar Mishra,** AORs. **Niranjan Sahu,** Adv., **Abhimanyu Tewari, Ms. Eliza bar,** Advs., **Avijit Mani Tripathi,** AOR and **T.K. Nayak,** Adv. *for the Respondent.*

ORDER

1. In March, 2020, this Court took *suo motu* cognizance of the difficulties that might be faced by the litigants in filing petitions/applications/suits/appeals/all other quasi proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State) due to the outbreak of the COVID-19 pandemic.

2. On 23-3-2020, this Court directed extension of the period of limitation in all proceedings before Courts/Tribunals including this Court w.e.f. 15-3-2020 till further orders. On 8-3-2021, the order dated 23-3-2020 was brought to an end, permitting the relaxation of period of limitation between 15-3-2020 and 14-3-2021. While doing so, it was made clear that the period of limitation would start from 15-3-2021.

3. Thereafter, due to a second surge in COVID-19 cases, the Supreme Court Advocates on Record Association (SCAORA) intervened in the *suo motu* proceedings by filing Miscellaneous Application No. 665 of 2021 seeking restoration of the order dated 23-3-2020 relaxing limitation. The aforesaid Miscellaneous Application No. 665 of 2021 was disposed of by this Court *vide* Order dated 23-9-2021, wherein this Court extended the period of limitation in all proceedings before the Courts/ Tribunals including this Court w.e.f 15-3-2020 till 2-10-2021.

4. The present Miscellaneous Application has been filed by the Supreme Court Advocates-on-Record Association in the context of the spread of the new variant of the COVID-19 and the drastic surge in the number of COVID cases across the country. Considering the prevailing conditions, the applicants are seeking the following :

i. allow the present application by restoring the order dated 23-3-2020 passed by this Hon'ble Court in Suo Motu Writ Petition (C) NO. 3 of 2020 ; and

ii. allow the present application by restoring the order dated 27-4-2021 passed by this Hon'ble Court in M.A. no. 665 of 2021 in Suo Motu Writ Petition (C) NO. 3 of 2020; and

iii. pass such other order or orders as this Hon'ble Court may deem fit and proper.

5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions :

I. The order dated 23-3-2020 is restored and in continuation of the subsequent orders dated 8-3-2021, 27-4-2021 and 23-9-2021, it is directed that the period from 15-3-2020 till 28-2-2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws

in respect of all judicial or *quasi-judicial* proceedings.

II. Consequently, the balance period of limitation remaining as on 3-10-2021, if any, shall become available with effect from 1-3-2022.

III. In cases where the limitation would have expired during the period between 15-3-2020 till 28-2-2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022. In the event the actual balance period of limitation remaining, with effect from 1-3-2022 is greater than 90 days, that longer period shall apply.

IV. It is further clarified that the period from 15-3-2020 till 28-2-2022 shall also stand excluded in computing the periods prescribed under sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (*b*) and (*c*) of section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(*s*) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

6. As prayed for by learned Senior Counsel, M.A. No. 29 of 2022 is dismissed as withdrawn.

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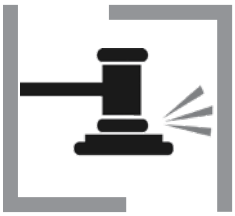


(2022) 136 taxmann.com 292 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Asif Abdullah Dalwai *v.* **Arun Bagaria, Interim Resolution Professional of Windals Auto (P.) Ltd.**

JUSTICE ASHOK BHUSHAN, CHAIRPERSON AND DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

COMP. APP. (AT) (INS.) NO. 958 OF 2021†

JANUARY 11, 2022

Section 12A of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Withdrawal of application - Whether where withdrawal application under section 12A has been filed prior to Constitution of CoC, there is no requirement of obtaining consent of CoC as required by section 12A - Held, yes (Para 6)

CASE REVIEW

Ashish Ispat (P.) Ltd. v. *Primuss Pipes & Tubes Ltd.* (Co. Appeal (AT) Ins. No. 892 of 2021, dated 7-1-2022) (para 6) *followed*.

National Engineering Industries Ltd. v. *Windals Auto (P.) Ltd.* (2022) 136 taxmann.com 291 (NCLT - Mum.) (para 8) *Set aside* (***See Annex***).

CASES REFERRED TO

Ashish Ispat (P.) Ltd. v. *Primuss Pipes & Tubes Ltd.* (Co. Appeal (AT) Ins. No. 892 of 2021, dated 7-1-2022) (para 6).

Ms. Prachi Johri and **Lakshya Sachdeva**, Advs. *for the Appellant.* **Arun Bagaria** and **H.P. Kar** *for the Respondent.*

ORDER

1. Heard Learned Counsel for the Appellant as well as Resolution Professional appearing in person and Learned Counsel for the Intervener.

2. This Appeal has been filed against the Judgment and Order dated 30th September, 2021 passed by Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-IV) in IA-1952/2021 in CP(IB)-3221(MB)/2019 by which Order, the Adjudicating Authority dismissed the Application and directed the IRP to get withdrawal of CIRP approved from the Committee of Creditors and thus the Appellant is aggrieved by the said Order.

3. Learned Counsel for the Appellant submits that in the present case by Order dated 2nd August, 2021 in CP (IB) No. 3221/MB-IV/2019, Corporate Debtor was admitted into Insolvency and public announcement was made on 7th August, 2021. On 24 August, 2021, an Application being I.A. No. 1952/2021 was filed for withdrawal of the CIRP under section 12A of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as 'Code') by the IRP before the

Adjudicating Authority along with Form-FA. The Application of withdrawal was listed on 6-9-2021 but due to paucity of time the matter could not be heard. On 24-9-2021 CoC was constituted and first meeting of COC was held on 29-9-2021.

4. The Submission of Learned Counsel for the Appellant is that when the Application was filed prior to constitution of CoC there was no requirement for approval of the CoC. Learned Counsel for the Intervener submits that there are huge claim of Financial Creditors and hence the matter need to be sent back to the CoC for its consent.

5. Resolution Professional has also filed Status Report where the dates on which the Application was filed *i.e.*14th August, 2021 and Constitution of CoC is on 24-9-2021 has been stated.

6. This Tribunal has already delivered a Judgment on 07th January, 2022 in Company Appeal (AT) ins. No. 892 of 2021 in the matter of `*Ashish Ispat (P.) Ltd.* v. *Primuss Pipes and Tubes Ltd.*' holding that when the Application under section 12A of the Code has been filed prior to Constitution of CoC there is no requirement of obtaining consent of the CoC as required by section 12A of the Code. The issue which has been raised is fully covered by the Judgment of this Tribunal delivered on 7-1-2022. In view of the aforesaid, we are of the view that the Order passed by Adjudicating Authority directing withdrawal application be placed before the CoC is uncalled for. We *set aside* the Order dated 30th September, 2021 and direct that the Application filed by IRP under section 12A of the Code be considered and appropriate order be passed by the Adjudicating Authority at the earliest.

7. With the above observations, the Appeal is allowed. It is open for the Financial Creditors to file Application under section 7 of the IBC if so advised.

8. We having *set aside* the Order dated 30th September, 2021, we are of the view that till the NCLT passes order under section 12A application, no further steps be taken in the CIRP Process.

ANNEX

(2022) 136 taxmann.com 291 (NCLT - Mum.)

NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH

National Engineering Industries Ltd. v. Windals Auto (P.) Ltd.

RAJESH SHARMA, TECHNICAL MEMBER AND SMT. SUCHITRA KANUPARTHI, JUDICIAL MEMBER

IA-1952/2021 CP (IB) - 3221 (MB)/2019

SEPTEMBER 30, 2021

Nishit Tanna, Ld. Counsel *for the Petitioner.*

ORDER

The Court is convened through Video Conference.

1. Mr. Nishit Tanna, Ld. Counsel for the Petitioner present. No representation on the part of the Corporate Debtor.

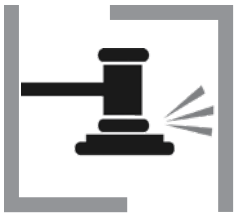
IA-1952/2021

2. This is an application filed by IRP for withdrawal of CIRP process against the Corporate Debtor. Mr. Nishit Tanna, Ld. Counsel for the IRP submits that the CoC has already been constituted in this case.

3. The IRP is directed to get the withdrawal of CIRP approved from the CoC before coming to this Bench.

4. Accordingly, the IA is dismissed.

† Arising out of order of NCLT, Mumbai Bench in *National Engineering Industries Ltd.* v. *Windals Auto (P.) Ltd.* (2022) 136 taxmann.com 291.



(2022) 136 taxmann.com 359 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Edelweiss Asset Reconstruction Company Ltd. *v.* **Peter Beck and Peter Vermoegensverwaltung Ltd.**

JARAT KUMAR JAIN, JUDICIAL MEMBER AND
DR. ALOK SRIVASTAVA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INS) NOS. 161 & 169 OF 2021
JANUARY 5, 2022

Section 31, read with section 33, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Resolution plan in respect of corporate debtor was approved by Adjudicating Authority - Successful resolution applicant had failed to take steps towards implementation of resolution plan - An application could have been made to Adjudicating Authority for liquidation of corporate debtor - However, no such application for liquidation had been made by financial creditor or any other stakeholder, but on contrary financial creditor have sought for re-initiation of CIRP - Whether this was not a fit case for liquidation of corporate debtor because it was a going concern and all stakeholders seems to be interested that corporate debtor remains a going concern - Held, yes (Para 32)

CASE REVIEW

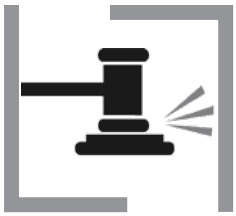
State Bank of India v. *Peter Beck and Peter Vermoegensverwaltung Ltd.* (2022) 136 taxmann.com 358 (NCLT - Mum.) (para 34) *modified* (***See Annex***).

CASES REFERRED TO

Rahul Jain v. *Rave Scans (P.) Ltd.* (2020) 113 taxmann.com 342/157 SCL 531 (SC) (para 12), *QVC Exports (P.) Ltd.* v. *United Tradico FZC* 2020 SCC Online NCLAT 555 (para 12), *Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC (India) Ltd.* (2021) 125 taxmann.com 360/166 SCL 678 (SC) (para 12), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 17), *CoC of Amtek Auto* v. *Dinkar T. Venkatsubramanian* (2021) 133 taxmann.com 17 (SC) (para 17), *COC of Metalyst Forging Ltd.* v. *Deccan Value Investors* (Company Appeal (AT) (Ins.) No. 1276 of 2019, dated 7-2-2020) (para 17), *Bank of Baroda* v. *Mandhana Industries Ltd.* (2018) 98 taxmann.com 40 (NCLT - Mum.) (para 17), *Swadeshi Woollen Mills (P.) Ltd.* v. *Vinod Krishan* (Company Appeal (AT) (Ins.) No. 202 of 2020) (para 17), *Vijay Kumar* v. *Gopalsamy Ganesh Babu* 2020 SCC Online NCLAT 1936 (para 17), *Yavar Dhala* v. *GM Financial Asset Reconstruction Co. Ltd.* (Company Appeal (AT) (Ins.) No. 13 of 2019, dated 18-3-2019) (para 18) and *ArcelorMittal (P.) Ltd.* v. *Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL354 (SC) (para 19).

R.P. Agrawal, **Ms. Manisha Agarwal** and **Ms. Vidhisha Haritwal**, Advs. *for the Appellant.*
Ankur Kashyap, **Ajith Ranganathan**, **Rohit Rajershi**, **Abhay Singh**, **Aman Bajaj** and **Yashish Chandra**, Advs. *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 136 taxmann.com 359 (NCLAT - New Delhi)



(2022) 134 taxmann.com 190 (SC)

SUPREME COURT OF INDIA

Bank of Baroda v. MBL Infrastructures Ltd.

SANJAY KISHAN KAUL AND M.M. SUNDRESH, JJ.

CIVIL APPEAL NO. 8411 OF 2019†

JANUARY 18, 2022

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - An order for initiation of corporate insolvency resolution process was passed in case of corporate debtor - In course of said process, resolution applicant being promoter of corporate debtor submitted his resolution plan and same was approved by Adjudicating Authority - Financial creditor raised an objection that resolution applicant had furnished personal guarantee in its favour to secure debt of corporate debtor and such guarantee had been invoked by creditor, which remains unpaid and therefore, said resolution applicant was ineligible to submit a resolution plan by reason of a amendment to section 29A(h) - It was noted that ultimate object of code was to put corporate debtor back on rails - In instant case, resolution plan was accepted by majority of CoC and same was put into operation and as of now corporate debtor was ongoing concern - Resolution applicant had infused about Rs. 63 crores into corporate debtor and had further received approval of shareholders to raise Rs. 300 crores to revive corporate debtor - Whether thus, on peculiar facts of present case, resolution plan of resolution applicant leading to ongoing operation of corporate debtor ought not to be disturbed and therefore, appeal against order passed by Adjudicating Authority was to be disposed of - Held, yes (Paras 64 and 65)

CASE REVIEW

RBL Bank Ltd. v. *MBL Infrastructures Ltd.* (2018) 90 taxmann.com 47 (para 65) *affirmed.*

CASES REFERRED TO

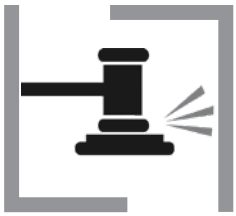
K. Sashidhar v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 26), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 33), *K.N. Rajkumar* v. *V.N. Nagarajan* (2021) 130 taxmann.com 254 (SC) (para 33), *ArcelorMittal India (P.) Ltd.* v. *Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL 354 (para 33), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 33), *Apollo Jyoti LLC* v. *Jyoti Structures Ltd.* (Company Appeal (AT) (Insolvency) No. 548 of 2018, dated 19-3-2019) (para 33), *DBS Bank Ltd.* v. *Sharad Sanghi* (Civil Appeal Nos. 3434-3436 of 2019, dated 15-4-2019) (para 33), *Ebix Singapore (P.) Ltd.* v. *CoC of Educomp Solutions Ltd.*

(2021) 130 taxmann.com 208 (SC) (para 33), *National Spot Exchange* v. *Anil Kohli* (2021) 130 taxmann.com 229 (SC) (para 33), *Seaford Court Estates Ltd.* v. *Asher* (1949) 2 KB 481 (para 35), *Reserve Bank of India* v. *Peerless General Finance & Investment Co. Ltd.* (1987) 1 SCC 424 (para 40), *Union of India* v. *Elphinstone Spg. & Wvg. Co. Ltd.* (2001) 4 SCC 139 (para 41), *Phoenix Arc (P.) Ltd.* v. *Spade Financial Services Ltd.* (2021) 124 taxmann.com 24/165 SCL 21 (SC) (para 42), *Arun Kumar Jagatramka* v. *Jindal Steel & Power Ltd.* (2021) 125 taxmann.com 244/165 SCL 652 (SC) (para 42) and *Chitra Sharma* v. *Union of India* (2018) 96 taxmann.com 216/148 SCL 833 (SC) (para 48).

Bishwajit Dubey, **Ms. Srideepa Bhattacharyya**, **Ms. Aishwarya Gupta**, and **Manpreet Lamba**, Advs. *for the Appellant*. **Ms. S. Janani**, **Satyendra Kumar**, **Sanjay Kapur**, AORs, **Ms. Megha Karnwal**, **Arjun Bhatia**, **Mrs. Shubhra Kapur**, **Lalit Rajput**, Advs., **Ankur Mittal**, **Tarun Gupta**, **Ms. Archana Pathak Dave**, AORs, **Mithilesh Kumar Pandey**, Adv., **Rakesh Kumar**, **Shantanu Kumar**, and **Dr.** (**Mrs.**) **Vipin Gupta**, AORs *for the Respondent*.

† Arising out of Order of *RBL Bank Ltd.* v. *MBL Infrastructures Ltd.* (2018) 90 taxmann.com 47 (NCLT - Kolkata)

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 134 taxmann.com 190 (SC)



(2022) 134 taxmann.com 48 (Bombay)

HIGH COURT OF BOMBAY

Angre Port (P.) Ltd. *v.* TAG 15 (IMO. 9705550)

B.P. COLABAWALLA, J.

INTERIM APPLICATION (L) NO. 112 OF 2021 COMMERCIAL ADMIRALTY SUIT(L) NO. 4 OF 2020

JANUARY 3, 2022

Section 14, read with sections 33 and 53, of the Insolvency and Bankruptcy Code, 2016, and section 2(e) of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 - Corporate insolvency resolution process - Moratorium - General - Defendant vessel entered plaintiff's port and started occupying berth space - Plaintiff supplied necessary berthing charges (as per its Tariff Booklet) to said vessel and thereafter raised invoices from time to time - Since, said invoices remained unpaid, plantiff invoked Admiralty jurisdiction by filing Commercial Admiralty suit under provisions of order XIII-A read with order XII rule 6 of Code of Civil Procedure against defendant seeking a judgment and decree against defendent for a sum of Rs. 9.37 crores as per particulars of claim - It was a case of defendant that its owners *i.e.* Tag Offshore went into liquidation and thus, present suit was not maintainable considering bar contained in section 33(5) - Defendant also submitted that claim of plaintiff was already adjudicated by liquidator of its owner Tag Offshore and thus, instant suit was barred under principles of *res judicata* - It was noted that section 33(5) prohibits institution of a suit or other legal proceeding against corporate debtor only, however, it does not in any way prohibit institution of a suit or other legal proceeding against a Vessel owned by corporate debtor because under Admiralty Act, Vessel is treated as a separate juristic entity which can be sued without joining owner of said Vessel to proceeding and thus, suit against defendant vessel even at stage of liquidation of corporate debtor was maintainable - Further, claims of plaintiff adjudicated by liquidator was pertaining to only one invoice, however, claim with reference to other invoices was neither submitted by plantiff nor adjudicated by Liquidator, and thus, principles of *res judicata* would not apply - Whether in view of aforesaid, suit filed by plaintiff seeking a summary judgment against defendant for a sum of Rs. 9.37 crore was to be allowed - Held, yes (Para 46)

FACTS

- The defendant Vessel entered the Plaintiff's Port and started occupying berth space. The Plaintiff supplied the necessary berthing charges (as per its Tariff Booklet) to the said Vessel and thereafter raised invoices from time-to-time.
- Subsequently, insolvency proceedings were initiated against Tag Offshore Ltd. (owners of the De-

fendant Vessel) by one operational creditor. Pursuant thereto, Resolution Professional (RP) was appointed.

- In the interregnum, on account of strong winds and currents brought on by the monsoon, the Defendant Vessel began drifting away from the Plaintiff's berth. The said Vessel broke her mooring rope, floated away and posed a serious threat to the port, its navigational channels, and the nearby village. In short, it was causing a serious navigational hazard and a danger to the life and property of the villagers nearby as well as their fishing boats. In view of this event, the Plaintiff immediately engaged and deployed a nearby tug, for salvaging and bringing back the Defendant Vessel to safe harbour. It was the case of the Plaintiff that RP did not provide any assistance to ensure the safety of the Defendant Vessel or for bringing it back to safe harbour. The Plaintiff even raised an invoice for the same, which according to the Plaintiff, had yet not been paid.

- Later on, the NCLT ordered the CoC to secure the assets of Tag Offshore Ltd. and take possession of the Defendant Vessel, if necessary, and proceed in terms of sections 51 and 52 of the Merchant Shipping Act, 1958. It also directed the CoC to explore the liquidation option and *inter alia* move the Defendant Vessel to a safer place without creating problems for the Port Trust.

- Finally, the NCLT ordered liquidation of Tag Offshore Ltd. and appointed Liquidator. It was the case of the Plaintiff that since its invoices remained unpaid, it finally approached instant Court by filing the suit under the provisions of order XIII-A read with order XII rule 6 of the Code of Civil Procedure, 1908 seeking a summary judgment against the Defendant Vessel in the sum of Rs. 9.37 crore. On the very same date, High Court also ordered arrest of the said Vessel.

- It was a case of defendant that suit itself was not maintainable in light of bar contained in section 33(5); the Plaintiff having already filed its claim before Liquidator of Tag Offshore Ltd. and thus, suit was barred by the principles of *res judicata*. Liquidator filed Interim Application, inter alia, seeking modifications/recall of the order of arrest on ground that that if the Defendant Vessel was not sold, its value will diminish, and the said Vessel would incur charges such as port charges and manning costs aggregating to USD 3,000 per day which would further get added to the liquidation costs. High Court, by its order granted limited relief to Liquidator by allowing him to sell the Defendant Vessel subject to certain terms and conditions.

HELD

- What sub-section (5) of section 33 contemplates is that subject to section 52, when a liquidation order

is passed against the Corporate Debtor, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor. Section 52 deals with the rights of the secured creditor in liquidation proceedings. The proviso to section 33(5) stipulates that a suit or other legal proceeding may be instituted by the Liquidator, on behalf of the Corporate Debtor, with the prior approval of the Adjudicating Authority. When one reads section 33(5), it is *ex facie* clear that the said provision prohibits the institution of a suit or other legal proceeding against the Corporate Debtor only. It does not in any way prohibit the institution of a suit or other legal proceeding against a ship/ Vessel owned by the Corporate Debtor when invoking the Admiralty Jurisdiction of this Court. Under the Admiralty Act, the Vessel is treated as a separate juristic entity which can be sued without joining the owner of the said Vessel to the proceeding. The action against the Vessel under the Admiralty Act, is an action in rem and a decree can be sought against the Vessel without suing the owner of the said Vessel. Under the Admiralty Act, a ship, or a Vessel, as commonly referred to, is a legal entity that can be sued without reference to its owner. The purpose of an action in rem against the Vessel is to enforce the maritime claim against the Vessel and to recover the amount of the claim from the Vessel by an admiralty sale of the Vessel and for payment out of the sale proceeds. It is the Vessel that is liable to pay the claim. This is the fundamental basis of an action in rem. The Claimant/Plaintiff is not concerned with the owner, and neither is the owner a necessary or a proper party. In other words, the presence of the owner is not required for adjudication of the Plaintiff's claim. It is for this very reason that there is no requirement to serve the writ of summons on the owner of the Vessel and the service of the warrant of arrest on the Vessel is considered adequate. For the purposes of an action in rem under the Admiralty Act, the ship/Vessel is treated as a separate juridical personality, an almost corporate capacity having not only rights but also liabilities (sometimes distinct from those of the owner). The fundamental legal nature of an action in rem, as distinct from its eventual object, is that it is a proceeding against the res. Thus, when a Vessel represents such res as is frequently the case, the action in rem is an action against the Vessel itself. The action is a remedy against the corpus of the offending Vessel. It is distinct from an action in personam which is a proceeding inter-parties founded on personal service on the Defendant within jurisdiction of the Court, leading to a judgment against the person of the Defendant. In an action in rem, no direct demand is made against the owner of the res personally. (Para 22)

- An action in rem is not against the Corporate Debtor but against the Vessel. The Vessel is a distinct juridical entity and the action proceeds without reference to the owner who is not a party to the suit when filed. Liquidation of the Corporate Debtor does not affect the ownership of the res so as to defeat a maritime claim in respect of the Vessel. The res continues to be in the ownership of the Corporate Debtor and the Liquidator merely acts as a custodian. The status of the res does not change. Hence, the action in rem can be entertained even at the stage of liquidation of the Corporate Debtor as the claim is against the res and not against the Corporate Debtor. By arrest of the Vessel, the Plaintiff would become a secured creditor to the extent of the value of the res only but not a secured creditor of the Corporate Debtor's other assets. Hence, this will not affect other secured creditors of the Corporate Debtor. However, by not permitting the action in rem and arrest of the Vessel, the rights in rem given to a maritime claimant under the Admiralty Act would be defeated and denied. The entire purpose of these rights (whether a maritime lien or a maritime claim) is to enable such a claimant to have his claim perfected in law by arrest of the Vessel. If a claimant is not permitted to do so, then his right in rem may stand extinguished and be lost forever. Thus, objection regarding the maintainability of the present suit holds no substance and the same is rejected. (Paras 23 and 24)

- The principles of *res judicata* would apply when the matter in issue in a previously instituted suit is directly and substantially in issue in the subsequent suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. (Para 29)

- In the facts of the present case, the claim of the Plaintiff adjudicated by liquidator was only pertaining to one invoice for the period 24th April 2019 to 26th September, 2019. In this adjudication, liquidator allowed the claim of the Plaintiff for (i) Berth Hire charges, from 24th April 2019 to 26th September, 2019 @ USD 500/- per day; (ii) Penal Berth Hire charges for the very same period also at USD 500/- per day; and (iii) Port dues for the said period for an aggregate amount of USD 6,600/-. The claim for Salvage costs/operations was rejected by liquidator. The claim of the Plaintiff with reference to any other periods, was never submitted nor adjudicated by liquidator. In these circumstances, even if this adjudication would amount to attracting the bar of res judicata,

then, at the highest, the Plaintiff in the present suit, may not be permitted to recover Salvage charges as the same has been adjudicated upon by liquidator and rejected. This however does not mean that any other claim is also hit by the principles of *res judicata*. The claim for Salvage charges has not been rejected by liquidator on merits. The claim has been rejected on the basis that not enough supporting documentation is provided to substantiate the claim under the heading 'Salvage charges'. This being the case, it could not be said that the entire claim of the Plaintiff is barred by the principles of *res judicata* or constructive *res judicata*. (Paras 30 and 31)

- In view of the foregoing discussion, there will be a summary judgment and a decree in favour of the Plaintiff and only against the sale proceeds of the Defendant Vessel in the sum of Rs. 5.5 crore till payment and/or realization. For the reasons recorded earlier, the claim towards Salvage operations is not granted at this stage and will have to be proved at the trial of the suit. (Para 47)

CASE REVIEW

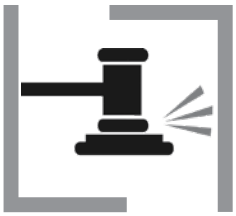
Raj Shipping Agencies v. *Barge Madhwa* (2020) 116 taxmann.com 707 (Bombay) (para 28) *followed.*

CASES REFERRED TO

Raj Shipping Agencies v. *Barge Madhwa* (2020) 116 taxmann.com 707 (Bom.) (para 22), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 26), *Smt. Ujjam Bai* v. *State of Uttar Pradesh* AIR 1962 SC 1621 (para 26), *Transcore* v. *Union of India* (2007) 73 SCL 11 (SC) (para 26), *Union of India* v. *N. Murugesan* 2021 SCC Online SC 895 (para 26), *Erach Boman Khavar* v. *Tukaram Shridhar Bhat* (2013) 15 SCC 655 (para 29), *Oil & Natural Gas Corporation Ltd.* v. *Saw Pipes Ltd.* (2003) 5 SCC 705 (para 34) and *Kailash Nath Associates* v. *Delhi Development Authority* (2015) 4 SCC 136 (para 34).

Prathamesh Kamat, **Pooja Tidke**, **Krushi Barfiwala** and **Ryan Menedes** *for the Applicant.* **Amir Arsiwala**, **Dhrupad Vaghani**, **Ms. Naveli Reshamwalla**, **Ajiz M.K.**, **Farzeen Pardiwalla** and **Nidhi Shah** *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 134 taxmann.com 48 (Bombay)



(2022) 134 taxmann.com 55 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Bank of Maharashtra *v.* **Videocon Industries Ltd.**

JARAT KUMAR JAIN, JUDICIAL MEMBER AND
DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INS.) NOS. 503 OF 2021 AND OTHERS†
JANUARY 5, 2022

Section 31, read with section 30, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether commercial wisdom of CoCs is non-justifiable and hence, power to reconsider any decision is within domain of CoC - Held, yes - Whether where resolution plan as approved in case of Videocon group provided a haircut of almost 95 per cent, *i.e.* a meagre amount of Rs. 2,900 crore for an admitted liability of Rs. 65,000 crore against amount claimed, section 31(1) had not been complied with - Held, yes - Whether further section 30(2) had also not been complied with as said plan provided for payment to Dissenting Financial Creditors by way of non-convertible debentures (NCDs) and equities which is impermissible as per IBC - Held, yes - Whether moreover, resolution applicant had accepted requirement of approval/ permission of CCI in accordance with IBC, prior to approval of CoC, however, said approval of CCI had not been obtained as required by proviso to section 31(4), hence, approved Resolution Plan required review and reconsideration for legal compliances - Held, yes - Whether therefore, approved Resolution Plan not being in compliance with section 30(2)(*b*) read with section 31 was to be *set aside* and matter was to be remitted back to CoC for completion of process relating to CIRP in accordance with provisions of IBC - Held, yes (Paras 42, 45, 46, 49 and 50)

CASE REVIEW

Abhijit Guhathakurta v. *Videocon Industries Ltd.* (2021) 128 taxmann.com 283 (NCLT - Mumbai) (para 50) *set aside.*

CASES REFERRED TO

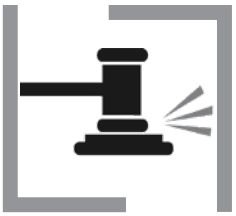
Jaypee Kensington Boulevard Apartments Welfare Associations v. *NBCC (India) Ltd.* (2021) 125 taxmann.com 360/166 SCL 678 (SC) (para 9), *Twin Star Technologies Ltd.* v. *Bank of Maharashtra* (Civil Appeal No. 4626 of 2021, dated 13-8-2021) (para 11), *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 11), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 11), *Kalpraj Dharamshi* v. *Kotak Investment Advisors* (2021) 125 taxmann.com 194/166 SCL 583 (SC) (para 11), *Ebix Singapore (P.) Ltd.* v. *Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208

(SC) (para 11), *K. Dhikpathy* v. *Chairman Chennai Post Trust* 2001 SCC Online Mad. 154 (para 12), *Kamleshkumar Ishwardas Patel* v. *Union of India* (1995) 4 SCC 51 (para 12), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 12), *Duli Chand* v. *State of Uttar Pradesh* (Writ-C No. 45851 of 2011, dated 12-8-2011) (para 12), *Kamal Kumar* v. *State of H.P.* (CWP No. 3443 of 2020, dated 18-12-2020) (para 12), *District Collector* v. *Bhaskara* (Writ Appeal No. 615 of 1982, dated 20-11-1986) (para 12), *Rajesh Hansraj Chopra* v. *Competent Authority* 2001 SCC Online Bom. 1145 (para 12), *Committee of Creditors of Amtek Auto Ltd.* v. *Dinkar T. Venkatsubhramanian* (2021) 124 taxmann.com 481/165 SCL 511 (SC) (para 12), *India Resurgence ARC (P.) Ltd.* v. *Amit Metaliks Ltd.* (2021) 126 taxmann.com 222 (NCLAT - New Delhi) (para 14), *Raj Kishore Jha* v. *State of Bihar* (2003) 11 SCC 519 (para 17), *Rangi International Ltd.* v. *Nova Scotia Bank* (2013) 36 taxmann.com 431/121 SCL 79 (SC) (para 17), *Siemens Engineering & Manufacturing Co. of India Ltd.* v. *Union of India* AIR 1976 SC 1785 (para 17), *State of Orissa* v. *Dhaniram Luhar* (2004) 5 SCC 568 (para 17), *Secretary & Curator Victoria Memorial Hall* v. *Howrah Ganatantrik Nagrik Samity* (2010) 3 SCC 732 (para 17), *Municipal Corporation of Greater Mumbai (MCGM)* v. *Abhilash Lal* (2019) 111 taxmann.com 405/(2020) 157 SCL 477 (SC) (para 17), *Vishal Vijay Kalantri* v. *Shailen Shah* (CA (AT) (Ins.) No. 466 of 2020, dated 24-7-2020) (para 18), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 18), *Tata Consultancy Services Ltd.* v. *Vishal Ghisulal Jain, RP, SK Wheels (P.) Ltd.* (2021) 132 taxmann.com 232 (SC) (para 20), *Sakiri Vasu* v. *State of U.P.* (2008) 2 SCC 409 (para 44), *Sunil Gayaprasad Mishra* v. *Rashtra Sant Tukdoji Maharaj* 2012 (5) All MR 581 (para 44) and *Sunil Gayaprasad Mishra* v. *Rashtra Sant Tukdoji Maharaj* (SLP Appeal (C) No. (*s*) 4622 of 2013, dated 6-5-2015) (para 44).

Vikas Singh, **Ms. Garima Prashad**, Sr. Advs., **Chaitanya B. Nikte**, **Ayush Negi**, **Rajiv K. Virmani**, **Abhinav Agrawal**, **Prakash Singh**, **Prasad Sarvankar**, **Sumedh Ruikar**, **Gaurav Jain**, **Atul Malhotra**, **Karan Valecha** and **Ms. Sneha Bhange**, Advs. *for the Appellant.* **Abhinav Vasisht**, Sr. Adv. **Anoop Rawat** , **Ms. Meghna Rajadhyaksha**, **Zeeshan Khan**, **Vaijayant Paliwal**, **Ms. Radhika Indapurkar**, **Ms. Mohana Nijhawan**, **Chaitanya Safaya**, **Bryan Pillai**, **Ms. Moulshree Shukla**, **Ms. Ishani Mookherjee**, **Ms. Priya Singh** and **Ameya Gokhale** , Advs., **Tushar Mehta**, Solicitor General, **Bishwajit Dubey**, **Madhav Kanoria**, **Ms. Surabhi Khattar**, **Kanu Agarwal**, **Prafful Goyal**, Advs., **Harish Salve**, **Gopal Jain**, Sr. Advs., **Diwakar Maheshwari** and **Shreyas Edupuganti**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT, Mumbai in *Abhijit Guhathakurter* v. *Videcon Industries Ltd.* (2021) 128 taxmann.com 283.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 134 taxmann.com 55 (NCLAT- New Delhi)



(2022) 134 taxmann.com 158 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Rajeev R. Jain *v.* **AASAN Corporate Solutions (P.) Ltd.**

JUSTICE ASHOK BHUSHAN, CHAIRPERSON JARAT KUMAR JAIN, JUDICIAL MEMBER AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS) NO. 1085 OF 2021†

JANUARY 12, 2022

Section 7 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Whether mortgage is an instrument and terms and conditions of mortgage cannot claim any superior status and proceedings under section 7 can be availed irrespective of any contrary or inconsistent condition in mortgage - Held, yes - Whether mortgage deed is an instrument which cannot come into way of section 7 application and shall be overridden by virtue of section 238 - Held, yes - Whether it is choice of mortgagee to recover his dues from secured assets or to take other recourse of remedy as provided under law - Held, yes - Whether where corporate debtor had obtained two loans from financial creditor by means of two deposit agreements and deposits were secured by deed of mortgage and mortgage entered between parties in instant case did not have any inconsistent condition, financial creditor could have taken recourse to section 7 on occurence of default - Held, yes (Paras 9 to 11)

Section 7, read with section 238 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Initiation by financial creditor - Whether principle behind doctrine of stare decisis is that when a law is declared by Court of Competent Jurisdiction in absence of any palpable mistake or error, it is required to be followed - Held, yes - Whether principle of stare decisis is fully applicable on judgments delivered by NCLT as well as NCLAT - Held, yes - Whether however, per incuriam is an exception to stare decisis, hence, where earlier decision was rendered without noticing an express provision of law, it was a decision which was per incuriam and was not a binding precedent - Held, yes - Whether therefore, where Tribunal while deciding Beacon Trusteeship Ltd. v. Neptune Ventures & Developers (P.) Ltd. (2022) 134 taxmann.com 102 (NCLT - Mum.) rendered in context of section 7 with reference to conditions of a mortgage deed did not advert to section 238 which had overriding effect on any clause of any debenture trust deed cum indenture of mortgage, thus said judgment was not a binding precedent to be followed by any other co-ordinate Bench - Held, yes - Whether thus, no error had been committed by Adjudicating Authority in not following above order and admitting section 7 application filed by financial creditor - Held, yes (Paras 15, 20 and 21)

FACTS

- The corporate debtor obtained two loans from the Financial Creditor by means of two deposits agreements. The deposits were secured by Deed of Mortgage and other security documents. As per the terms of the First Deposit Agreement, the first loan was repayable on the expiry of three months from the date of first loan. The date for payment was extended till 31-3-2018. By 31-3-2018, the corporate debtor was liable to repay the outstanding principal amount and interest.
- An application under section 7 was filed by the financial creditor claiming default of debt. After issuance of notice by the Adjudicating Authority, the corporate debtor appeared and opposed the application. The corporate debtor objected to the petition on the ground that (i) financial creditor had committed breach of contract in not fully making the payment of advance amount of second deposit agreement (ii) amounts under the First Deposit were secured and amounts under the Second Deposit were also secured.
- The Adjudicating Authority by impugned judgment admitted the application.
- On appeal by the suspended director of the corporate debtor :

HELD

- In the instant case, there is no dispute between the parties regarding debt or default committed by the corporate debtor. The Adjudicating Authority in its judgment has noticed that the corporate debtor is neither disputing the debt nor the default committed by them in this case. The only contention of the corporate debtor is that the remedy of the financial creditor is to proceed against the mortgage securities as per the order of Beacon Trusteeship Ltd. v. Neptune Ventures & Developers (P.) Ltd. (2022) 134 taxmann.com 102 (NCLT - Mum.).(Para 5)
- The appellant referred to the terms and conditions of the Mortgage Deed specially clause 6 and clause 11.3. Referring to clause 6 of the Mortgage Deed, it is submitted that there was provision for `covenant for re-conveyance' and by the mortgage, the properties were already covenant to the mortgagee. Hence, there was no default and mortgagee could have realised his dues from the secured assets. He has also placed reliance on clause 11.3 which require that in event default occur, the Mortgagee shall, sell, call in, collect, convert into money or otherwise deal with or dispose of the Mortgaged Properties. (Para 6)
- On looking into clause 11.3 and clause 19.4 of the Mortgage Deed, it is clear that there no kind of embargo has been put on the mortgagee to necessarily realise his dues from the secured assets.

Clause 11.3 itself provides 'If any one or more of the Events of Default occur, the Mortgagee shall, without prejudice to any other rights and remedies it may have and without prior notice to the Mortgagors'. (Para 8)

- Similarly, clause 19.4 specifically reserves the other remedies available to the Mortgagee which clearly mentioned that the rights and remedies conferred upon the Mortgagee under this indenture shall not prejudice any other rights or remedies, to which the Mortgagee may, independently of this Indenture, be entitled. Thus, if the law provides any other remedy to Mortgagee the same can very well be availed by him. It is the choice of the mortgagee to recover his dues from secured assets or to take other recourse of remedy as provided under law. (Para 9)

- Section 7 is special remedy provided to financial creditors. The financial creditor can take recourse to section 7 when a default has occurred. Present is a case where application under section 7 has been filed when a default has occurred. The remedy under section 7 is special remedy and the provision of IBC has been given overriding effect from any other law or instrument. (Para 10)

- A reading of section 238 indicates that provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Thus, what is overridden by the IBC is both inconsistency with any other law or any instrument having effect. The mortgage is an instrument. The terms and conditions of the mortgage thus cannot claim any superior status and proceedings under section 7 can be availed irrespective of any contrary or inconsistent condition in mortgage. However, as noticed above, the mortgage entered between the parties in the present case does not have any inconsistent condition rather the mortgage itself reserves and protects other remedies which are available to the financial creditor in any other law. (Para 11)

- The second submission of the appellant that there being judgment of the co-ordinate Bench in Beacon Trusteeship Ltd. (supra), the Adjudicating Authority ought to have followed the decision and rejected the section 7 application. The judgment of co-ordinate Bench in Beacon Trusteeship Ltd. has been noticed and considered by the Adjudicating Authority in the impugned judgment to the effect that no credence can be given to this judgment. (Para 12)

- The reason given by the Adjudicating Authority in not following the co-ordinate Bench judgment was that the same Judicial Member has taken a contrary view in another matter. (Para 13)

- The appellant submits that on principle of stare decisis, the Adjudicating Authority was bound by the judgment of the co-ordinate Bench. (Para 14)

- Doctrine of stare decisis means to stand by decided cases. The principle behind the doctrine is that men who are governed by law should be fixed definite and known and when a law is declared by Court of Competent Jurisdiction in absence of any palpable mistake or error, it is required to be followed. Doctrine of stare decisis is wholesome doctrine which gives certainty to law and guide the people to mould their affairs in future. The doctrine is fully attracted on the statutory Tribunal which is well settled. (Para 15)

- The same principle has been reiterated by the Supreme Court in CCE v. Matador Foam (2005) taxmann.com 446. (Para 16)

- There can be no doubt that the principle of stare decisis is fully applicable on judgments delivered by the NCLT as well as this Appellate Tribunal. Both NCLT and this Tribunal are bound by doctrine of stare decisis. At this juncture, it maybe clarified that what is binding as a precedent on Company Law Tribunal is the judgment of jurisdictional Tribunal. Judgment delivered by NCLT in other jurisdiction have only persuasive value. The present is a case where judgment of the co-ordinate Bench of jurisdictional Tribunal was cited. The reasons given by the Adjudicating Authority as given for not following the judgment of Beacon Trusteeship Ltd. (supra) have been gone into, but due to one reason the same cannot be dealt with in any further. The reason is that the judgment of Tribunal in Beacon Trusteeship Ltd. (supra) was rendered in the context of section 7 of IBC with reference to conditions of a Mortgage Deed. The Debenture of Trust Deed cum Indenture of Mortgage was extracted including clause 17.1. (Para 17)

- The Mortgage Deed is an instrument which cannot come into way of section 7 application and shall be overridden by virtue of section 238 of IBC. The Tribunal did not advert to section 238 in its judgment which makes the judgment of the Tribunal in Beacon Trusteeship Ltd. (supra) per incuriam. It is well settled that per incuriam is exception to the rule of precedent. Incuria literally means carelessness. In practice, per incuriam appears to us per ignorantiam. When judgment is rendered in ignorance of binding statute or binding authority the judgment is said to be per incuriam. (Para 18)

- There can be no doubt that registered mortgage is instrument which shall also be overridden by section 238 which specifically provides for overriding of provisions of IBC to a contrary provisions of law as well as an instrument made under any other law. The

Tribunal while deciding Beacon Trusteeship Ltd. (supra) did not advert to section 238 which had overriding effect on any clause of any Debenture of Trust Deed cum Indenture of Mortgage. (Para 20)

- It is viewed that the above view taken by the Tribunal in Beacon Trusteeship Ltd. (supra) is not inconsonance with section 7 read with section 238. The financial creditor has full right to initiate action under section 7 for non-payment of dues. It is thus viewed that the judgment of the co-ordinate Bench in Beacon Trusteeship Ltd. (supra) was not a binding precedent to be followed by any other co-ordinate Bench. It is thus viewed that no error has been committed by the Adjudicating Authority in admitting section 7 Application filed by the financial creditor. There is no merit in this appeal. The appeal is dismissed. (Para 21)

CASE REVIEW

AASAN Corporate Solutions (P.) Ltd. v. *Nirmal Lifestyle Realty (P.) Ltd.* (2021) 133 taxmann.com 469 (NCLT - Mum.) (para 21) *affirmed* (***See Annex***).

Beacon Trusteeship Ltd. v. *Neptune Ventures and Developers (P.) Ltd.* (2022) 134 taxmann.com 102 (NCLT - Mum.) (para 21) *distinguished.*

CASES REFERRED TO

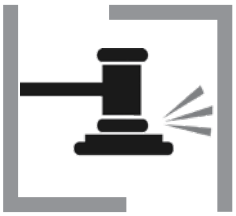
Beacon Trusteeship Ltd. v. *Neptune Ventures and Developers (P.) Ltd.* (2022) 134 taxmann.com 102 (NCLT - Mum.) (para 2), *IDBI Trusteeship Services Ltd.* v. *Ornate Spaces (P.) Ltd.* (C.P. No. 4469/IBC/MB/2019, dated 29-6-2020) (para 13), *Sub-Inspector Rooplal* v. *Governor* (2000) 1 SCC 644 (para 15), *CCE* v. *Matador Foam* 2005 taxmann.com 446 (SC) (para 16) and *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 19).

Arun Kathpalia, Sr. Adv. **Ashok Paranjpe**, **Kunal Vajani**, **Shreyas Lele** and **Kunal Mimani**, Advs. *for the Appellant.* **Amit Sibal**, Sr. Adv. **Denzil Arambhan**, **Ms. Amisha Patel**, **Ms. Priyakshi Bhatnagar**, **Kaustubh Prakash**, **Vinamra Kaporiha**, **Pranaya Goyal**, **Aman Gandhi**, **Vardaan Bajaj**, **Ms. Nanki Grewal**, **Karan Grover** and **IPS Oberoi**, Advs. *for the Respondent.*

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

† Arising out of Order passed by NCLT, Mumbai Bench, *AASAN Corporate Solutions (P) Ltd.* v. *Nirmal Lifestyle Realty (P.) Ltd.* (2021) 133 taxmann.com 469.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 134 taxmann.com 158 (NCLAT - New Delhi)



(2022) 136 taxmann.com 325 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Visisth Services Ltd. *v.* **S.V. Ramani**

ANANT BIJAY SINGH, JUDICIAL MEMBER AND MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 896 OF 2020†

JANUARY 11, 2022

Section 35, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Liquidator - Powers and duties of - Liquidator of corporate debtor company issued advertisements inviting bids from prospective buyers through e-auction for sale of company - Bid document duly clarifies that assets in liquidation were being sold as a 'going concern in an as is very basis' - In response to that, bid was received from appellant, who fulfilled criteria as laid down in advertisement of e-auction and agreed to takeover company as per terms and conditions of bid - Appellant also unconditionally agreed to abide by terms of e-auction which was inclusive of forfeiture of Earnest Money Deposit (EMD) upon withdrawal after acceptance of bid in its favour - Appellant was declared as successful bidder in e-auction - Liquidator issued a provisional sale letter in favour of appellant - Whether thus, appellant was now disentitled to withdraw from bid and to refund of amount paid during e-auction on ground that their offer was conditional and liabilities of company would not be foisted upon appellant - Held, yes (Para 18)

FACTS

- An application under section 10 filed by the corporate debtor company was admitted by the NCLT. An order of liquidation was passed and R1 was appointed as Liquidator. The Liquidator issued advertisements inviting bids from prospective buyers through e-auction for sale of the company under liquidation as a 'going concern'. The appellant purchased e-auction Process Information Document from the Liquidator upon payment of Rs. 5 Lakhs.
- The appellant issued an email to the Liquidator seeking clarifications on several issues with respect to e-auction process and proposed different payment terms and specified in the e-mail that their offer of acceptance was conditional to extinguish claims of Financial Creditors, Tax Department, Operational Creditors, Provident Fund Employees and other contingent liabilities.
- The Liquidator issued two e-mails to the appellant informing that the Terms and Conditions of the bid Document could not be changed or revised after public notification.

State Bank of India (SBI) had also replied to the e-mail and clarified the conditions. The appellant submitted EMD of Rs. 37.10 lakh to the Liquidator.

- The Liquidator issued a provisional sale letter in favour of the appellant upon receipt of communication from SBI confirming that it was the highest successful bidder in the e-auction.
- The appellant addressed a letter to the Liquidator stating the Provisional Letter of Sale was inconsistent with the terms of payment specified by the appellant and sought for refund of the money paid with the interest.
- An affidavit was filed by the appellant in the application preferred by the Liquidator before the NCLT seeking direction for 'Approval of the Sale' as a 'Going Concern', and sought for approval without transfer of any liabilities and if there exists any impediment, the appellant sought for withdrawing from the bid and the refund of the amount paid.

HELD

- As per Regulation 32A of the IBBI (Liquidation Process) Regulations, 2016 sale as a 'Going Concern' means sale of assets as well as liabilities and not assets sans liabilities. (Para 9)
- Applicant has accepted all the terms and conditions and cannot revise the same. The bid document also specifies under the heading 'Costs, Expenses and Tax Implications' that payment of all statutory and non-statutory dues, taxes, rates, assessments, charges, fees, owed by the Corporate Debtor to anybody in respect of the subject property shall be the sole responsibility of the Successful Bidder. It is also significant to note that the Liquidator has clearly mentioned that 'legal issues pertaining to e-auction cannot be changed after public notification'. By paying the EMD amount and accepting the bid, the Successful Bidder cannot now say that it was not a concluded contract. The Bidder-Appellant is bound by the terms and conditions of the Bid document and no communication to the Liquidator stating that it is a conditional offer, is sustainable. If the appellant had any apprehensions and conditions about the liabilities the appellant could have exercised their choice of not participating in the bid. Having participated, the appellant cannot propose certain conditions subsequent to their participation and putting in their bid. The appellant was supposed to comply the auction purchase in 2019 itself and the Pandemic erupted in the year 2020. (Para 15)
- The Liquidator will carry on the business of the Corporate Debtor for its beneficial Liquidation as prescribed under section 35. The Liquidator will only act and cannot modify/revise the terms of the contract. The Liquidator shall endeavour to sell the Corporate

Debtor Company as a 'Going Concern' only in accordance with the law. If the Bidder is allowed to withdraw from the Bid at this stage and seek refund on the ground that their conditional offer has not been accepted, then the liquidation process would be a never ending one, defeating the scope and objective of the Code. In the declaration signed, the appellant-bidder unconditionally agreed to abide by the terms of the e-auction which is inclusive of forfeiture of the EMD, in the event the Bidder did not perform their part of obligation after the acceptance of the bid in their favour. The acceptance was conveyed to the Bidder. Clearly noting the terms and conditions that the Company was being sold as a 'Going Concern in an as is very basis', the Bidder cannot now be permitted to turn around and plead that their offer was conditional. (Para 16)

- The Bidder cannot wriggle out of the contractual obligations arising out of acceptance of his Bid and also having regard to Regulation 32A and the scope and objective of the Code the appellant cannot be entitled to the EMD amount and the amount paid towards the Bid Purchase document, if he does not comply with the terms of the contract. (Para 18)

- There is no illegality or infirmity in the well-reasoned order of the NCLT. Hence this Appeal fails and is dismissed, accordingly. (Para 19)

CASE REVIEW

United Chloro-Paraffins (P.) Ltd. v. *State Bank of India* (2022) 136 taxmann.com 324 (NCLT - Kol.) (para 19) *affirmed* (***see annex***).

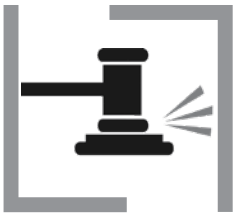
CASES REFERRED TO

Dresser Rand S.A v. *Bindal Agro Chem Ltd.* (2006) 1 SCC 751 (para 3), *Padlia Timber Co. (P.) Ltd.* v. *Board Trustees Visakhapatnam Port Trust* (2021) 3 SCC 24 (para 3), *Tarun International Ltd.* v. *Vikram Bajaj* (Co. Appeal (AT) Ins. No. 1194 of 2019, dated 3-3-2021) (para 4), *Mohan Gems & Jewels (P.) Ltd.* v. *Vijay Verma* (Co. Appeal (AT) (Ins.) No. 849 of 2020, dated 24-8-2021) (para 4), *Mohan Gems and Jewels (P.) Ltd.*, In re (CP (IB) No. 590 (PB) of 2018, dated 16-9-2020) (para 15), *Punjab Urban Planning and Development Authority* v. *Raghu Nath Gupta* (2012) 8 SCC 197 (para 17) and *UT Chandigarh Admn.* v. *Amarjeet Singh* (2012) 8 SCC 202 (para 17).

Jeevan Ballav Panda, **Ms. Shalini Sati Prasad**, **Gaurav Sharma** and **Ms. Meher Tandon**, Advs. *for the Appellant.* **Sanjeev Kumar**, **Anshul Sehgal** and **Om Narayan Rai**, Advs. *for the Respondent.*

† Arising out of order of NCLT, Kolkata in *United Chloro-Paraffins (P.) Ltd.* v. *State Bank of India* (2022) 136 taxmann.com 324.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 136 taxmann.com 325 (NCLAT- New Delhi)



(2022) 136 taxmann.com 327 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Varrsana Ispat Ltd. *v.* **Varrsana Employee Welfare Association**

JARAT KUMAR JAIN, JUDICIAL MEMBER AND
DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER
COMPANY APPEAL(AT) (INS) NO. 885 OF 2020†
JANUARY 19, 2022

Section 61, read with section 62, of the Insolvency and Bankruptcy Code, 2016 and section 420 of the Companies Act, 2013 read with rule 154 of the National Company Law Tribunal Rules, 2016 - Corporate person's adjudicating authorities - Appeals and Appellate Authority - Liquidation of corporate debtor was initiated and liquidation account was opened to operate receipts and payments - Adjudicating Authority permitted liquidator to utilise amount of Rs. 18.00 crores from working capital and profit kept in account of corporate debtor/liquidator for operations of corporate debtor so that corporate debtor remain as going concern and to distribute said fund equally among stakeholders - Adjudicating Authority subsequently, by impugned order had virtually reversed its earlier decision by asking liquidator that stakeholders, who were in receipt of funds, would keep amount in an interest bearing account of corporate debtor and returnable if need arises for operating corporate debtor - It was noted that Adjudicating Authority had only power to rectify any mistake apparent from record in accordance with section 420 of Companies Act, 2013 read with rule 154 of NCLT Rules, 2016 and it does not have any power to review its own order - Whether thus, impugned order passed by Adjudicating Authority whereby it had reviewed and reversed its own order was to be *set aside* - Held, yes (Para 25)

FACTS

- The liquidation of the corporate debtor was initiated and 'Liquidation Account' was opened to operate receipts and payments. Liquidator constituted a 'Stakeholders Constitution Committee' (SCC) as per regulation 31A of the 'IBBI (Liquidation Process) regulations'. It was discussed and decided in the 'SCC' that the corporate debtor would be kept as a going concern and Rs. 20 crore distribution would be done as per section 53 - R1 i.e. corporate debtor's employees Welfare Associations filed an application alleging that the company was a going concern and there was possibility of revival of corporate debtor as the Liquidator taking steps to invite scheme from interested party and Liquidator had admittedly realized substantial amounts of money of Rs. 18 crore and the amount was disbursed, the cash flow of the corporate debtor would have no adverse impact on the operation of the Company.

- The Adjudicating Authority had passed an order that there is no justification for the Liquidator to withhold the aforesaid amount of Rs. 18.00 crores and odd, lying with the Liquidator and Adjudicating Authority directed that the same may be utilized for the operations of the corporate debtor to remain corporate debtor as going concern for distribution amongst stakeholders in equal manner as per provisions of section 53, which would include the claims of the employees.
- The Liquidator in compliance with the aforesaid order disbursed amount lying with it to stakeholders.
- The R1 once again filed another application against the Liquidator for wrongful deduction of salary and distribution during the process of the liquidation. The Adjudicating Authority subsequently by impugned order reversed its own order and concluded that the disbursement by the liquidator from the working capital and profit kept in the account of the liquidator/corporate debtor before liquidating the assets was not in accordance with the provisions of the Code and Regulations. The pay cut from the salary of the employees of the corporate debtor is arbitrary and not just and proper and that the stakeholders would return the monies after distribution. Adjudicating Authority held that the amounts received by the respective financial creditors would be kept by them in an Interest bearing account of the corporate debtor. It would meet the ends of justice in the nature of this case.

HELD

- Adjudicating Authority its impugned order, on a petition filed by the `Employees Welfare Associations' of corporate debtor has virtually reversed its earlier decision by asking the Liquidator that the Stakeholders/ Financial Creditor who are in receipt of the funds shall keep the amount in an interest bearing account of the corporate debtor and returnable if need arises for operating the corporate debtor and also directed the Liquidator to pay the portion of salary deducted from the salary of the employees with applicable bank interest. (Para 24)
- The Adjudicating Authority (NCLT) has only power to rectify any mistake apparent from the record in accordance with section 420 of the Companies Act, 2013 r/w rule 154 of NCLT Rules, 2016. (Para 25)
- In view of aforesaid provisions of law and facts on record, the appeal is partially allowed by setting aside the impugned order of Adjudicating Authority. (Para 25)

CASE REVIEW

SBER Bank v. *Varrsana Ispat Ltd.* (2022) 136 taxmann.com 326 (NCLT - Kol.) (para 25) *reversed* (***See Annex***).

† Arising out of Order of NCLT, Kolkata Bench in *SBER Bank* v. *Varrsana Ispat Ltd.* (2022) 136 taxmann.com 326.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 136 taxmann.com 327 (NCLAT- New Delhi)

Grievance Redressal Mechanism under IBC

BACKGROUND

An Insolvency Professional is vital component of Insolvency and Bankruptcy Code. Be it Corporate Insolvency Resolution Process (CIRP) or Liquidation, both the processes are largely executed through Insolvency Professionals. He is the fulcrum of the process and link between the Adjudicating Authorities (AA) and Committee of Creditors (CoC) as also other stakeholders.

The role of Insolvency Professional under the Insolvency and Bankruptcy Code is crucial and critical to fulfil the objective of the Code. He is entrusted with wide range of functions such as management of affairs of the corporate debtor, preservations & protection of assets of corporate debtor, compliance with the applicable laws on behalf of corporate debtor, preparation of information memorandum, facilitation of approval of resolution plan, balancing of interest of various stakeholders etc. The conduct of Insolvency Professional could be fair and equitable or under the influence of some set of stakeholders. There may be instances of the stakeholders having genuine or false/malicious grievances against the Insolvency Professionals. Therefore, the IBBI and IPAs have a

fair and transparent mechanism to redress the grievances/complaints of consumers against Insolvency Professionals.

GRIEVANCE/COMPLAINT HANDLING PROCEDURE OF IBBI

The Grievance/Complaint handling procedure of IBBI is governed by Section 196(1)(*q*), 217, 218(1) and 240(2)(zzy) of the Insolvency and Bankruptcy Code, 2016 read with IBBI (Grievances and Complaint Handling) Regulations, 2017.

Grievance v. Complaint

Pursuant to IBBI (Grievances and Complaint Handling) Regulations, 2017, bifurcation is made between the term "grievance" and "complaint" and different manner is specified for their disposal. "Complaint" means a written expression by a stakeholder alleging contravention of any provision of the Code or rules, regulations, or guidelines made thereunder or circulars or directions issued by the Board by a service provider or any of its associated persons and includes a complaint-cum-grievance. However, "grievance" means a written expression by a stakeholder of his suffering on account of conduct of a service provider or its associated persons.

Confidential Identity

A stakeholder filing a grievance or a complaint, may request the IBBI to keep its identity confidential and in that case the IBBI shall keep it confidential unless its disclosure is necessary for processing the grievance or complaint or under any law.

Below is the tabular representation of Grievance/Complaint handling procedure of IBBI:

Filing of grievance and complaint	• A stakeholder may file a grievance/complaint with IBBI (along with fees of Rs. 2,500) within 45 days of the occurence of cause of action. A grievance/complaint may be filed after 45 days, if there are sufficient reasons justifying the delay but such period shall not exceed 30 days.
Registration of grievance/complaint	• The IBBI shall assign a unique registration number to grievance/complaint and communicate the same to complainant. • Anonymous grievance/complaints shall not be considered by IBBI
Disposal of grievance	• The IBBI shall close the grievance within 45 days if it does not require any redress. • The IBBI shall direct the IPA/IP to redress the grievance within 45 days if it requires any redress
Disposal of complaint	• The IBBI may seek additional information from complainant or concerned IP/IPA. • The IBBI shall close complaint where it is of the opinion that there does not exist a prima facie case. • Where IBBI opines that there exist a prima facie case, it may order inspection, investigation or issue show cause notice.
Review of decision of IBBI	• If the complainant is not satisfied by the decision of the IBBI to close the complaint, he may request review of such decision.

Following is the detail of grievances and complaints disposed of by IBBI:

Year/Quarter	Complaints and Grievances Received						Total		
	Under the Regulations		Through CP GRAM/ PMO/MCA/Other Authorities		Through other modes		Received	Disposed	Undue Examination
	Received	Disposed	Received	Disposed	Received	Disposed			
2017-2018	18	0	6	0	22	2	46	2	44
2018-2019	111	51	333	290	713	380	1157	721	480
2019-2020	153	177	239	227	1268	989	1660	1393	747
2020-2021	268	260	358	378	990	1364	1616	2002	361
Apr-Jun, 2021	79	85	120	90	287	420	486	595	252
Jul-Sep, 2021	85	75	175	199	157	114	417	388	281
Total	714	648	1231	1184	3437	3269	5382	5101	281

GRIEVANCE REDRESSAL MECHANISM OF IPAs

The Grievance Redressal Mechanism of IPAs is governed by Section 204(*f*) of the Insolvency and Bankruptcy Code, 2016 read with Bye Law 8(1)(*c*), 21, 22 of the Model Bye Laws prescribed under schedule to IBBI (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 and Grievance Redressal Policies adopted by the IPAs. Below is the tabular representation of grievance redressal mechanism of IBBI:

Grievance against IP or IPAs	• Any IP, any person who has engaged the services of the IP or any other person as may be provided by the Governing Board of the IPA may file grievance against the IPA or IP with the IPA. • IBBI may forward grievance received by it to IPA and direct to take necessary action for redressal of grievance.
Registration of grievance by Grievance Redressal Officer (GRO)	• The GRO designated by the IPA shall scrutinize the grievance and may seek additional information/clarification from the complainant. After ensuring completeness of the grievance, GRO shall register the grievance and send an acknowledgement to the complainant.
Reply from the respondent	• The reply against grievance and other relevant documents/clarifications shall be sought from respondent.
Grievance Redressal Committee (GRC)	• The grievance shall be submitted to the GRC along with recommendations of IPA for consideration and necessary action. In case of grievance against IPA, the matter shall be referred directly by GRO to GRC.

Action by Grievance Redressal Committee	•The grievance redressal committee, after examining the grievance,may: (a) dismiss the grievance if it is devoid of merit; or (b) initiate a mediation between parties for redressal of grievance. (c) refer the matter to the Disciplinary Committee, wherever the grievance warrants disciplinary action.
Intimation of closure of grievamce	•The decision taken by the grievance redressal committee shall be intimated to the complainant and respondent. It is pertinent to mention that there of no provision for appeal against decision of the grievance redressal committee.

Actions on false and/or malicious complaints/grievances

In case the Grievance Redressal Committee, on investigation of the complaint/grievance, finds that a false grievance/complaint has been made or that a grievance/complaint has been made with a malicious intent, the Committee takes such reasonable steps as they deem necessary to curb the initiation of such false and/or malicious complaints/grievances in the future.

However, a mere inability to provide adequate proof to substantiate the complaint/grievance is not construed as false and malicious complaint/grievance.

CONCLUSION

Due to effective and credible mechanism for redressal of grievances followed by IBBI as well as IPAs it is possible to keep a check on the misconduct or fraudulent practices by the Insolvency Professionals.

While redressing the grievances/complaints, the Complainant and Insolvency Professional are treated fairly at all times. The confidentiality of identity of the Complainant has been provided for. The reply from the Insolvency Professional is also sought. Low impact & in deliberate violations are generally excused by merely issuing advisory, reprimand etc. However, in case of major violations inspections are conducted and serious actions are taken against Insolvency Professionals.

The IBBI and IPAs emphasize on 'Self Discipline'. Every function which an IP is required to perform as per IBC requires highest level of professional competence including financial engineering and value maximization management. Therefore, an IP is expected to comply with the provisions of the law and ensure utmost integrity, objectivity, independence and impartiality.

REFERENCES

- IBBI (Grievances and Complaint Handling) Regulations, 2017
- IBBI (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016
- Grievance Redressal Policies of IPAs
- Quarterly newsletter of IBBI (July-September, 2021)

FAQs on Claims

1. Whether resolution professional can adjudicate claims in CIRP process?

Regulations 13 and 14 of the CIRP Regulations limit the role of a resolution professional to that of an administrative authority to verify and collate claims but not adjudicate (this limitation is not applicable to a liquidator). Section 25 of the IBC mandates resolution professionals to maintain an updated list of claims made under the Code. Resolution Professional has to verify the claims made and ultimately determine the amount of each claim.

One might come across a situation where a claim may be disputed by the debtor or the value of claim amount as determined by the resolution professional is disputed by the creditor. It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. The Resolution Professional has to vet and verify the claims made and ultimately determine the amount of each claim. It is clear from a reading of the Regulations (*i.e.* Regulations 10, 12, 13 and 14 of CIRP Regulations) that the resolution professional is given administrative as opposed to *quasi judicial* powers.

Section 60(5) of the IBC grants the Adjudicating Authority with the power to entertain claims made by or against the corporate debtor.

Adjudicating Authority (NCLT) has the power to adjudge claims or disputes relating to claims. Tribunal shall have jurisdiction to entertain or dispose of any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India.

2. What is be the category of money advanced by a promoter, director or shareholder of the corporate debtor?

Money advanced by a promoter, director or shareholder of the corporate debtor (even without interest) can be filed as financial debt.

3. What will be the nature of dues of state Government and Central Government under the Insolvency and Bankruptcy Code?

All the dues of Central Government, State Government, local authorities etc. arising out of the operation of any existing law are classified as Operational Debt and such bodies are considered as Operational Creditors within the meaning of Section 5(20) of the Insolvency and Bankruptcy Code, 2016.

4. Who are the persons entitled to file claims on behalf of financial creditor during the Corporate Insolvency resolution process with the resolution professional?

The following persons are authorised to file claims on behalf of financial creditor during the Corporate Insolvency resolution process with the resolution professional:

- A guardian
- An executor or administrator of an estate of a Financial Creditor
- A trustee (including a debenture trustee)
- A person duly authorised by the Board of Directors of a Company

5. What methodology shall be followed by the resolution professional while accepting interest component in the claims?

A financial debt is a debt along with interest, as defined under section 5(8) of the Code.

In case of operational debt, the claim can be based on interest also in addition to the principal debt amount if claim is supported with a valid contract or under the applicable law. Without a valid contract or in the absence of any applicable law, the interest as per Sales of Goods Act and Civil Procedure Code can be awarded only by the Adjudicating Authority and not RP as RP during CIRP acts as administrator.

Where the rate of interest has not been agreed to between the parties in case of creditors in a class (including home buyers), an interest at the rate of 8 percent per annum will be calculated.

Penal interest calculated is also included in the total amount of claim.

6. Who shall bear the cost of filing a claim?

The cost of filing a claim has to be borne by the claimant himself/itself.

Regulatory updates (January 2022)

- The MCA *vide* its notification dt. 28th January, 2022 (S.O. 408(E)) notified concerning appointment of Dr. Anuradha Guru, Economic Adviser, Ministry of Corporate Affairs as *ex-officio* member in the Insolvency and Bankruptcy Board of India to represent the said Ministry in that Board.

  (**The notification can be accessed at https://ibbi.gov.in/uploads/whatsnew/9a2a104e02a36d1ed79b6630b9fc814d.pdf**)

- The Central Government *vide* order dated 4th January, 2022 extended the additional charge of Dr.Navrang Saini, Whole-time Member, Insolvency and Bankruptcy Board of India (IBBI) as Chairperson of IBBI beyond 13th January, 2022, till the completion of his tenure in IBBI on 5th March, 2022 or till the joining of a new incumbent to the post or until further orders, whichever is earlier.

  (**The IBBI press release thereof can be accessed at https://ibbi.gov.in//uploads/press/a11292e2c5408e458e778f93f7a98cfe.pdf**)

Group Insolvency Framework: China

1. GOVERNING LEGISLATION

The Enterprise Bankruptcy Law of the People's Republic of China (Effective from 1st June, 2006)[1]

The Supreme People's Court judicial interpretations, Authoritative Guidelines for Bankruptcy Judicial Practice in China as issued on March 4, 2018 by Supreme People's Court of the People's Republic of China in National Court Work Conference on Bankruptcy trials.

The Bankruptcy Law, which consists of 136 articles organized into 12 chapters, applies to all types of insolvent enterprises, whether state-owned or privately owned, and includes foreign investment enterprises and financial institutions. It does not apply to individual natural persons. The legislation only applies to PRC entities although it extends beyond China's borders in relation to a debtor's overseas properties. The regime also recognises certain foreign proceedings that seek to secure assets located in China.

The High Courts of the provinces and municipalities in the PRC also establish specific rules for the implementation of the EBL within their local areas.

2. ADMINISTRATOR DUTIES

Administrator is synonymous to the Insolvency Professional in India. The administrator's powers and duties include:

- Taking control of the debtor's property, company seals, accounting records, documents and other such materials;
- Investigating and reporting on the debtor's financial status;
- Making decisions in relation to the debtor's internal management and daily expenditure;
- Deciding whether to continue or suspend the debtor's business operations prior to the first creditors' meeting;
- Managing and disposing of the debtor's property;
- Representing the debtor in litigation, arbitration or other proceedings;
- Proposing the holding of creditors' meetings; and
- Performing other functions that may be required by the court.

(1) NO PROVISION OF INSOLVENCIES OF RELATED ENTERPRISES IN ENTERPRISE BANKRUPTCY LAW OF THE PEOPLE'S REPUBLIC OF CHINA

There are no circumstances in which a parent or affiliated corporation assumes the responsibility for the liabilities of subsidiaries or affiliates. In practice, the parent corporation should bear the responsibility for its subsidiary if that subsidiary is not an independent entity, or it has conducted an abnormal transaction.

The combination of bankruptcy procedures of the parent company and its subsidiaries is permitted in general practice. Under such circumstances, the assets and liabilities belonging to the companies may be pooled for the purpose of distribution.

(2) PROVISION OF INSOLVENCIES OF RELATED ENTERPRISES IN AUTHORITATIVE GUIDELINES FOR BANKRUPTCY ISSUED BY SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA IN NATIONAL COURT WORK CONFERENCE ON BANKRUPTCY TRIALS[2]

On December 25, 2017, the Supreme People's Court of the People's Republic of China ("PRC") convened the National Court Work Conference on Bankruptcy Trials in Shenzhen, Guangdong Province. Representatives from higher people's courts of all provinces, autonomous regions and municipalities attended the conference and reached a consensus on major issues concerning bankruptcy trials. Minutes of the conference were issued by the Supreme People's Court on March 4, 2018, which have become authoritative guidelines for bankruptcy judicial practice in China.

In that conference, issue of substantive consolidation of related parties was issued and analysis of several key provisions detailed within the minutes of the conference is provided below:

Substantive consolidation among affiliated debtor entities is a double-edged sword - on the one hand, it is helpful to prevent the debtor's fraudulent conducts and asset manipulations that jeopardise the creditors' interest, and on the other hand, the abuse

or overuse of substantive consolidation may unfairly reduce the recovery rate of some creditors.

When examining the bankruptcy cases of enterprises, the people's courts should respect the independence of the corporate personality, and make the individual judgment of the reasons for the bankruptcy of the affiliated members and apply the **individual bankruptcy procedures as the basic principle.** When there is a high degree of legal personality confusion among the members of the affiliated enterprises, and the cost of distinguishing the property of each affiliated enterprise is too high, and the creditor`s fair settlement interest is seriously damage the related entity`s ***substantive merger and bankruptcy may be applied for trial.***

After receiving the substantive merger application:

- the people's court will notify the relevant interested parties and organize the hearing.
- In the process of reviewing the application for substantive merger, the people's court may comprehensively consider the mixing procedures of assets between related enterprises and their duration, the interests of each enterprise, the overall liquidation of creditors, and the possibility of increasing the reorganization of enterprises.
- A ruling on whether to proceed in a substantive merger within 30 days from the date of receipt of the application.
- The people's court will decide rights relief of interested parties and if the related parties are dissatisfied with the substantive merger judgment, it may apply to the people's court at the next higher court for reconsideration within 15 days from the date of service of the ruling.

In the case of reorganization by means of substantive consolidation, a unified credit classification, creditor adjustment and claims compensation scheme shall be formulated in the draft reorganization plan.

3. JURISDICTION OF THE SUBSTANTIVE CONSOLIDATION PROCESS

If a case involving related enterprises is tried through the substantive consolidation process, the people's court in the place where the essential controlling enterprise is located shall have the jurisdiction. The reason for this is that, with the main assets and the management located, the people's court should be able to carry out the bankruptcy procedure more effectively and thus reduce costs incurred in the judicial process. Moreover, if the essential controlling enterprise is difficult to be identified, the people's court in the place where the major property of the related enterprises is located shall have the jurisdiction. If several courts are in dispute over which has jurisdiction, their common superior people's court shall be requested to designate the jurisdiction.

4. OUTCOME

In case of substantive merger, the creditor's

rights and debts between the members of each affiliated enterprise shall be extinguished, and the property of each member shall be the unified bankruptcy property after the merger, and the creditors of each member shall be fair in the same procedure in accordance with the statutory order.

If the substantive merger rules are applied for bankruptcy liquidation, all affiliated enterprises shall be cancelled after the termination of the bankruptcy proceedings. If the substantive merger rules are applied for settlement or reorganization, the affiliated enterprises shall be merged into one enterprise in principle. According to the settlement agreement or the reorganization plan, if it is necessary to maintain the independence of individual enterprises, it shall be handled separately according to the relevant rules of enterprise separation.

1. https://www.iiiglobal.org/sites/default/files/EnterpriseBankLaw.pdf.
2. http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=311007

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